

Punishing Proximity: Sentencing Preparatory Terrorism in Australia and the United Kingdom

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Abstract

Very heavy sentences have consistently been handed down for preparatory terrorism convictions in Australia. This article analyses Australian and United Kingdom (UK) cases to determine the degree to which the proximity of a terrorist act affects sentences in each jurisdiction. While Australian courts discuss proximity more regularly, even where planning is at a very early stage, this will not generally mitigate sentences significantly. UK sentences tend to reflect the actual conduct of the accused to a much greater degree. This article argues that given the extension of criminality that preparatory liability represents, care should be taken to ensure that the core principles of criminal law continue to apply to such offences. It suggests that greater consideration of proximity in sentencing processes may lead to sentences that are more proportionate to the gravity of the offender's conduct and intention.

Introduction

The perception of an increased threat of terrorism after '9/11' (terrorist attacks on 11 September 2001 in the United States) propelled many countries to introduce new terrorism offences. With a focus on preventing terrorism before it occurs, offences were introduced that criminalise acts that, while not criminal in themselves, become criminal when done in preparation for a terrorist act. The Australian experience thus far demonstrates that lengthy sentences for those offences have consistently been handed down, even where the conduct is interrupted quite early (Walker 2012:30).

Through a comparative analysis of jurisprudence and sentencing in preparatory terrorism cases in Australia and the United Kingdom (UK), this article argues that the proximity of a preparatory act to a terrorist act is not given as much weight in sentencing in Australia as in the UK. It suggests that this results in disproportionately severe sentences in Australia and that proximity should be a more influential factor in mitigating sentences. Given the extension of criminal liability these preparatory offences represent, the essential safeguarding principles of criminal law should continue to apply, and greater consideration of proximity may be a vehicle for this.

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Offences

In 2002, the offence of engaging in a terrorist act was introduced into the *Criminal Code 1995* (Cth) ('*Criminal Code*') along with four associated preparatory offences. Other countries have also criminalised preparatory conduct in the terrorism context, although in most countries, preparatory acts are considered too remote from the actual perpetration of a crime to deserve punishment (Picotti 2007:409).

Preparatory offences are designed to prioritise the prevention of terrorism (Senate Legal and Constitutional Legislation Committee 2002:25; Ruddock in Lynch, MacDonald and Williams 2007:5; MacDonald and Williams 2007:34), so, in contrast to traditional post-crime punishment, those planning terrorist acts can be arrested and punished long before those acts would occur (Gani in Gani and Mathew 2008:272; Tulich 2012:52). Preparatory offences criminalise action that is not ordinarily seen as criminal and thus seek to criminalise remote risks and make actions criminal before threats are imminent (Roach in Ramraj et al 2012:101).

Traditionally, criminal law might criminalise inchoate offences like attempt or conspiracy, but criminalising preparatory acts that are further removed from the terrorist act represents an extra step and creates pre-inchoate liability (Tulich 2012:56). These go further than traditional offences because they criminalise the formative stages of an act and render individuals liable to very serious penalties before there is clear criminal intent (MacDonald and Williams 2007:34; Williams 2011:1154; McSherry 2004:366). This kind of criminalisation aligns with a recent increase in countries using criminal law not only to punish harms committed, but also to prevent or reduce the risk of anticipated future harm (Ashworth, Zedner and Tomlin 2013:1; Husak 2004:442). Such offences are based on the logic of risk that licenses forward-looking incapacitative measures, which are justified by the claim that it is possible to determine in advance who poses a risk and to what degree (Zedner in McSherry, Norrie and Bronitt 2009:35). The extension of the law in this manner has generated debate. Some defend the criminalisation of risk when faced with such serious potential harm (eg Ignatieff in Zedner in McSherry, Norrie and Bronitt 2009:55). Others express concern at the potential for pre-emptive offences to condone increasingly early and more invasive measures (Zedner 2006:430) that radically depart from established legal principles (Zedner in McSherry, Norrie and Bronitt 2009:36) and emphasise that prediction of human behaviour is necessarily uncertain (Zedner in McSherry, Norrie and Bronitt 2009:36).

Further, some commentators suggest that — despite an assumption that crimes of earlier intervention could, correlatively, bring lower criminal penalties — 'over-punitive' sentences have at times been imposed for relatively low-level preparatory conduct by Australian courts (Saul 2012:6; Pyne 2011:179) for acts that are 'too far removed' from the actual commission of a terror act (Williams 2011:1162). While some preparatory conduct is unlikely to harm anyone, sentences are often substantially higher than those for ordinary crimes causing death or serious sexual assault (Saul 2012:6).

The difficulty in proving the requisite mental elements is often seen as a crucial safeguard around the perceived overreach of preparatory offences (Maidment 2009; Rose and Nestorovska 2007:29, 55). The prosecution must prove the preparatory act was done with intent (*Criminal Code* s 5.6(1)) and that the individual was (at least) reckless as to whether the act was in preparation for a terrorist act (*Criminal Code* s 5.6(2)). However, once an intention has been found, this safeguard has no application to ensuring that a proportionate sentence is handed down.

Extending the law to pre-crime liability in this manner should be the subject of intense debate (Zedner 2010:24; Ashworth and Zedner 2012:570). However, while the general expansiveness of terrorism laws has been vigorously debated, discussion about how and why these crimes are punished has been minimal (Pyne 2011:179).

Amid the various preparatory offences that have been enacted involving possession, collection of information or weapons, dissemination and facilitation in preparation or in connection to a terrorist act, this article's focus will be the general preparatory offences in s 101.6 of the *Criminal Code* and s 5 of the *Terrorism Act 2006* (UK) ('*Terrorism Act*') and prosecutions thereunder.

Proximity

The term 'proximity' in this article refers to how close the preparatory conduct has actually come to reaching any terrorist act, which will inevitably include a consideration of how imminent and viable a terrorist act is. Preparatory offences criminalise conduct earlier than traditional criminal offences. As the preparatory conduct's link to that criminal terrorist act is precisely what makes it punishable, it is logical that its *proximity* to the terrorist act should be a key consideration for courts when weighing up the seriousness of the conduct and the appropriate sentence to be handed down.

Concepts of proximity tend to fall into two groupings. The 'viability' aspect of proximity refers to the sophistication and realistic achievability of the plan, the defendants' abilities and whether the plan is logically, physically or scientifically possible; whereas the 'progress' aspect refers to the extent and detail of and the steps taken to progress an attack such as identifying a target, time or place and assembling weapons. While courts and counsel do not always use the term 'proximity,' (except in *Lodhi v The Queen* (2007) at [228]–[232] and arguments raised by Mr Boulton SC in *Lodhi v The Queen* particularly at [227]), the concept is discussed regularly.

Proximity will not, however, be the only indicator of culpability. For example, courts have considered that there is less culpability in plotting to kill one individual, than in plotting to commit mass murder (*R v Parviz Khan* at [11]); and in plotting to cause property damage, than plotting to take lives (*R v Touma* at [116] and *R v Roche* at [119]). Similarly, in sentencing, a guilty plea, showing remorse, ideological motivation and various other considerations will equally affect the sentence (see, for example, *R v Barot*). However, while proximity is only one indicator among several, it remains a crucial factor that is worthy of examination.

Preparatory terrorism and Australian law

The *Criminal Code* s 101.6 makes it an offence to do 'any act in preparation for, or planning, a terrorist act', including where no specific terrorist act or no single terrorist act can be identified, and regardless of whether or not a terrorist act occurs at all (*Criminal Code* s 101.6(2)). This offence attracts a maximum penalty of life imprisonment (*Criminal Code* s 101.6). Cases in which conduct has been prosecuted under this section are outlined below.

Lodhi v The Queen

Lodhi had enquired about the availability of chemicals, possessed electricity grid maps and a recipe for various poisons and bombs. He was convicted of s 101.6 as well as preparatory possession offences.

The Court considered that the acts were ‘ineffective enough’ (at [54]) ‘at a very early stage’ (at [51]), included a ‘degree of impracticality’ (at [54]) and a ‘lack of viability and sophistication’ (at [54]). No particular bomber, precise area to be bombed or manner in which any bombing would take place had been established (at [26]). However, Whealy J considered that the legislation had been established to prevent terrorist acts at a very early stage and that a culpability evaluation required an analysis ‘not only of the act itself, which may be quite innocuous, but as well, an examination of the nature of the terrorist act contemplated’ (at [51]) and that ‘even the most amateurish plan would be capable of causing considerable damage and even death amongst our community’ (at [54]). He suggested that courts look not only to the act itself, but the nature of the terrorist act contemplated in light of the intentions of the accused (at [51]). Accepting that this case involved a high level of culpability and emphasising the importance of deterrence (at [91], [92], [103] for example) he imposed a sentence of 20 years (15 years’ non-parole) for the s 101.6 offence.

On appeal, Price J noted that while proximity is relevant in crimes of attempt, in crimes of preparation, the proximity of the attack is necessarily more remote, and although relevant, does not determine the objective seriousness of the offence (at [228]). He found that it does not follow that as long as the preparatory acts are in their infancy, criminal culpability must necessarily be low. The main focus of the assessment of objective seriousness must be the offender’s conduct and the offender’s intention at the time the crime was committed (at [229]).

Counsel argued that offenders with well-developed plans and those with exploratory plans should be distinguished, that proximity should be given weight (at [231]), that the offences cover a range of conduct and that too much weight was given to the intention of the legislation and not enough to the facts of the case (at [241]). Price J responded that it was inevitable by the construction of the law that acts would be at early preparatory stages and that while some acts may be more serious than in this case, that did not mean that these acts should not be regarded as serious (at [241]). The sentence was upheld.

R v Touma

Touma had attempted to make explosive devices and collected ammunition. A large amount of extremist material was found in his possession. He had not selected any target, method or time to undertake a terrorist act. He was also charged with a possession offence. He was sentenced to 14 years’ imprisonment (10.5 years’ non-parole) for the s 101.6 offence.

Justice Whealy found that the collection of ammunition and building of explosive devices was at a serious level of criminality and those actions put the offender in a position where he was closer to carrying out an attack (at [119]). He accepted that the attempt to make the bomb was amateurish, but found that the offender clearly contemplated using such a device to carry out an attack (at [118]).

Counsel argued that no target had been selected, that the firearm found did not match the ammunition and that the defendant had limited cognitive ability (at [121]–[127]). However, Whealy J was not satisfied that these elements lead to ‘reductive significance’, finding that while the offences are only preparatory, the circumstances established a serious level of criminality (at [121]).

R v Elomar

The five accused were convicted of conspiracy to do acts in preparation for a terrorist act under ss 11.5(1) and 101.6. A number of preparatory acts had been undertaken, including the ordering or collection of types of ammunition; the purchase or attempted purchase of laboratory equipment; camping trips involving shooting practice; and purchases, orders and enquiries about chemicals. Instructional material and extremist material was also found in the accused's homes.

Justice Whealy noted that, at times, the preparations were 'amateurish' and 'inept and clumsy', but that this did not make the plot less dangerous (at [68]), and that 'the legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community' (at [68]). He found that the plans were well advanced, as materials were to hand and instructions were compiled, and plans were characterised by a 'clear and logical inevitability' and would have occurred 'sooner rather than later' (at [68]). He concluded that the plans were likely to have 'come to fruition in early 2006' and that the 'driving fanaticism' of the accused would have ensured events moved quickly (at [68]). He therefore considered it fell only just short of the most serious case. However, Whealy J noted that each of the accused sentences would be 'moderated by the fact that no target had been selected and no decision made about what would be the precise nature of the terrorist act or who would carry it out' (at [91] and [126]).

Sentences ranged from 23 years' (17 years 3 months' non-parole) to 28 years' imprisonment (21 years' non-parole). These sentences are currently being appealed (Hills 2010).

R v Fattal

The three accused were convicted of conspiring to do acts in preparation for an attack on the Holsworthy army barracks under ss 11.5(1) and 101.6. It was suggested that their plan was to enter the barracks and shoot as many people as possible before themselves being killed. Who or how many individuals would be involved had not been decided. One accused visited the barracks and one sought a fatwa to carry out the operation. The fatwa was denied. They had not sought out any weapons.

In sentencing, King J noted that 'by far the most ameliorating factor' was 'the amateurish level' at which the group operated and the fact that the conspiracy 'did not advance to any significant degree' (at [87]). She noted that Fattal's trip to the barracks was useless for preparation purposes as he had no cameras, writing materials etc, and would only have seen the front gate. Similarly, the fatwa had been denied.

Justice King found that the plan was 'far from sophisticated' (at [91]) and considered, that in contradistinction to *Elomar*, it was not inevitable that the terrorist act would be committed, noting that, 'the evidence, if anything, points in the other direction' (at [92]). The plan was not particularly advanced and 'not attenuated with all the steps that have been taken' [in *Elomar*] and accordingly, did not warrant such a heavy sentence (at [96]).

Justice King noted the lack of advancement in planning was a mitigating factor (at [99]) and imposed sentences of 18 years' (13.5 years' non-parole). The case is currently being appealed (Russell 2013:11).

Australian case analysis

On the whole, Australian courts have imposed very high sentences for convictions under s 101.6, even where acts are very preliminary and no developed plans exist. The lowest sentence imposed was 14 years, the highest was 28 years.

Following *Lodhi*, the ‘objective seriousness’ of the conduct has consistently been evaluated by Australian courts, and is the principal consideration in sentencing (McGarrity 2013:30). Most cases reiterate that although the acts are preparatory, they involve serious levels of criminality (*R v Touma*; *Lodhi v The Queen*). It is unclear, however, to what degree *Lodhi*’s apparent rejection of the concept of proximity as a guide in sentencing has been subsequently applied by courts in practice. There are frequent references to proximity considerations in the Australian jurisprudence, including how ‘close’ an attack is (*Lodhi v The Queen* at [119]), an estimated date of attack (*R v Elomar* at [68]) and even moderated sentences based on a lack of decision as to targets and methods (*R v Elomar* at [91], [126]). In every Australian case examined, courts have specifically considered how far a plan has progressed, i.e. what steps were taken towards a terrorist act. Further, in every case, courts have considered how amateur or sophisticated that plot and those individuals are.

It may be that in evaluating seriousness based on the offender’s ‘conduct and intention’ (*Lodhi v The Queen*) courts are, in effect, evaluating questions of proximity as these concepts inherently lie beneath any assessment of objective seriousness of a preparatory act. Justice Price’s formulation is, after all, relatively vague and does no more than restate the elements of the crime.

However, whether these considerations mitigate sentences is a more complex question. There is no identifiable pattern in Australian cases as to whether judges give weight to specific elements of proximity and decline to give weight to others; this appears to be dependent on the circumstances of each particular case. However there is some inconsistency in application generally.

For example, while in *Fattal* the ‘most ameliorating factor’ was the amateurishness of the accused, in *Elomar* and *Lodhi* the preparations being amateur was not found to make the plot less dangerous. In *Touma*, the fact that the accused had not identified a target was *not* found to be a mitigating factor, and yet it was a mitigating factor in *Elomar*.

Courts have explicitly stated that sentences have been specifically mitigated because no target had been identified, no decision had been made about the precise nature of the attack or who would carry it out (*R v Elomar* at [91]) and due to lack of advancement in planning (*R v Fattal*). This may demonstrate that while Australian courts will discuss an accused’s perceived amateurishness, they are more inclined to directly mitigate sentences based on conceptions of progress of planning, however, given the small number of cases thus far and the fact that such evaluations are inevitably determined by particular fact scenarios, this is far from determinative.

Pyne (2011:163) argues that Australian courts are reluctant to mitigate sentences based on proximity of preparatory conduct to a terrorist act. Certainly the position is unclear. Australian courts appear to discuss and significantly consider the proximity of an attack in sentencing, and sometimes suggest these considerations have mitigated sentences. However, even so, sentences still appear extremely high when the actual conduct of the accused is considered. It may therefore be the case that even where sentences *are* mitigated on proximity grounds, this will not reduce a sentence so much as to reflect the actual conduct committed.

Preparatory terrorism and UK law

The UK's equivalent provision, the *Terrorism Act* s 5, makes it an offence punishable by life imprisonment, where an individual 'with the intention of committing acts of terrorism or assisting another to commit such acts, engages in any conduct in preparation for giving effect to his intention'. It is irrelevant whether the preparation or intention relate to more than one act of terrorism or acts of terrorism generally (*Terrorism Act* s 5(2)).

Barot v The Queen

In *Barot*, the defendant was not charged with the s 5 offence, but rather with conspiracy to murder. However, this case sets out salient terrorism sentencing principles and represents a turning point in this area.

Barot was involved in a plot to detonate explosives in a limousine parked in an underground carpark with a view to causing buildings to collapse and hundreds of casualties, in addition to three subsidiary and less developed plots.

The trial judge found that the fact that the proposals were in the early stages of preparation was not significant, because he was satisfied that if the group had not been stopped, it was only a matter of time before the plot would be carried out (at [14]). He imposed a life sentence with a minimum of 40 years, stating that he had declined to impose a life sentence as a minimum based on the guilty plea and the fact that the defendant had not achieved his objectives or moved to the final stages of achieving them (at [39]).

The Appeal Court found that the expert evidence on the lack of viability had been neglected (at [17]); that the plot was 'superficially attractive, but in fact, amateurish' (at [29]); and that the trial judge was wrong to proceed on the basis that the attack would have eventuated (at [30]). It stated that the relevant principles of sentencing include punishment, deterrence and protection of the public (*Criminal Justice Act 2003* (UK) s 142). The starting point in sentencing inchoate offences is to consider the sentence appropriate had the objective of the offender been achieved (at [42], in accordance with *R v Martin* per Lord Bingham CJ), because where harm was intended, but not caused, the degree of harm intended is vital to culpability (at [46]).

The Court stated that the fanaticism of today's terrorists is novel and makes indeterminate sentences appropriate, 'because it will often be impossible to say when, if ever, such terrorists will cease to pose a danger' (at [54]). The Court then stated that a life sentence with a minimum of 40 years is an appropriate sentence for an individual who sets out to achieve mass murder by viable method, but is not successful in causing physical harm. However, in a situation of conspiracy, where it is uncertain if the conspiracy would have eventuated or been successful, the sentence should be significantly lower than for a viable attempt (at [61]).

However, the Court then noted that minimum sentences will always depend on the facts of the case and the level of involvement of the defendant, and that other aggravating and mitigating factors as described by the sentencing guidelines also apply. The Court revised the accused's sentence to a 30-year minimum term, citing uncertainty as to the viability of the plot and his guilty plea (at [65], [63]).

R v Roddis

Roddis was convicted of the s 5 offence on the basis that he had acquired certain chemicals, bomb recipes and had attempted to obtain the chemicals he lacked. He did not have a

detonator. He was found to be in possession of extremist material and had composed a document that referred to bombs to be set off in his town. He was sentenced to five years' imprisonment on the s 5 count.

The defendant had not told anyone he was building a bomb or planned a targeted terrorist attack, however he had planted a convincing hoax bomb on a public bus and had hinted that he had planted a bomb in a former workplace; both instances triggering evacuations.

R v Parviz Khan

Khan was convicted of a number of terrorism offences. His conviction under s 5 related to a plot involving others to kidnap a Muslim soldier in the British armed forces and film his beheading to undermine morals, deter others (especially Muslims) from joining the armed forces and strike a political blow at the Government. No individual soldier had been identified. The trial judge sentenced him to life imprisonment with a minimum term of 14 years (for the three offences). For the s 5 offence the judge imposed a notional determinate term of 18 years.

The Court found that despite no target, the defendant had a detailed plan of action including how to ensnare the soldier and had identified the garage in which the execution would take place (at [6]). The Court considered that the defendant had the kind of 'fanatical determination' described in *Barot* and therefore clearly fell into the category of very grave offences (at [8]).

The Court accepted that the defendant's conduct would have been more serious if an individual soldier had been identified and even more serious if the plot had advanced to identifying a specific day for the attack (at [11]). Nonetheless, it found that this plot was one that, if carried out, would call for a life sentence (at [11]). Noting that in *Barot* an unviable plot for mass murder attracted a 30-year sentence, the Court was unable to find that the sentence imposed was too long (at [12]).

R v Gilleard

Gilleard was a neo-Nazi convicted under s 5 and a possession offence. Four home-made nail bombs, knives, guns, swords, ammunition and a terrorism manual were found in his possession. While the judge noted that he did not have a finalised target list, he was satisfied that Gilleard believed the time had come 'to engage in direct action' and that 'mosques and other places where black or Asian people were gathered together' would be his targets. For the two terrorism offences he was sentenced to 11 years in total (see *Anonymous 2008*; *Stokes 2008*; *Brooke 2008*).

R v Tabbakh

Tabbakh was convicted under s 5 for compiling bomb-making instructions and some, but not all, necessary ingredients. He did not have a detonator. Some of the ingredients were of poor quality and would not have exploded. He was found to have some limited jihadist material. He argued that he was intending to make fireworks, not a bomb. He was sentenced to seven years' imprisonment (at [27]).

R v Davison

Davison was a neo-Nazi and part of an 'Aryan Strike Force.' He was assembling chemicals and had concocted ricin poison sufficient to kill nine people. He possessed extremist white supremacist material and instructional material on bomb-making. No targets had been definitively identified, but the prosecution argued the plan was to 'create an international

Aryan group and establish white supremacy in white countries' (Wainwright 2010:22). The Court was satisfied that the poison was intended be used. Davison was sentenced to 10 years' imprisonment (Wainwright 2010:22).

R v Qureshi

Qureshi was convicted of the s 5 offence for travelling to Heathrow Airport in order to travel to Pakistan. He possessed extremist material and had indicated on an internet forum that he intended to go to Pakistan to join a terrorism operation. It was not asserted that there was any intention to commit any particular act of terrorism, there was no evidence of his connection to any terrorism plot (at [10]) and he was not found to possess any chemicals or weapons (at [16]). He was also convicted of possession offences.

The trial judge noted that he could not identify where the accused was going or what kind of activity he would do. He commented that Qureshi may have been 'play acting' in his conduct to some extent (at [17]). He noted that on the 'wide spectrum' covered by s 5, this matter was at the lower end (at [10]).

The Appeal Court noted that mitigating factors in this case were the inchoate nature of the offence and that that accused had not demonstrated a concluded intention to engage in a terrorist act. Any engagement was uncertain and would be conditional on the opportunity arising (at [8]). It also noted the broad spectrum of offences in s 5 and agreed that this fell at the lower end of the scale, because 'the nexus between the acts committed by the offender and potential terrorist activity was relatively remote' (at [17]). He was sentenced to four and a half years' imprisonment.

R v Iqbal

Iqbal was convicted of the s 5 offence (collecting weapons), as well as a dissemination offence. He was found to possess knives, air rifles, cross-bows and BB guns, discharged blank cartridges and a collection of low-level instructional and extremist material that largely involved photos and films of the defendants and associates wearing camouflage clothing and holding weapons. He was arrested at Manchester Airport intending to travel to Finland.

Counsel argued that the defendant and associates were 'dreamers obsessed with weapons and action films' (at [11]), did not intend to carry out any terrorism, and that the weapons were not suitable for terrorism (at [11]) The judge stated that 'it would be wrong to pass a long sentence on someone who is obviously more taken with the vanity than the reality' (See Anonymous 2010; Daily Mail Reporter 2010; Middleton 2011a:179) and did not appear to consider him a sophisticated or dangerous terrorist. He was sentenced to one year imprisonment for the s 5 offence.

R v Abushamma

The defendant pleaded guilty to the s 5 offence. He had planned to travel to Afghanistan and join the insurgency. He was sentenced to three and a half years' imprisonment (BBC News 2009).

Usman Khan v The Queen

This case involved nine individuals. It was argued that the 'London defendants' were planning to place a pipe bomb in a toilet in the London Stock Exchange in the near future, although no materials had been obtained and no date had been set.

The ‘Stoke defendants’ had discussed setting up a Jihadi training camp in Pakistan and funding, recruiting and participating in this to potentially return to the UK to carry out terror attacks. Counsel argued that the Stoke defendants did not intend to participate in a terrorism act in the immediate future; that they had no timeframe, no targets and no methods agreed; and that potentially, they may no longer have had any terror intentions when they would eventually return to the UK.

The trial judge found that, ‘reading their conversations’, the Stoke defendants ‘regard themselves as significantly more advanced both in terms of experience, technique, ambition, facility’ (at [39]). He found that that the Stoke defendants’ plot posed very serious consequences in the long term and involved calculated activity so while the London plot was more immediate, the two plots were equally serious (at [41]).

He noted that constructing a pipe bomb required no specialist knowledge, and materials were easily obtainable (at [57–58]). He also acknowledged that they had no training, limited experience, no method for entering the target and given significant security measures in place in the London Stock Exchange, it was likely the plan would have failed (at [68]). The London defendants received sentences of 18.5 years’ (13.5 years’ non-parole) and 17 years’ (12 years’ non-parole), while the Stoke defendants received indeterminate sentences (detention for public protection) (eight years’ minimum).

On appeal, counsel argued that there was no camp built, no funding and no training contacts for the Stoke plot and that Pakistani authorities would be likely to stop the activities (at [63]). He also noted that no timetable, targets or method had been developed for any potential attack that might eventually take place in the UK (at [65]).

The Appeal Court considered there was no suggestion that the Stoke defendants could actively operate or participate in a training camp, however much they might have ‘talked up’ their prospects (at [71]). It accepted that the plans of the two groups were equally serious because the trial judge had considered the evidence in detail and was in a strong position to make that decision (at [78]). They found that if, as the trial judge concluded, the plans of the two groups were equally serious, ‘the risk posed to the public could not be greater from those who were very much further away from realising their apparent goal than those who were far closer’ (at [72]). They therefore concluded that ‘too much weight should not be placed on conversations for the purpose of ascribing comparative sophistication’ and when assessing comparative risk, did not consider a distinction could be drawn between the groups (at [72]). The Appeal Court quashed the life sentences of the Stoke defendants and replaced them with sentences of 22 years 8 months/17 years 8 months (extension 5 years), 21 years/16 years (extension 5 years), and 21 years/16 years (extension 5 years).

UK case analysis

The sentences handed down for this offence in the UK are extremely varied, ranging from one year’s imprisonment to a life sentence. In some cases, such as *Barot* and *Usman Khan*, the sentences seem very high considering how preliminary the conduct was; while arguably in the majority of other cases, the sentences appear to reflect the preliminary nature of the accused’s conduct. Although *Barot* imposed a weighty sentence and elevated sentences for terrorism generally (Bajwa 2010:5), the Court also introduced the concept of proximity into UK sentencing for preparatory terrorism offences and set the scene for subsequent cases.

There is little discussion of proximity in UK jurisprudence — other than in *Usman Khan*, *Barot* and *Qureshi* — so it is difficult to say determinatively that concepts of proximity are taken into account. Further, many initial decisions are unreported and thus inaccessible, and

often, appeals challenge grounds other than sentence, so initial justifications for sentences are not addressed. Generally, judgments in this area are not long or detailed, so ascertaining courts' reasoning is difficult at times.

UK courts often use a similar concept to amateurishness. They have previously suggested an individual is 'all talk'; described defendants as 'play acting' (*R v Qureshi* at [17]), 'dreamers' (*R v Iqbal* at [11]), 'more taken with vanity than reality' (*R v Iqbal* at [11]) and having 'talked up' (*Usman Khan v The Queen*) their prospects. In identifying these characteristics, courts suggest the accused are not as dangerous as they wish to appear. This appears to contribute to reducing culpability.

While the UK courts have discussed viability, they have also discussed progress in most cases. *Parviz Khan* indicates that the further advanced the preparatory conduct, the more serious the offence becomes.

While it is difficult to discern how courts arrived at sentences, the sentences in these cases on the whole appear to reflect how remote the terrorist acts were. This is generally illustrated through sentences of below 10 years in cases like *Roddis*, *Iqbal*, *Qureshi*, *Tabbakh*, *Davison* and *Gilleard*, which demonstrate no discernible plot, minimal collection of weapons, lack of sophistication in approach, lack of experience or expertise and an unviable plot. Higher sentences, such as *Parviz Khan*, relate to a plan that was more detailed, sophisticated and advanced. This suggests the approach of lower punishment for less proximity in *Barot* has been followed to some degree.

Among these cases, *Usman Khan* appears somewhat of an anomaly. Faced with an attack that was extremely remote — the individuals had no training and no weapons; they had discussed a plan that involved training, but no final definitive terrorist act — the trial judge found that this was of equal seriousness to the more detailed and imminent plot of the London defendants and then proceeded to hand down a heavier sentence based on the Court's appreciation that they were more dangerous. Arguably, this shows an extreme disregard for the importance of proximity in assessing the seriousness of conduct. The Appeal Court's reduction of sentences with reference to the comparative lack of proximity is notable. However, it arguably still imposes a heavy punishment for such preliminary conduct. *Usman Khan* involved very minor planning acts and a plan to go overseas and could well have been viewed more like a *Qureshi* or *Iqbal* situation. Arguably the conduct was roughly equivalent to other UK cases involving minor conduct and, yet, received a very heavy sentence.

While there is not much discussion of proximity in these cases, *Barot*, *Qureshi* and *Parviz Khan* made it clear through judicial comment that lack of proximity to a terrorist act will be a mitigating factor in sentencing. Generally, sentences handed down appear to be reasonably representative of the level of proximity to the terrorist act. Although judges rarely state outright that proximity is a direct factor in determining the seriousness of the offence, on an examination of sentences in UK cases, it certainly appears that way.

Comparative analysis

How offences are used

The way in which these preparatory terrorism offences are used in each jurisdiction is likely to affect a direct comparison of Australian and UK sentences.

In the UK, this offence appears to be used largely against individuals who are plotting alone (for example, *Roddis*, *Tabbakh*, *Davison*, *Gilleard*) or against those who are planning to travel overseas to engage in terrorism (for example, *Iqbal*, *Abushamma*, *Qureshi*). Serious cases of groups plotting attacks seem to be prosecuted under the offence of conspiracy to murder (eg *R v Abdulla Ahmed Ali*). In the UK, alleged terrorists are prosecuted with general law offences and terrorism offences are only used where necessary (Carlile 2007:[27],[33]). Many s 5 cases therefore consider conduct that is relatively minor (courts have previously noted that situations are more akin to a conspiracy to murder case due to the 'gravity of offending' *Usman Khan v The Queen* at [27]). In Australia, however, the most serious terrorist plots are prosecuted under s 101.6. This may account for the fact that UK sentences appear lower in general.

Another complicating factor is that, where appropriate, Australian prosecutions often attach inchoate liability through conspiracy charges. Conspiracy cases tend to be sentenced more heavily, as they are seen as more dangerous. As compared to a s 101.6 charge, the *Touma* Court noted that had a defendant been convicted of that offence and if the criminality was significant, 'it would have warranted a very significant penalty', perhaps even a maximum penalty (*R v Touma* at [130]) — referring to the fact that Touma had previously been charged with a conspiracy offence. Courts have found that an individual's mere presence can encourage others to prepare for and commit terror acts (*Usman Khan v The Queen* at [60]) and the seriousness of an individual's intent has previously been inferred from the fact of being part of the group (*Usman Khan v The Queen* at [81]). This may account for some of the heavy sentences in cases including conspiracy charges, such as *Elomar*.

Further, in the UK in particular, since many of the UK's preparatory offences have similar *actus reus*, offenders are often charged simultaneously with a number of offences (Middleton 2011b:228) to substantiate a conviction (this was repeatedly stressed as the principal aim of the strategy to deal with terrorism suspects: *CONTEST* in Middleton 2011a:179). This also occurs in Australia, although arguably less frequently. As courts may therefore adjust sentences to account for sentences for other convictions, UK sentences for specific offences may appear lower. Judges are not faced with this issue in Australia, as sentences are served concurrently.

Proximity

Generally, the range of conduct prosecuted under the preparatory terrorism offence in the UK is far more varied than in Australia, which leads to greater variance in sentences. These varied sentences illustrate the breadth of conduct covered by this offence in a way the Australian cases do not. At first glance, other than the life sentence in *Barot*, Australian sentences generally appear higher than UK sentences.

The leading cases in each jurisdiction take very different approaches to proximity, with *Barot* noting the relevance of proximity and *Lodhi* suggesting proximity is largely irrelevant. It is unclear to what extent this guidance is followed in each jurisdiction.

Australian judgments tend to be longer and more detailed and include more discussion of proximity. Courts often follow discussions of remoteness with references to the aims of the legislation and the statement that conduct under these offences will always be serious. However, in Australian cases it appears that often, despite discussion of proximity and even mitigation of a sentence based on proximity, sentences will still be very high when considering the preliminary nature of the conduct. This may mean that while sentences are being mitigated in a minor way, proximity considerations do not have a significant impact on sentences.

In the UK, however, sentences are not always as high for this offence. Courts rarely state explicitly that proximity is a relevant factor, but sentences often appear to reflect the proximity of any preparatory acts to a terrorist act to a greater degree than Australian sentences. While other factors clearly also contribute to variation in sentences, generally it can be said that less proximate preparatory acts attract lower sentences in the UK than in Australia.

In every Australian case examined, the court commented on the amateurishness of acts and some commented the progress of the plot, where relevant. In the UK, this was not noted as much, although there were more references to accused who were ‘all talk’. Courts in both jurisdictions discuss various aspects of proximity in cases, and it is impossible to say that any particular jurisdiction prioritises any particular elements. This appears to be largely reactive to the circumstances of each individual case.

Roddis, *Tabbakh* and *Touma* present cases in which the facts were relatively similar. *Roddis* possessed a significant amount of weaponry and extremist material and had previously planted hoax bombs, however he had no plan or target. *Tabbakh* possessed instructional material and some components required for a bomb, but no plans or targets. *Touma* had also collected weaponry and extremist material and had attempted to make bombs, but had no plan or target. In the UK, *Roddis* was sentenced to five years’ and *Tabbakh* seven years’ imprisonment. *Touma*, however, was sentenced to 14 years’ imprisonment in Australia.

Similarly, in *Fattal*, a target had been nominated and a plot that lacked significant detail had been established, however it did not include a plan for getting past the security of the barracks. In comparison, *Parviz Khan* had an extremely detailed plan. The Court acknowledged that an individual victim had not been identified. However, arguably — given the profession and ethnicity of the victim had been decided, as well as such details as place, method and circumstances of execution — his acts should have been seen as very proximate to an attack. This is particularly so given the execution that was planned would not require any specialised weapon or security plans to carry out. Both were sentenced to 18 years, but arguably, the *Parviz Khan* plan was far more viable and imminent, and in Australia, *Fattal*’s sentence appears harsh based on the preliminary nature of his actual conduct. Arguably, these comparisons demonstrate that Australian sentences will be much harsher even where acts have little proximity to a terrorist act.

Fanaticism

In some cases, courts seem to disregard concerns that acts are very preparatory and remote from a terrorist act based on an accused’s ‘fanatic’ or ‘extremist’ beliefs.

In *Lodhi*, Spigelman CJ commented:

The objective acts of the appellant, which did not go beyond collecting materials for future use, did not give rise to any imminent, let alone actual threat of personal injury or damage to property. Such preparatory acts, even though criminalised, would not at first appear to justify so substantial a penalty. However, the position is different in the light of his Honour’s clear and justifiable findings of fact that the appellant has not resiled from the extremist intention with which these acts were performed. (at [83])

When noting that the preparatory acts were ‘inept’ and ‘amateurish’ and that ‘more work needed to be done’ in *Elomar*, Whealy J considered that an attack was inevitable because ‘the driving fanaticism behind the collective mindset of the conspiracy would have ensured that events moved quickly once sufficient material had been assembled’ (at [68]).

In *Usman Khan*, despite the fact that no attack had been planned and the defendants had only discussed setting up a training camp, Wilkie J found that they warranted indeterminate sentences because their ‘commitment to long-term terrorist aims had been *different* to the others’ and that they had ‘serious long-term plans’ and rightly considered themselves ‘more serious jihadis’(at [58]).

The *Barot* Court found that it was appropriate to impose higher sentences on terrorists because it is impossible to say when they stop posing a danger due to their fanaticism (at [54]). In a similar vein, UK courts have justified the length of the sentence by stating that the defendant had a ‘fanatical determination’ and represented a risk for a period that could not be determined’ (*R v Parviz Khan* at [8]).

These cases illustrate that courts are willing to overlook remoteness of preparatory acts in favour of a conclusion that the ‘fanatical’ mindsets of offenders would necessarily result in terror plans being carried out, and imposing lengthy sentences on that basis. Arguably, courts should be mindful not to impose lengthy sentences based on a prediction about dangerousness or what an accused might do, drawn from a judge’s perception that an individual is fanatical. This is an extremely subjective assessment and where it is relied on in preference to clearer guides, such as proximity, it has the potential to produce excessive sentences that do not reflect the preliminary nature of conduct that is often the subject of preparatory offence charges.

The role of proximity in sentencing preparatory terrorism offences

Excessively high sentences

There is surprisingly little written about sentencing terrorism offences (Roach 2011:1; Diab 2010:269) and a tendency to simply consider that heavy sentences should always apply (Roach 2011:1). Indeed, sentences for preparatory terrorism offences tend to be very high; often much higher than sentences for murder and sexual assault (Holmes 2011; Saul 2012:6). In New South Wales (NSW), the average sentence: for murder is 25 years (Taussig 2012); for aggravated sexual assault is 6.5 years (Ringland 2011); and for child sexual assault is 5.7 years (Holmes 2011).

In undertaking such a study, it must be acknowledged that certain factors exist that are likely to detract from the influence of proximity and thereby raise sentences in all cases.

First, many countries impose higher sentences for terrorism offences. Spain increased the maximum sentence to 40 years and made ‘social reinsertion’ conditional on abandonment of terrorist aims (Oehmichen in Walker 2013:291). Terrorism is also treated as an aggravating factor in sentencing in France (Parliamentary Joint Committee on Human Rights, UK2004:[68]). The Australian system mandates extended non-parole periods for those convicted of terrorism (*Crimes Act 1914* (Cth) s 19AG) and the UK raises determinate sentences for murder (*Criminal Justice Act 2003* (UK) sch 21; Attorney-General’s reference Nos 85–87 with particular reference to terrorism *R v Jalil* at [22], [24]). Terrorism is listed an aggravating feature in sentencing in both Australia and the UK (as well as Canada) (*Counter-Terrorism Act 2008* (UK) s 30; *Criminal Code 1985* (Canada) s 718.2(a)(v)), although the impact of this in the UK has been questioned on the basis of the lengthy sentences already imposed (Walker 2011:288). In fact, maximum penalties for terrorism offences are higher in the UK and Australia than Canada and New Zealand

(Conte 2010:447), and British and Australian cases are cited in support of increasing terrorism sentences elsewhere (*R v Gaya* in Roach 2011:3).

Second, in Australia, concepts of punishment, deterrence, denunciation and incapacitation are prioritised in sentencing terrorism offences (*R v Touma* [72]–[82]; Whealy 2010:33). Similarly, in the UK, punishment, deterrence and incapacitation will feature, but rehabilitation will play very little, if any, part (*R v Martin*, see also *Usman Khan v The Queen* at [75]). This is likely to contribute to higher sentences. Many argue that there has been excessive emphasis on deterrence and punishment (Bajwa 2010:6) and that rehabilitation should not be discarded (Roach in Ramraj et al 2012:116). These factors are likely to consistently minimise any effect proximity might have on a sentence, but this should not be understood as rendering considerations of proximity irrelevant.

While these legal factors tend to drive sentences up, other, cultural considerations may do the same. There is some concern at the potential for terrorists to be sentenced heavily not based on their actual conduct, but due to the fear that terrorism creates (Pyne 2011:179) or society's disapproval of the offender's views (Pyne 2011:163) with some cases specifically warning that punishment 'must be assessed in relation to conduct and not for the fear and detestation generated by terrorism generally' (*R v Touma* at [84]). Sunstein (2003:122) highlights the 'probability neglect' that often characterises responses to terrorism, which results in a focus on the terrible outcomes of terrorism and inattentiveness to the fact that is it unlikely to occur. With offences such as this there is also a risk of long sentences that are disproportionate to the actual severity of what the accused did, or alternatively, sentences that the public considers too lenient due to the emotive terrorist label (Roach in Ramraj et al 2012:102 and 117); potentially placing pressure on courts to raise sentences. Courts should not allow the terrorist label of an offence to lead to sentences that are excessive in relation to what the accused actually did or intended (Roach in Ramraj et al 2012:117). Finally, while a court's starting point might be a higher sentence, this does not provide any guidance on how to differentiate between culpability for different degrees of terrorism activity.

Proportionality

While new preparatory offences are justified to allow earlier prosecution of terrorists, the fact that the conduct is merely preparatory should also be reflected in the sentences imposed. The preparatory offences examined are 'catch-all' offences (MacDonald and Williams 2007:34) and thus cover a very broad range of conduct that will satisfy the definition of a preparatory 'act'. For example, these can range from minor conduct like travelling to the airport (*R v Qureshi*), to inquiring about chemicals (*R v Lodhi*) right up to planting or constructing a bomb. The *Usman Khan* decision noted that the breadth of conduct the offences captures ranges from 'acts just short of attempt to conduct that only just crosses the line into criminality' (at [74]). Given the range of conduct captured by this offence, there should be a very broad range of sentences available. Saul (2012:5) has often argued that while some terrorism is catastrophic, some is particularly 'garden-variety' and offences for one may not be suited to the other. A sound assessment should be undertaken of what the accused did to ensure he is sentenced accordingly (Roach in Ramraj et al 2012:4). In *Qureshi*, the Court specifically noted the breadth of the offence and that that act fell at the lower end because its proximity to a terror act was remote.

Furthermore, Price J's view that the legislation necessarily makes conduct under s 101.6 'serious' indicates an assumption has already been made and that an accurate and appropriate reflection of conduct and proportionality may not result, especially for very preliminary acts.

These acts may therefore be punished very harshly. Sentences should, on the contrary, reflect the facts of the case and the range of sentences available for the conduct.

Similarly, where courts dismiss a lack of proximity based on a finding that an accused is fanatic and extremist, there is a danger that they are not giving adequate consideration of the importance of proximity in that sentence. While protection of the community is a consideration in the sentencing of offenders, Veen's case warns courts against increasing sentences beyond what is proportionate by giving too much weight to protecting the community from risk (*Veen v The Queen (No 2)* at 472–3).

Given the factors discussed that pose the potential to raise sentences for terrorism offences beyond what is reasonable, it is crucial to ensure that sentences handed down do not exceed that which is proportionate to the gravity of the crime (*R v Hoare* in *Edney and Bagaric* 2007:97). The principle of proportionality is the primary aim of sentencing in Australia (*Veen v The Queen (No 2)* at 472; *Veen v The Queen (No 1)* in *R v Lodhi* at [82]; *Edney and Bagaric* 2007:97). Courts should not allow other factors to tip the balance to such an extent that sentences are no longer proportionate to the crime committed.

Proximity's relevance in the law of attempt

An act amounting to an attempt covers a range of conduct (Law Commission in *Duff* 1997:116). However, to qualify as an attempt, there is always a requirement that the action be sufficiently close to the criminal act (*Bronitt and McSherry* 2012:447). For example, conduct must be 'sufficiently proximate' (*Britten v Alpogut* at 938), 'not merely preparatory' (*Criminal Code* s 11.1(2)), or 'immediately and not remotely connected' (*Crimes Act 1958* (Vic) s 321(N)(1)). As well as the seriousness of the intended consequence, in the law of attempt, the 'real prospects' of achieving the consequence must be evaluated (*R v Taouk* noted in *Lodhi v The Queen* at [228]).

How proximate an attempt act is to that consequence will also have an impact on sentencing. Federally in Australia, attempts *may* be punished as if the offence has been committed (*Criminal Code* s 11.1(1)). This, of course, is not mandatory and is rarely the case in practice. For example, the average sentence for murder in NSW in 2009–10 was 25 years (Taussig 2012; *Duff* 1997:358). The average sentence for attempted murder was 9.75 years.¹ The US also punishes attempts more leniently (*Hershenov* 2000:480) and, in practice, so does the UK (*Clarkson and Keating* 1984:453–545; *Cross and Ashworth* 1981:151–2; *Thomas* in *Duff* 1997:116). Many consider that there is good reason for this (*Duff* 1997:358): for example, if the accused still has the opportunity to desist from the act (*Ashworth* in *Bronitt and McSherry* 2012:442), or if the attempt is unlikely to succeed (*R v Taouk* in *Lodhi v The Queen* at [228]). Further, because attempts range from an attempt that is frustrated at the last moment to a remote act of preparation, allowing a range of sentences to be imposed is appropriate (*Law Commission in Duff* 1997:126).

The law of attempt covers inchoate liability immediately before a criminal act takes place. Preparatory conduct is just one step further removed. In *Lodhi*, Price J found that, despite its relevance in the law of attempt, proximity is not relevant to preparatory offences, because *all* acts in preparatory offences are necessarily more remote (*R v Lodhi* at [229]). However, just as in the law of attempt, in the law of preparatory conduct, all acts are not *equally* remote. The conduct caught by the offence is extremely broad and some acts will necessarily be more remote than other acts. Just as proximity is a useful indicator in the law of attempt as to how

¹ However, other Australian states *mandate* more lenient punishments for attempts than completed criminal acts — for example, *Criminal Code* (Qld) ss 2, 299; *Criminal Code* (NT) ss 4, 277, and *Crimes Act 1958* (Vic) ss 321M, 321N.

heavy a punishment should be imposed, proximity could play the same role for preparatory conduct. Indeed, some commentators even expected that traditional criminal law notions derived from inchoate offence areas such as 'proximity' would be tested when these offences were introduced (Goldsmith in Lynch, MacDonald and Williams 2007:61).

Guidance

The *Lodhi* 'conduct' and 'intention' formulation lacks meaning and courts have commented on the lack of guidance on sentencing preparatory acts (see *R v Tabbakh* at [27]; *R v Usman Khan* at [52]). It appears that regular sentencing principles are not applied in terrorism cases, however the precise content of the principles that do apply are unclear (McGarrity 2013:32) suggesting that Australian courts have had difficulty adapting traditional sentencing principles to the terrorism context (McGarrity 2013:19). Sentencing in such a vacuum may lead to less principled decisions and, given how new and little-prosecuted these offences are, further guidance around sentencing is likely to be useful to courts. Australian courts should give greater weight to the proximity of a terrorist act and mitigate sentences to a greater degree where conduct is further removed from the terrorist act. Australia could perhaps learn from UK cases in which the full range of sentences available has been used, right down to one year's imprisonment. Even where there is a strong case for the establishment of new offences on preventative grounds, a decision to criminalise conduct must be taken in conjunction with appropriate restraining principles (Ashworth and Zedner 2012:571).

Overly punitive sentences have been identified as a concern in this area. While the Court in *Lodhi* suggested proximity was still 'relevant', it did not regard it as an important factor. If the law of attempt was looked to for guidance, giving greater weight to proximity as a guiding principle may help to bring about more proportionate sentences for preparatory conduct.

Conclusion

Generally, preparatory acts that are more proximate to terrorist acts appear to attract higher sentences. A comparative analysis of the sentences handed down in Australia and the UK for general preparatory offences demonstrates that while Australian cases discuss proximity more frequently, considerations of proximity do not appear to mitigate sentences significantly. UK sentences seem to reflect the actual conduct of the accused to a much greater degree.

In Australia, there is some concern that courts place too much emphasis on perceived fanaticism, the stigma of terrorism offences, deterrence and protection of society and the perception that the legislation intends all conduct to be seen as serious. Focusing on these concepts creates a danger that excessive sentences will be imposed. Given proximity is a key guiding principle in sentencing attempts, and preparatory acts are just one step further removed, placing greater weight on proximity could be a helpful guide in assessing the objective seriousness of conduct, and ensuring Australian courts hand down sentences for these offences that are more proportionate to the gravity of the offender's conduct and intention.

It is not disputed that preparatory acts should be criminalised. However, given the extreme extension of criminality that preparatory offences represent, great care should be taken to ensure that the core values of criminal law are upheld (Ashworth and Zedner 2012:571) by establishing appropriate guiding principles so that proportionate sentences are handed down.

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