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Counter-terrorism laws in practice

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1. INTRODUCTION

In the wake of the atrocities in New York and Washington DC on 11 September 2001 most countries introduced legislation to guard against and to punish acts of terrorism. A new language emerged utilising phrases that are now commonplace. Australia, like most other western democracies, has committed itself to an apparently endless 'war against terrorism'. This war has taken the shape of a pseudo-religious crusade. Thus far all of the people questioned under the new ASIO powers and charged under the new Terror Laws have all been Muslims. In Sydney, a disturbed former Liberal Party staffer threatened the life of the NSW Premier because of political dissatisfaction. The NSW Police Counter Terrorism Command investigated him. He was not charged with any terrorist related crime and there has been no suggestion by any commentator that he should have been.

The picture is emerging that the Government is prepared to utilise its legislative armoury against terrorist suspects in a way that is quite exceptional. The combination of ASIO's coercive powers, the broad definition of terrorist offences, the extremely harsh conditions of custody in which terrorist suspects are held and the running commentary of politicians and the media about the arrest, prosecution and detention of terrorist suspects are all combining to create very difficult conditions for the trials of these people. These cases are increasingly utilising provisions that enable evidence to be heard in camera, the use of pseudonyms, the suppression of evidence from publication, the use of witnesses being held in overseas prisons — including prisoners held without charge under severe security legislation and evidence extracted from suspects being held in conditions that would be regarded as illegal or tyrannical in Australia. The prospect is looming of non-security cleared defence lawyers being excluded from these cases.

There has been what I describe as a "whole-of-government" approach to these terrorist prosecutions. ASIO targets the suspects. Some are coerced into speaking behind closed doors. ASIO backgrounds safe journalists and politicians. The police raid suspects' houses. Documents are seized. People are arrested in a blaze of publicity. Many Commonwealth and State politicians feel justified in maintaining a running commentary about terrorist trials in the media, meanwhile, in Court the Government's lawyers vigorously seek to suppress evidence from the public eye.

Practitioners acting for people charged with terrorism-related offences face special challenges. The laws are rapidly evolving and can change in the course of the case in a way, which seemingly overcomes perceived difficulties with the prosecution case. The National Security Information laws provide particular burdens, which are guaranteed to ensure long and complicated procedural arguments. Likewise, the need to deal with ASIO and the Attorney General's Department which represents them also provides real challenges to the average practitioner. Part of the challenge involves, at least, an expectation (reasonably held) that you, the practitioner, might well be subject to covert surveillance. The recent amendments to the Telecommunications Interception Act which allows the telephone services of lawyers to be tapped in order to intercept the telephone conversations of suspects have done nothing to ease the suspicions of the legal profession that they might well be the subject of ASIO attention whilst they are acting for people charged with terrorist related offences.

2. THE TERRORIST OFFENCES

The terrorism offences are to be found in the Commonwealth Criminal Code Act. These offences were added to the Code in 2003. These offences criminalise a great range of acts and omissions and extend Australia's criminal jurisdiction to all parts of the planet. There are obvious terrorist crimes such as engaging in a terrorist act (s.101.1) and detonating an explosive device in a government facility or public transportation system (s.72.3), both carrying maximum penalties of life imprisonment. But there are also many offences that criminalise acts which fall short of the actual commission of a terrorist act but which also carry very heavy penalties.

The Code criminalises:

providing or receiving training connected with terrorist acts (s.101.2) – 15 years imprisonment;

possession of things connected with preparation for or assistance in a terrorist act(s101.4) – 15 years imprisonment;

collecting or making documents likely to facilitate terrorist acts (s.101.5) – 15 years imprisonment;

preparing or planning for a terrorist act (s.101.6) – life imprisonment;

directing the activities of a terrorist organisation (s.102.2) – 25 years imprisonment;

membership of a terrorist organisation (s.102.3) – 10 years imprisonment;

recruiting a person for a terrorist organisation (s.102.4) – 25 years imprisonment;

training or receiving training from a terrorist organisation (s.102.5) – 25 years imprisonment;

receiving funds from or making funds available to a terrorist organisation (s.102.6) – 25 years imprisonment;

providing support to a terrorist organisation (s.102.7) – 25 years imprisonment; and

collecting funds to facilitate or engage in terrorism (s.103.1) – life imprisonment.

As well as all of these substantive offences, the Criminal Code also criminalises attempts to commit these offences (s.11.1), the incitement of these offences (s.11.4) and the use of an innocent agent to commit the offences (s.11.3). Aiders and abettors and conspirators can also be prosecuted, convicted and punished in the same manner as the principal offenders (ss.11.2 and 11.5).

Up until the arrests in Sydney and Melbourne in November, 2005, five men had been charged with offences under Division 101 of the Criminal Code. One was charged with receiving training connected with terrorist acts – he is alleged to have trained with a terrorist organisation in Pakistan. One was charged with possession of a videotape and a rifle connected with the preparation for a terrorist act. Two others have been charged with making or collecting documents likely to facilitate terrorist acts and one charged with preparation and planning terrorist acts. One has been charged with and recently convicted of receiving funds from a terrorist organisation. The 18 young men charged in November are divided into two geographical groups. The Sydney people are charged with a conspiracy to do an act in preparation or planning for a terrorist act. The Melbourne people are charged with being members of a terrorist organisation, namely, their own informal jihadi group. None of the acts of the persons charged thus far could properly and legally be described as “attempts”. They are all alleged to have taken steps which, properly analysed, constitute acts of preparation for an ultimate act of terrorism or with offences relating to the activities of a proscribed group. Usually, the law only criminalises substantive offences and attempts to commit them. Mere acts of preparation are not traditionally considered to be sufficiently proximate to a criminal act to justify criminal sanctions. The new terrorism offences are unusual in this regard.

Section 100.1 defines a terrorist act to mean an action or threat of action done or made with the intention of advancing a political, religious or ideological cause and with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country or intimidating the public or a section of the public. The act must cause death or serious harm to a person, serious damage to property, endanger a person’s life, create serious risks to the health or safety of the public or seriously interfere with, disrupt or destroy an electronic system such as an information, telecommunications or financial system. Ordinary acts of protest, dissent, advocacy or industrial action which are not intended to cause serious harm, death or endanger the life of a person or create a serious risk to the health or safety of the public do not constitute terrorist acts.

3. THE ASIO PROVISIONS

Part III, Division 3 of the ASIO Act provides ASIO with extraordinary powers to detain and conduct coercive questioning of anybody who may substantially assist in the collection of intelligence that is important in relation to a terrorism offence (s.34C). This detention and questioning takes place after the issue and service of a warrant under s.34D. The subject of the detention and questioning does not

have to be suspected themselves of complicity in any terrorist act. It is sufficient if the person could substantially assist in the collection of intelligence about terrorism. Practically speaking, it is likely that the overwhelming majority of persons detained and questioned under these powers will actually be suspected of the broad range of terrorism offences. I certainly suspect, that given the broad scope of terrorism offences, nearly all of the people who have been subject of s.34D warrants have been suspected by ASIO of complicity in one of the many terrorism offences in the Criminal Code.

Warrants may stay in force for up to 28 days. During the term of the warrant, the subject can be questioned for a total of 24 hours (an initial eight hour period with two subsequent eight hour periods with approval) or for 48 hours if a person requires the assistance of an interpreter. A person who is detained pursuant to a warrant can be held for a maximum of 168 continuous hours (seven days).

The questioning is coercive. Failure to answer questions or to give information is a criminal offence that carries a maximum of five years imprisonment. So too is failing to produce records or things that are required to be produced under the warrant. Giving false or misleading answers is also a criminal offence carrying a maximum penalty of five years. Hence a person is required to provide information, documents or things even though the answers and material may incriminate them. But what is said or produced cannot be used in evidence against that person in criminal proceedings (s.34G(9)). Note, though, that this is merely “use immunity”. It is NOT derivative use immunity. This gives rise to some potential problems.

It is open to the examiner to require a subject to produce documents or things during the course of questioning. If the subject produces the document whilst the warrant is in force pursuant to a request made of him under the warrant then neither the information that the person gave about the document nor the document itself could be tendered in evidence at a criminal trial. But, if ASIO or a police officer learns about the existence of a document or thing because of information provided pursuant to a warrant, it is still open to the law enforcement authorities to seek the issue of a search warrant and then obtain the document for use in a criminal prosecution. I understand that this is exactly what has happened in one of the criminal prosecutions that has been commenced thus far.

The questioning of a subject under these warrants takes place before a retired judge described in the Act as a “prescribed authority”. A lawyer from the Australian Government Solicitor’s Office on behalf of ASIO usually conducts the questioning. The prescribed authority must explain the warrant to the subject (s.34E) and has a statutory duty to ensure that all time limits are strictly complied with. The prescribed authority also must assess whether or not to grant a request to extend the period of questioning and also has the power to order the detention or continued detention of someone under the warrant.

A person can only be detained under a warrant if there are reasonable grounds for believing that if the person is not immediately taken into custody and detained they might alert a person involved in a terrorism offence that the offence is being investigated; or may not appear before the prescribed authority; or may destroy, damage or alter a record or thing that the person may be requested in accordance with the warrant to produce. These same reasons might also lead to a person being detained during the course of questioning even if the initial warrant only required them to appear for questioning without being detained (s.34F(3)).

ASIO advised the Parliament in 2005 that eight people had , at that time, been the subject of Section 34D warrants. All of those warrants were for questioning and none have been for the detention of any suspect. In every case the suspect was questioned for many hours. In the last 12 months there have been more questioning warrants issued but, apparently, even now , no detention warrants have been utilised.

Much of the debate about ASIO’s increased powers has focused on the potential use of the detention power yet, so far, this power has not been utilised. From my perspective, this suggests that the very basis for the existence of this power has been overstated. The questioning and detention regime seems, therefore, to be disproportionate to the threat that terrorism poses to Australia. Even so, the raft of new counter-terrorism laws that were introduced in December, 2005 (in the Anti-Terrorism Act (No 2)) provided the Government with a new wave of preventative detention powers and control orders that makes the ASIO detention and questioning powers look insipid by comparison.

In my experience, the questioning powers are being used by ASIO for general intelligence gathering. The regime was never designed for this purpose. Rather, it was designed to deal with an imminent threat of a terrorist attack. It also seems that the questioning regime is being used to supplement and enhance general policing powers. It was never intended for police purposes. These extraordinary

detention and questioning powers were implemented for intelligence purposes only. The questioning at ASIO hearings largely relates to past, historical events that have no direct connection with any imminent terrorist threat. Indeed, much of the questioning in one hearing related to my client's indirect associations with other people and lacked any apparent connection to a particular act of terrorism.

My concern is that the questioning regime is being used by ASIO to gather information to add to its broader base of intelligence. The powers are not strictly used to obtain information that might be relevant to a specific, identifiable terrorism offence. They are not being used for their stated and intended purpose.

I also believe that the questioning powers are being used to supplement general policing powers and to assist in securing prosecutions. There is a pattern of close cooperation between ASIO and the police — both the AFP and their state counterparts. The use of the questioning regime to gather evidence for prosecutions is facilitated by the absence of a derivative use immunity. It is standard practice for police investigators to be present at ASIO questioning. These police are obviously using the information obtained through the questioning process to advance criminal investigations. The ASIO questioning is in reality a de facto police interrogation. These powers are as wide as they are and more powerful than police questioning powers because they are designed for use in support of national security issues — i.e. to ward off the threat of imminent terrorist attacks. They should not be used for ordinary police work.

4. The Role of a Lawyer at an ASIO Hearing

A s.34D warrant may state that the subject of the warrant is permitted to contact a lawyer of their choice. Certainly it seems that the legislative intent is that usually a subject would be entitled to be represented at the questioning procedure by their lawyer of choice. But s.34TA enables the prescribed authority to direct that the person be prevented from contacting their own lawyer if the authority is satisfied that, if the subject is permitted to contact that lawyer a person involved in a terrorism offence may be alerted that the offence is being investigated or a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered. If a prescribed authority refuses to let the person contact their lawyer of choice, they are able to choose another lawyer who, similarly, may be rejected by the prescribed authority for the same reasons.

My enquiries, limited though they are, have failed to find any instance where any lawyer has been excluded from an interrogation under these warrants. The warrants for questioning that I am familiar with have practically allowed the subject to contact their own lawyer in advance of the questioning process. It seems usual to be given one or two days' gap between the service of the warrant and the commencement of the questioning process. In circumstances like that, it is wise for any lawyer briefed to appear and assist the subject of a warrant to contact ASIO in advance and put them on notice that you will be appearing and seek clarification prior to the hearing about whether it is likely that you will be excluded because of s.34TA. There is some real possibility of exclusion if a lawyer already has a prior professional relationship with another person of interest who is already the subject of investigation.

Despite the entitlement to contact a lawyer, questioning may still take place in the absence of a lawyer of a person's choice (s.34TB). Hence, if a lawyer is excluded or if there is a delay in a lawyer's attendance at the questioning, the prescribed authority need not wait and the questioning may continue irrespective of the lawyer's absence. It is my experience that the prescribed authority is prepared to allow the attendance of both an instructing solicitor and a barrister during the course of the interrogation. Importantly, the Attorney-General's Department will fund a lawyer's appearance at a hearing.

Once you are granted permission to attend the interrogation, there is very little active role that a lawyer can play. What is more, you must be aware that any contact you have with your client may be monitored by a person exercising authority under the warrant (s.34U). This is despite the fact that the ASIO Act claims that the interrogation provisions do not affect the law relating to legal professional privilege (s.34WA). You should assume that everything that you say to your client is able to be heard. The detention and questioning of your client is likely to take place in premises that have the facility to electronically monitor conversations.

You are entitled to receive a copy of the warrant but you are not entitled to be given a copy of, or see any other documents that are referred to or tendered during the course of the hearing (s.34U(2A)).

The prescribed authority must provide a reasonable opportunity for a legal adviser to advise the subject during breaks in the questioning (s.34U(3)). Remember, though, that such conversations may well be

electronically monitored.

Most importantly, s.34U(4) provides that a legal adviser may not intervene in the questioning of the subject or even to address the prescribed authority except to request clarification of an ambiguous question. This draconian measure is backed up by s.34U(5) which provides that, if the prescribed authority considers the legal adviser's conduct is unduly disrupting the questioning, the authority may direct the removal of the legal adviser from the place where the questioning is occurring. These provisions require the lawyer to exercise fine judgment. You are not allowed to object to questions on the basis of unfairness or relevance or because they are harassing or intimidatory or because they are simply repetitive. But it ought not be too difficult to think of ways that a lawyer might seek clarification of a question if it is unclear, not grounded in previous evidence or misstates the effect of answers previously given.

A set of protocols established by regulation govern the manner of questioning as well as such topics as what personal effects a subject may have whilst in detention, the manner and means of searches, the use of force and restraint and what food, sleep and healthcare a subject is entitled to whilst in detention. Significantly, the protocols require that a subject shall be permitted to engage in religious practices as required by the religion, subject to the requirements of safety and security.

The protocols require that questioning be conducted in a humane and courteous manner and no one must speak to a subject in a demeaning manner. Further, a subject must not be questioned in a manner that is unfair or oppressive in the circumstances (Protocol 4.1). Questioning must not continue for more than 4 hours without a break of at least 30 minutes' duration (Protocol 4.4).

Now, normally an advocate could successfully object to demeaning, unfair or oppressive questioning, even in Tribunals and Commissions that have the power to engage in coercive questioning (e.g. the Australian Crime Commission, the Police Integrity Commission, the Independent Commission Against Corruption, the New South Wales Crime Commission and Royal Commissions). Section 34U, though, works to effectively muzzle defence lawyers during an ASIO interrogation. The only possible immediate remedy available to someone subjected to unfair, oppressive or demeaning questioning is the intervention of the Inspector General of ASIO or his representative. Be aware that you can complain to the Inspector General about the nature of the examination even whilst it is occurring. Section 34VAA(5) enables the lawyer to make a complaint to the Ombudsman or to the Inspector General of Intelligence and Security without penalty. My experience and understanding is that the Inspector General himself or one of his senior employees exercises his statutory right to be present at these coercive questioning hearings (s.34HAB). The Inspector General is entitled to raise concerns about the impropriety or illegality of the questioning exercise at any time. The Inspector General's concerns must be brought to the attention of the prescribed authority who is required to consider those concerns and, if necessary, may give a direction deferring the questioning or exercising some other power until the prescribed authority is satisfied that the concern has been satisfactorily addressed (s.34HA).

I would advise proactive lawyers to deal with inappropriate questioning of their clients by seeking an adjournment of the questioning in order to complain to the Inspector General or his representative and then to seek to convince the Inspector General that the form of the questioning is improper or illegal. If the questioning breaches the terms of the protocols then the questioning is improper and/or illegal and the Inspector General should raise concerns about the questioning to the prescribed authority and seek a direction that the questioning continue in proper form.

Another important role for a lawyer at these hearings is to keep careful watch on the statutory time limits. Section 34HB enables questioning under the warrant for a total of eight hours, unless the prescribed authority permits the questioning to continue thereafter. Note that the eight hour period means eight hours of questioning. It does not include periods of "down time" for such purposes as, providing legal advice, meals, religious observance, complaints to the Inspector General or adjournments of the questioning on the application of ASIO to enable them to undertake further investigations. ASIO must make an application to extend the eight hour period prior to the expiration of the first eight hour period. The request may be made in the absence of the subject of the questioning and their legal adviser, parent or guardian. The request may only be granted if the prescribed authority is satisfied that there are reasonable grounds for believing that the continuation of the questioning will "substantially assist the collection of intelligence that is important in relation to a terrorism offence and that the powers under the warrant have been exercised properly and without delay (s.34HB(4)).

An application to extend the period of questioning needs to be made formally and, presumably, reasons provided to the prescribed authority so that s.34HB can be complied with. You may find that extensions of the questioning period may be granted in a perfunctory manner without any real formal attempt to comply with the section. The only immediate remedy for such blasé action is to make a

complaint to the Inspector General. The lawyer has no power to address the prescribed authority or to be heard as to whether or not the questioning period should be extended. If the eight hour period concludes without an application being made there is absolutely no power to extend the period of questioning.

The Act leaves open the opportunity for a person to seek a remedy from a Federal Court relating to the warrant or the treatment of a person in connection with the warrant. At the outset of the questioning process the prescribed authority must explain to the person about their right to seek such a remedy from a Federal Court (s.34E). The lawyer may disclose information concerning the warrant and the detention and questioning process for the purposes of seeking a remedy from a Federal Court without leaving themselves liable to prosecution under s.34VAA. But regulations may be passed prohibiting or regulating access to information on the basis of security grounds even if the information might be legitimately connected with proceedings for a remedy relating to the issue of a warrant or the treatment of a person in connection with the warrant (s.34VA). Recent regulations have been passed preventing a prescribed authority from authorising the legal adviser to communicate information obtained during questioning or detention where the information relates to the sources or holding of intelligence or ASIO's methods of operation. If this information is disclosed by a lawyer, even in the course of litigation in a Federal Court, the lawyer may be committing an offence. This regulation also controls lawyers' access to "security information" for proceedings for a remedy relating to a warrant. Lawyers must not be given access to security information unless they have a security clearance from the Attorney General or if the Secretary of the Attorney General's department is satisfied that giving the lawyer access would not be prejudicial to security. "Security information" is defined as "information access to which is controlled or limited on security grounds, otherwise than by this regulation". (ASIO Amendment Regulations
2003 (No. 1)). Security clearance does not, however, give a lawyer an entitlement to access security information ipso facto.

Please note that there are criminal sanctions affecting legal advisers. Lawyers cannot, without authorisation, communicate information to a third person about the questioning or detention of their client (s.34U(7)). There are exceptions to the rule. Lawyers can communicate with the prescribed authority, the person exercising authority under the warrant, the Inspector General or the Ombudsman. Further, the prescribed authority cannot refuse to authorise contact with a Federal Court for the purposes of seeking a remedy under the warrant.

To my knowledge no proceedings have been commenced in the Federal Court as yet. Such proceedings would have to be limited to remedies in the face of easily demonstrable breaches of the Act concerning the conduct of the questioning process or the circumstances of the detention of the subject or irregularities on the face of the warrants.

The immunity from criminal prosecution granted to a subject by s.34G(9) is only "use immunity". It does not extend to "derivative use immunity". Information that ASIO obtains during the course of these interrogations can be used by ASIO to uncover further evidence of suspected complicity in a terrorist offence. That new evidence found as a result of information gathered under a s.34D warrant can be used by prosecution authorities in a criminal case.

5. THE TERRORIST TRIALS

i. Jack Roche
Jack Roche was charged with offences that predated the introduction of the special terrorist offences in the Criminal Code. His case is a reminder that our criminal justice system was capable of dealing effectively with terrorist related crimes without the need to create the new crimes.

Mr Roche was charged with a conspiracy to commit an offence under section 8(3C)(a) of the Crimes (Internationally Protected Persons) Act 1976. He was dealt with in the Supreme Court of WA and, during the course of his trial, pleaded guilty to the charge which, in essence, alleged that he was party to a conspiracy to explode a bomb at the Israeli Embassy in Canberra.

The section under which he was charged carried a maximum penalty of 25 years. The same section provides a series of offences with varying punishments. The most serious involves the murder or kidnap of an internationally protected person, an offence punishable by life imprisonment. Other offences concerned with attacking the person and a range of offences concerned with the intentional destruction of property carry penalties ranging from 10 to 20 years. Threatening to commit any such an offence carries 7 years imprisonment.

On any view of it Roche's participation in this offence was objectively very grave. Mr Roche received funds from a co-conspirator in Karachi, travelled to Kuala Lumpur where he met with the now notorious mastermind of the Bali bombing, Hambali. The two of them discussed various plans relating to the conspiracy before Roche travelled to Indonesia where he purchased a camera and altered his appearance. He returned to Malaysia where he received a further sum of money and reported on his activities. He then flew to Perth, bought a second hand Toyota and borrowed a video camera. He drove from Perth to Sydney and then Canberra and filmed both the Israeli Embassy in Canberra and the Sydney Consulate. Later he flew to Indonesia and met with Abu Bakar Bashir. Finally, Mr Roche made enquiries in Australia about the location of mines and the ability to obtain explosives and then purchased a copper head igniter and model rocket head igniters before deciding against proceeding with the plan.

Mr Roche received 9 years imprisonment after receiving a 12-month discount on account of promised future cooperation (pursuant to s 21E of the Crimes Act). A non-parole period of 4 years and 6 months was fixed. The Crown appealed against the contended inadequacy of the sentence. The West Australian Court of Appeal dismissed the appeal 2 to 1 (Murray ACJ and Templeman J dismissing the appeal; McKechnie J would have upheld the appeal and re-sentenced the respondent to 15 years with a non parole period of 9 years.)

It seems that most of the prosecution's evidence was obtained as a result of interviews between investigative authorities and the accused, a feature of several other recent terrorist-related trials.

ii. Zaky Mallah

Zaky Mallah was the first person in Australia charged with the new terrorist offences under the Criminal Code. He was my client and I am pleased to report that he was acquitted of these terrorist charges at his trial in the NSW Supreme Court in March 2005.

Zaky Mallah was a nineteen-year old Australian born youth whose parents had died when he was a teenager. He lived by himself in a one bedroom housing commission flat in the southwestern suburbs of Sydney. He worked as a supermarket shelf stacker and later as a pizza delivery boy. At the time of these offences he had no prior convictions.

He had applied to the Department of Foreign Affairs and Trade for a passport and consequently was interviewed by ASIO. His application was refused by reason of an assessment that he might prejudice the security of Australia or of a foreign country.

He sought a review of this decision by the AAT which conducted a hearing in March 2003. For much of that hearing he and his barrister were excluded whilst evidence was tendered in his absence. Mr Mallah was very frustrated by this process.

He became the subject of a great deal of media attention with appearances on national television, the Allan Jones Show and in newspaper articles. This publicity led to a hostile reaction to him. There were break-ins to his home and he was relocated by the Housing Commission.

He became very depressed, upset and angry especially with ASIO and DFAT. He prepared a videotape in the nature of a suicide message. He also bought a gun and some ammunition. His phone was tapped. The authorities quickly learnt of his acquisition of the gun. His home was raided and his gun was seized. He was charged with firearm offences. He attended Bankstown Court and was fined. The DPP appealed against the lenient penalty. His arrest led to heightened interest from the media, something he began to enjoy. He was featured on the front page of the weekend edition of The Australian in an article entitled "Tortured World of an Angry Young Man". The newspaper published some of the posed 'glamour photographs' that he had supplied and paid him $500.

In this environment the NSW Counter Terrorist Command set up an operation using an undercover police officer who made contact with the accused pretending to be a freelance journalist wishing to write a story about him. This "journalist" offered him media coverage on the front page of Time magazine and a lucrative payment for any videotape that could be used in television coverage. Mr Mallah explained to the "journalist" that he had a plan to kill an ASIO or DFAT officer and that he had produced a video tape that could be used to explain his reasons for this act.

After three meetings, only one of which was the subject of a Controlled Operations Certificate issued under the Commonwealth Crimes Act, the undercover police officer paid Zaky Mallah $3000 in return for the suicide bomber video tape. Mr Mallah was then immediately arrested and charged with one count alleging that he had committed an act in preparation for or in the planning of a terrorist act,

contrary to s 101.6 of the Criminal Code Act, namely, that he sold the video tape as part of a plan to kill an ASIO officer.

Mr Mallah was refused bail and for most of the 16 months that he was on remand he was kept in the highest security conditions in strict isolation in the notorious Goulburn Gaol, spending 22 or 23 hours per day in his cell with limited access to a telephone or access for visitors. He was denied permission to join the Friday religious services for members of his faith. His cell was subject to continuous video surveillance. Whenever he was moved it was in the custody of a SWAT team. When I first visited him in remand he was guarded by four prison officers wearing flack jackets and truncheons, one of whom was video taping him as he sat in the interview room wearing orange overalls.

Early in the process we offered to plead guilty to one charge of threatening a Commonwealth Officer, an offence under s 147.2 of the Criminal Code Act that carries a maximum penalty of 7 years. The Commonwealth DPP rejected this offer and then added that charge to the indictment as an extra charge. They also added a third count, also a charge under s 101.6 alleging that he acquired the rifle and ammunition in preparation for and in the planning of a terrorist act.

At the trial the accused initially pleaded not guilty to all charges but pleaded guilty to the charge of threatening a Commonwealth Officer at the end of the Commonwealth case. This left the jury to determine the two terrorist related charges.

We had sought to exclude all of the evidence obtained by the undercover officer on the basis that he had engaged in conduct that was unlawful, involving offences by him of inciting the very terrorist act (the sale of the video tape) that the accused was charged with. We also argued that the undercover officer had acted improperly and unfairly by obtaining confessions from the accused by misrepresenting himself in his conversations with the accused. The trial judge, Justice Wood, found that the police officer had engaged in conduct that amounted to an aiding and abetting or counselling or procuring of the offence charged against the accused (R v Mallah [2005] NSWSC 358 at para 85) and that the police officer had acted unfairly when he questioned the accused. His honour deemed many of the accused's admissions to have been obtained improperly as a consequence of the deliberate false statements made to the accused during the course of the questioning (para 98). Nevertheless, His honour determined to admit the evidence at the trial.

Mr Mallah's case at trial was that he had never had a serious plan to take anyone hostage or to kill them, let alone to die himself in a siege. He gave evidence that he bought the rifle for self-protection because of the series of break-ins and threats he had experienced. He said that his dealings with the journalists were to secure publicity for himself and to obtain money for items that were newsworthy. Much of his discussion with the undercover police officer was nonsense. He was stringing him along so that he could get the money that was on offer.

The jury delivered verdicts of "not guilty" in relation to the two terrorist charges. On 21 April 2005 Wood CJ at CL sentenced Mr Mallah in relation to the charge of threatening a Commonwealth officer to imprisonment for 2 years and 6 months to date from 3 December 2003. His honour ordered his release at the expiration of one year and nine months and made a recognisance release order requiring him to be of good behaviour for two years.

The jury verdicts reflected a widespread impression that the authorities had over-charged this young man. After the acquittals the Federal Police Commissioner distanced the AFP from the proceedings by pointing the finger in the direction of the NSW Counter Terrorism Command who had brought the charges. In fact both the AFP and the NSW Police were instrumental in the prosecution. The Commonwealth DPP had carriage of the matter throughout. The Commonwealth Attorney-General informed the media after the trial that he would examine ways of tightening the law.

iii. Izhar Ul-Haque

Izhar Ul-Haque is a 21-year old medical student who was arrested in April 2004 and charged with receiving training from a terrorist organization, an offence which carries 25 years imprisonment. The case involves an allegation that Mr Ul-Haque trained in Pakistan controlled Kashmir with an organisation called Lashkar-e-Toiba (LET). This charge has been laid even though LET was not proscribed as a terrorist organisation by Australia at the time of Mr Ul-Haque's alleged participation. Most of the evidence against Mr Ul-Haque was obtained in a series of interviews with the AFP. Those interviews will be the subject of challenge at his trial later this year.

Mr Ul-Haque appeared before Justice Bell in November, 2005. His barristers, Ian Barker QC and Peter Lange demurred to the indictment on the ground that the Commonwealth had no constitutional power

to purport to criminalise activities of an Australian citizen in Pakistan who had merely received training from a Pakistani "terrorist organisation" where the training was not intended to be utilised in any way in or against an Australian Government or Australian Citizens. Additionally, it was argued that there was no evidence that Lashkar-E-Toiba (LET) was a terrorist organisation and therefore the proceedings should be permanently stayed because the Crown could not establish a prima facie case. These arguments failed before Bell J and are the subject of a pending appeal to the Court of Criminal Appeal pursuant to section 5F of the Criminal Appeal Act.

iv. Faheem Lodhi

I am acting for Mr Lodhi who has been charged with two counts of making and collecting documents connected with preparation for a terrorist act (ss 101.4 and 101.5 of the Criminal Code Act) – maximum penalty of 15 years; one count of possession of a document connected with a terrorist act (s101.4) – maximum penalty of 15 years; and one count of preparing for a terrorist act (s 101.6) — maximum penalty of life imprisonment. He has also been charged with five counts of making false statements under questioning at ASIO (s 34G of the ASIO Act). One charge of recruiting Izhar Ul-Haque to participate in the activities of a terrorist organisation was withdrawn last year.

All of these charges relate to Faheem Lodhi's alleged involvement with LET activities in both Pakistan and in Sydney. The charges resulted from ASIO and AFP investigations into a French citizen, Willy Brigitte.

In October 2003 Brigitte was detained by the Department of Immigration and, after refusing to speak about his activities, he was deported to France where he his currently in custody. He has been held since October 2003 without being charged.

ASIO and the AFP have been working in close conjunction in the course of this investigation. Mr Lodhi, employed by a Sydney firm of architects, was detected purchasing maps of the electricity grid, making enquiries about the availability of chemicals, downloading aerial photographs of Victoria Barracks, Holdsworthy Barracks and HMAS Penguin and acquiring a large quantity of toilet paper which the prosecution allege is capable of producing nitro-cellulose.

Mr Lodhi is currently standing trial in the Supreme Court before Whealy J and a jury. There have been some very interesting legal arguments and judgements during the course of the trial thus far, some of which are referred to later in this paper.

In order to prove the terrorist nature of these offences it is necessary to demonstrate that the terrorist acts being prepared for were to be done with an intention to kill or to cause serious harm and were motivated by a religious, political or ideological cause. To help prove the relevant cause, the prosecution intended to rely on the evidence of four overseas witnesses who all gave evidence at the committal hearing over objection on video link.

One of these witnesses, Naharudin, is being held in Singapore without charge under the National Security Legislation. Three other witnesses are serving sentences in the United States and have all reached plea agreements with the US Government to give evidence in various trials in the US, Australia and the UK.

These four witnesses have not lived up to the prosecution's expectations. One of the Americans had already been "dropped" by the US in their criminal prosecutions prior to Mr Lodhi's committal hearing. He performed very poorly in Central Local Court and was quickly dropped by the Australian authorities too. A second American also emerged badly from his cross-examination at the committal hearing in February 2005 where it was revealed that he had been arrested by Saudi Arabian police in Riyadh, held without warrant and without charge for approximately 4 weeks in solitary confinement in a cell with the lights on 24-hours a day, interrogated regularly throughout the night by Saudi police then handed over the FBI who, after stripping him naked and photographing his genitals, dressed him in prison greens, placed him in irons and placed dark goggles over his faced then transported him from Riyadh to Washington. He told Central Local Court that it was in this flight that he first confessed his involvement in LET activities. He, too, was then dropped by the DPP.

The Singaporean witness became even more problematic. He was discarded even though he was the only witness who purported to be able to identify Faheem Lodhi as a participant in LET training camps in Pakistan. The prosecution dropped him after the defence subpoenaed documents which we believed would adversely affect his credibility and, in particular, his ability to accurately identify the accused without prompting from his Singaporean handlers. The Commonwealth refused to produce the documents on subpoena even though similar documents had been produced to the defence in the Ul-

Haque case. Eventually, it seems that the Singaporean witness became too problematic for the Commonwealth DPP and he also was dropped from the witness list at the trial.

At trial the DPP called only one overseas prisoner, a man who has given evidence in three US trials and one trial in London. That witness entered into a plea agreement whereby charges that would have led to a likely sentence exceeding 150 years were dropped. He pleaded to less serious charges, received 11 and a half years initially and then, in February 2006, this sentence was reduced to less than three years which he had, by then, already served. This witness gave evidence that demonstrated that he has regularly lied to and misled his FBI handlers and that he lied on oath in his evidence before a Grand Jury in Virginia.

Mr Lodhi's committal hearing was punctuated by regular sessions in camera, orders prohibiting the publication of evidence and even orders refusing to allow the defence to cross-examine the Singaporean witness on certain specified topics — even though those topics were relevant and probative. At one stage the magistrate closed the court and then ordered the accused to be taken to the cells so that legal argument could be had in his absence because the Commonwealth had argued that the accused's presence in court constituted a national security risk. All of this was, of course, over the defence objection.

Mr Lodhi was the first prisoner in NSW classified "AA". This security rating involves extremely harsh conditions of custody, including virtual solitary confinement, limited visiting rights and extraordinary security when attending court. Mr Lodhi is now transported by helicopter from Lithgow gaol (4 hours drive away) when he appears in a Sydney Court. This is despite the fact that the only friend or supporter who has attended court at any stage has been the accused's quiet, law-abiding brother.

v. Bilal Khazal

Mr Khazal is a thirty four year old former Qantas baggage handler who has been charged with collecting and making documents likely to facilitate an act of terrorism (s 101.5) maximum penalty of 15 years. His charge relates to the use of his home computer to collect information from the internet relating to Islamist, "jihad" issues and the subsequent reformatting of this material and republishing it on the internet. Mr Khazal has been convicted in his absence by a military tribunal in Lebanon of a charge relating to his financing of a Lebanese terrorist organisation. He has also been charged in Lebanon with participation in the bombing of a McDonald's restaurant.

The Lebanese charges are based on largely discredited hearsay evidence, yet the Australian government has vowed to extradite him to Lebanon to face the military tribunal at the conclusion of his Australian proceedings. The Lebanese military tribunal must be considered as analogous to but worse than the American tribunal established to deal with the Guantanamo Bay detainees. It is interesting that the Australian Government has forged an agreement with the Lebanese Government to extradite Mr Khazal even though no agreement to extradite any other person has ever existed.

The Khazal case has highlighted the extent of politicians' participation in the process of terrorist trials. Mr Khazal was granted bail by a magistrate in Central Local Court. There was media outrage. The Carr Government changed the Bail Act overnight in time for the DPP's review of the grant of bail in the Supreme Court. During the course of the Supreme Court bail review, the Commonwealth Parliament considered and passed legislation to insert even stricter bail laws for terrorist charges in the Crimes Act.

Despite these legislative amendments, Justice Greg James upheld the decision to grant Mr Khazal bail on very strict conditions.

The Commonwealth regards the material Mr Khazal published as extremely sensitive. His lawyers are bound by very strict non-disclosure orders, one of which requires the brief of evidence to be locked in a safe in the lawyers' chambers. The DPP supplied the safes. Mr Khazal is due to stand trial later this year in the Supreme Court.

vi. Jihad Jack Thomas

Mr Thomas was charged in Victoria with intentionally receiving funds from a terrorist organization, providing support to a terrorist organization and possession of a false passport. He stood trial in the Supreme Court in Melbourne and was convicted of the passport charge and receiving funds from the terrorist organization.

Pakistani authorities arrested Jack Thomas in 2002. He was held without trial for five months. During that time the CIA, the FBI, the Pakistani Secret Service, ASIO and the AFP questioned him. At the trial,

the prosecution relied heavily on admissions made during the course of the AFP interviews in Pakistan. Mr Thomas objected to the admission of these interviews arguing that they were either involuntary or obtained unfairly and should be excluded.

Mr Thomas complained to the AFP in the subject interviews about threats that had been made to harm him and his wife when being interviewed by American investigators. There was also a significant issue about the relevance of the fact that Mr Thomas' Pakistani gaolors had made it clear to the AFP that they would not allow Mr Thomas to communicate with a legal practitioner of his choice. It was argued on the accused's behalf at trial that the AFP were therefore in breach of Part IC of the Crimes Act by not giving him an opportunity to receive legal advice.
Cummins J ruled that the records of interview were admissible. In his judgement (DPP v Thomas [2005] VSC523 (7 November 2005)), he said (at paragraphs 5 and 6),
" I consider the provisions of Part IC of the Crimes Act applied to the interview on 8 March 2003…Thus, ordinarily, the accused should, pursuant to section 23G(1)(b) of the Act, have been informed by the investigating officers that he may communicate with or attempt to communicate with a legal practitioner of his choice and arrange or attempt to arrange for a legal practitioner to be present during the questioning, and the questioning should have been deferred for a reasonable time to allow that communication or presence to occur. The officers, rather than inform the accused of that dual right, informed him that "this right will not be available to you today" (question 29). Normally, failure to avail an interviewee of that right would be fatal to the admission of a subsequent interview. That is, because the right is an important right in the system of justice. However, that requirement is not absolute. Here, the officers had ascertained that the provision would not be permitted in Pakistan. They were faced with the choice of conducting an interview or postponing it for an indefinite period to an indefinite place. Had the officers sought to utilize that situation for a collateral purpose, or as a pretext, or opportunistically to defeat or deflect the requirements of Part IC of the Act, I would have had no hesitation in ruling the interview inadmissible. Further, I would unhesitatingly excuse the interview if I considered it unfair to admit it. However, I consider the officers acted reasonably, honestly and fairly in all the circumstances.

Further, I don't consider it was unfair to the accused to conduct the interview in the absence of legal recourse as defined by section 23G(2). Doubtless the accused would have availed himself of that legal recourse were it proffered. Presumably the legal practitioner would have advised the accused appropriately. Whether, then, the accused would have answered questions or declined to answer questions is unknown and certainly I do no speculate in that regard."

Mr Thomas has appealed against his conviction and, no doubt, his appeal will focus on Cummins J's decision to admit the records of interview.

On 31 March 2006 Cummins J sentenced Mr Thomas in relation to the charge of intentionally receiving funds from a terrorist organization to five years imprisonment and in relation to the possession of a false passport to one years imprisonment to be served concurrently with a total effective minimum term of two years.

vii Abdul Rakib Hasan
Mr Hasan has been charged with a number of counts of making false statements under questioning at ASIO (section 34G of the ASIO Act). Mr Hasan, like Mr Lodhi, was one of the first subjects of the ASIO questioning powers. He was served with a warrant to appear before ASIO in late October 2003 in the wake of a political furore that developed following the deportation form Australia of a French citizen, Willy Brigitte. At that time questions were posed as to why Australia had deported Brigitte. The Attorney General, Phillip Ruddock complained that, compared with France, Australia had inadequate powers to detain and question terrorist suspects. It was then pointed out by the Labor opposition that Australia had just enacted significant powers enabling ASIO to detain and question suspects but no attempt had been made to utilize them in Mr Brigitte's case. Thereafter, an intensive ASIO and police investigation was launched into Mr Brigitte's Sydney based associates. In that context, Mr Hasan received a warrant to appear before a prescribed authority for questioning. Curiously, the ASIO Act at that time prohibited the publication of the fact of ASIO questioning under a section 34D warrant only in circumstances where the subject had been arrested and detained under a warrant, not just where they were being questioned under the warrant. (As indicated previously, so far, no one has been **detained** for questioning). So it was that *The Australian* newspaper published the fact of Mr Hasan and Mr Lodhi's questioning (presumably through leaks from government or ASIO sources). Meanwhile, those acting before Mr Lodhi and Mr Hasan were urged by ASIO to keep the whole process confidential. Subsequently, the ASIO Act was amended to prohibit any publication at all of the fact of ASIO questioning whether or not the subject was in custody.

Mr Hasan's trial is pending in the Supreme Court. His position has become complicated because he

was one of eight men arrested in November 2005 and charged with conspiracy to do an act in preparation or planning for a terrorist act.

viii The Sydney and Melbourne arrests in November 2005
In November 2005, following a special sitting of Parliament to amend the offence creating provisions of Division 101of the Commonwealth Criminal Code, two groups of men were arrested, one group in Sydney and one in Melbourne. The Sydney men were charged with conspiracy to do an act in preparation for a terrorist act. The Melbourne men were charged with being members of a terrorist organisation, namely their own small group of jihadist extremists. The conspiracy charge which the Sydney men face does not purport to identify any particular terrorist act as being the object of the conspiracy. The Anti-Terrorism Act 2005 enabled the prosecution of offenders charged with crimes relating to acts in preparation of a terrorist act where the prosecutors are unable to specify what particular terrorist act is the subject of the preparation and/or where multiple terrorist acts are or could be the subject of the preparation. (See below for further discussion).

An unprecedented level of court security and a political and media circus accompanied the arrests and the first appearances in court of these young men. Police had obviously released to the media video footage of the arrests of some of the alleged offenders. This footage included exciting “ultraviolet night vision” video footage taken from a hovering helicopter. The Premier and the Police Commissioner fronted a news conference to proclaim the effectiveness of the joint Commonwealth/State operation and to convince the public that the State was effective in saving them from the threat of terrorism in their midst. Meanwhile, the federal Police Commissioner, Mr Keelty, apparently miffed at the lack of prominence that the State Premier and Police Commissioner gave to the AFP at the earlier press conference, announced that he would take steps to ensure that the Commonwealth DPP did not make public any details of the operation that had led to the arrests.

When one of the accused, Mirsad Mulahalilovich unsuccessfully sought bail in Central Local Court on 11 November, counsel for the DPP, apparently acting in conformity with Mr Keelty’s request for secrecy, sought and obtained from the Magistrate an order suppressing the Facts Sheet from publication. Lawyers for media interests immediately lodged an appeal against the suppression order to the Supreme Court, a step which apparently forced the DPP to recapitulate on their endeavor to suppress the evidence in the case.

A brief of evidence has now been served on lawyers acting for these accused. It consists of nearly 70 ring back binders of statements and telephone transcripts. It is apparent that this is a case which will take a great deal of court time before all of the issues are determined.

6. THE NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004

The National Security Information legislation (NSI Act) is now likely to become a regular feature of terrorist-related criminal litigation. It was first triggered in NSW in the Faheem Lodhi trial which, consequently, was subject to a series of procedural hearings which slowed the progress of the trial down to a snail’s pace. The NSI Act casts extraordinary burdens on the lawyers acting for the accused and the prosecution. If the lawyers acting for the accused or the prosecution know or believe that they will disclose, or that one of their intended witnesses (either in giving evidence or by his or her mere presence) will disclose information that relates to national security or where the disclosure may affect national security, the lawyer must, as soon as practicable, give the Attorney General notice of that knowledge or belief and advise the court that the notice has been given. Failure to give the notice is a criminal offence which carries two years imprisonment (section 24). Likewise, during the course of the trial, if a witness is asked a question and objection is taken to the question on the basis that the answer to the question might reveal information relating to national security or it may affect national security, the court must adjourn the proceedings and, in closed court, require the witness to write the answer to the question down on a piece of paper. The answer must then be shown to the prosecutor (not to the accused) who must then give notice to the court and the Attorney-General and the proceedings adjourned until the Attorney-General has had an opportunity to consider what steps to take (section 25 (6)).

If the Attorney-General is given notice pursuant to sections 24 or 25, the Attorney-General must *personally* consider the evidence concerned and may issue a “non disclosure certificate”. If such a certificate is issued, the court must convene in a special closed court session to consider whether or not to make orders that conform with the certificate or otherwise.

Once a party gives notice to the Attorney-General, the proceedings must adjourn until the Attorney General issues a non disclosure certificate or determines not to issue such a certificate.

These steps have all been utilised in the Lodhi trial which has been adjourned from time to time to allow the procedure take its course.

The real sting in the tail of the NSI Act is the way in which the Act affects the way in which the trial judge has to consider the exercise of his or her discretion in determining whether or not to make orders in conformity with the Attorney-General's certificate. Section 31(7) provides that, in deciding what order to make under the section, the Court must consider various factors including whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security and, whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing. But section 31(8) provides that, in making its decision the Court must give ***greatest weight*** to the Attorney General's certificate.

Largely because of this fettered discretion, during the pre-trial arguments in the Lodhi case, lawyers acting for the media interests challenged the constitutional validity of the relevant Part of the NSI Act. It was argued that the Act altered the nature of the Supreme Court by obliterating its power to discharge, without interference, its ability to determine guilt or innocence, that the Act conferred power on the Supreme Court, in the exercise of the judicial power of the Commonwealth, a discretion which is incompatible with the exercise of that power and that the Act is inconsistent with the implied freedom of speech in relation to the discussion of political matters which arises under the Constitution.

Whealy J dismissed the constitutional challenge. A central reason in his Honour's judgement was the very narrow construction that he gave to the Act's operation. He held (*R v Lodhi Unreported 7 February 2006*), "In my opinion, the function (of the Act) is a very limited one and is concerned only with the disclosure of information" (para 82). His Honour held that, "the mere fact that the legislation states that more weight, that is the greater weight, is to be given to one factor over another does not mean that the other factor is to be disregarded … Read fairly, it seems to me that the legislation does no more than to give the Court guidance as to the comparative weight it is to give one factor when considering it alongside a number of others. Yet the discretion remains intact and … in a proper case the Court will order disclosure or a form of disclosure other than that preferred by the Attorney-General (para 108).

In Lodhi's case, Whealy J decided all issues relating to the closure of the Court, non-publication orders and orders relating to the identity of witnesses in accordance with the established common law and the relevant statutory provisions. The NSI Act was held not to have any effect on these ancillary orders.

Nevertheless, much of the evidence has been heard in closed court. Some of the evidence is suppressed. Whealy J has, though, established a system of releasing edited forms of the transcripts of the closed court sessions within days of the evidence being heard.

The accused successfully argued that special counsel could be appointed if it became necessary to argue about the disclosure of particularly sensitive National Security Information (*R v Lodhi Unreported 21 February 2006*). This would involve the appointment of a security cleared counsel who could view the subject material, obtain instructions from the accused about its importance to the defence case and then mount informed arguments in favour of disclosure of the information to the accused. This concept has been developed in England in the background of terrorist-related issues in immigration cases and some criminal cases and has been applied in a similar context in Hong Kong. (See in particular *R v H; R v C [2004] 2 AC 134; Regina (Roberts) v The Parole Board & Anor [2005] 3 WLR 152*; *Secretary of State for the Home Department v Rehman [2003] 1 AC 153*)

7. THE PARTICULARITY OF THE CHARGES

Lodhi's case involves charges which relate to the preparation of a number of possible terrorist acts. The Crown case suggests that the accused was allegedly involved in the early stages of a plan to commit one or more terrorist acts. The accused is charged pursuant to sections 101.4, 101.5 and 101.6 of the Criminal Code Act alleging that he possessed, collected and made documents connected with preparation for a terrorist act and that he did an act in preparation for a terrorist act. At the time of charging, these sections contained subsections that provided that the offences were committed, "even if **the** terrorist act does not occur". The accused sought to have the indictment quashed on the basis that the charges were duplicitous. It was argued that it was necessary for the Crown to prove that a particular terrorist act, capable of being identified in some way, shape or form was being prepared for. Only then could a jury determine whether the accused was guilty or not of a particular, identifiable crime.

Whealy J dismissed this argument in a judgement dated 23 December 2005. When the prosecution

amended the indictment in February 2006 the argument was repeated and his Honour ruled against the accused again. Mr Lodhi appealed to the Court of Criminal Appeal pursuant to section 5F of the Criminal Appeal Act. The appeal was listed for hearing on 16 February. On the day before the hearing of the appeal, the Governor-General on the advice of the Attorney-General made a proclamation that the Commonwealth claimed gave retrospective effect to amendments to the offence-creating provisions with which Mr Lodhi stood charged.

The Anti-Terrorism Act 2005 repealed the subsections that the accused had argued required the Crown to specify with particularity the terrorist act which was the subject of preparation in each case. In each instance the Act added subsections changing the old subsection from reading "**the** terrorist act does not occur" to reading "**a** terrorist act does not occur" and which clearly removed the necessity to prove that the preparation was for a specific terrorist act. If these amendments had the retrospective application argued for by the Crown it would have been an example of the government changing the law concerning the offences an accused faced after his trial had already commenced.

The Anti-Terrorism Act 2005 did not purport to have retrospective application. Indeed, during debate about the bill, the Attorney General pointed out that it was not intended to apply retrospectively. This bill was pushed through Parliament in a specially convened session in order to apparently provide the government with the necessary powers to "deal with an imminent terrorist threat" (apparently the eighteen men arrested in Sydney and Melbourne the week after the law was proclaimed). Despite this assurance about the law's lack of retrospective application, the government introduced the potential for retrospectivity when it introduced the broad additions to the counter-terrorism laws in the compendious Anti-Terrorism Act (No 2) in December.

The potential for retrospective application became an actual attempt at retrospective application when the Governor-General signed the proclamation on 15 February 2006 which gave effect to the new provisions as from the 16 February. This attempt, though, was not successful. In Mr Lodhi's appeal to the CCA (*Lodhi v Regina [2006] NSWCCA 121*) Spigelman CJ, with whom McClellan CJ at CL and Sully J agreed, upheld an argument that the retrospective amendments should be read down so that they did not apply to a trial that had already commenced. The Chief Justice concluded on this issue, "In my opinion, Parliament is "prima facie expected to respect" the principle that a statute will not retrospectively alter a criminal offence where a trial has commenced."

However, despite Mr Lodhi's success in this argument, the Court held that, even under the original form of the provisions, it was not necessary for the Crown to particularise to any extent the details of the terrorist act in any of the charges. Spigelman CJ held, "Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgement has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge. The courts must respect that legislative policy." (Para 66.)

The Court did uphold an argument that the indictment must specify all essential factual elements, including the relevant intentions that relate to the terrorist act which is the subject of each charge. Consequently, Mr Lodhi's appeal was upheld, the indictment quashed and the matter remitted to the trial judge to enable the DPP to present an indictment in proper form. The existing indictment now reflects the CCA's judgement but, because of the combination of the accused's failure to win the argument about specificity and his success in relation to the argument concerning the requirement of pleading all relevant factual elements, each charge has now taken a most convoluted and complex form which basically recites the definition of "terrorist act" from the definitions section of that Part of the Code.

8. CONCLUSION

The terrorist offences and the ASIO interrogation and detention provisions were enacted as a response to a particular set of circumstances. The ASIO provisions have a three-year sunset clause. Last year the Parliamentary Joint Committee on ASIO, ASIS and DSD conducted an inquiry into the effectiveness of the Act. Meanwhile, a committee of eminent lawyers headed by Simon Sheller QC has recently reported to the Government in relation to some aspects of the original counter terrorism measures that were passed in 2003. At the time of writing this report had not yet been made public but press speculation suggests that the Sheller report has recommended some significant amendments to the provisions which relate to the proscription of terrorist organisations.
Meanwhile, the State, Territory and Commonwealth Parliaments have all passed a new wave of

draconian laws that allow for the preventative detention and the electronic tracking of suspects and sweeping new search and seizure powers. Every time the legal profession, civil libertarians, the press and some concerned back bench Members of Parliament make some headway in moderating the terror laws, the State security apparatus and its champions in high office forge irrepressibly onwards with a seemingly never-ending roll out of repressive measures that they claim are necessary for the maintenance of life as we know it.
Politicians should keep in mind the principles that were formulated by Lord Lloyd of Berwick in his report to the United Kingdom Parliament on whether or not there was a need for specific counter terrorism legislation in the event of a lasting peace in Northern Ireland. He formulated four guiding principles which apply the rule of law to the challenge of terrorism:

(a) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure.

(b) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.

(c) The need for additional safeguards should be considered alongside any additional powers.

(d) The law should comply with international law.

A strong argument exists that the extraordinary ASIO powers and the laws creating the raft of terrorist offences are disproportionate to the threat which terrorism poses in Australia. The balance has been tilted too far towards the needs of security and against the rights and liberties of the individual.