Alert or Alarmed? Recent Legislative Reforms directed at Terrorist Organisations and Persons Supporting or Assisting Terrorist Acts

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Introduction

In mid 2002 a raft of Commonwealth legislation directed at terrorism became law in Australia.[1] This was despite many arguing[2] that most of the new laws were unnecessary and that existing legislation was adequate both to deal with the level of terrorist threat to which Australia was exposed and to meet our international obligations in the

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1 These laws are listed and described in the 'Legislation' section of the Commonwealth Government's National Security Australia website:< http://www.nationalsecurity.gov.au/> at 17 February 2004.

2 See many of the submissions that are referred to in the Report of the Senate Legal and Constitutional Legislation Committee, Parliament of the Commonwealth of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (2002)19-24 (henceforward, 'Committee Report'). For comments doubting Australia's obligation to implement 'tough' anti-terrorist legislative measures in response to *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*, SC Res, UN SC/RES/1373 (2001) (discussed below n 3) see Nathan Hancock, *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, Research Paper No 12 2001-02 (2002) [2.1.3].

post September 11 climate.[3] The laws that were introduced at that time (some of which have been further amended) were substantial in number and scope and many of the provisions are highly technical. Accordingly, this article does not attempt to examine them all in detail. Rather, we are interested in what might be described as the more novel features and trends that can be identified in the new terrorism legislation. Those features include the expansion of federal legislative and executive power, both through mechanisms of proscription and through the extension of jurisdiction, and the departure from the traditional criminal law model apparent in the creation of serious status based criminal offences. Part 1 of this article briefly examines the new legislation in the light of these issues and trends. Part 2 raises questions about the potential effects of the legislation by assessing its possible application to a realistic scenario and focuses on issues in relation to motive and culpability that are left unresolved by the legislation in its current form.

Part 1: The Legislation

A *Background*

In the autumn sitting of Parliament in 2002, then Commonwealth Attorney-General Daryl Williams introduced into Parliament a set of Bills that represented the government's main legislative response to terrorism at that time. The Bills included:

- the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) (introduced on 21 March 2002) (henceforth, 'ASIO Bill');
- the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 (Cth) (introduced on 13 February 2002); and
- five other Bills which were introduced as a package on 12 March 2002:

î - the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth);

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[3] Under Resolution 1373 all States are required to prevent and suppress the financing of terrorist acts and to criminalise the wilful provision or collection of terrorist funds by their nationals or in their territories. Further, under parag 2(e) all States are required to:

> Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

See the discussion of Resolution 1373 in Hancock, above n 2, [2.1.1] and the Committee Report, above n 2, 5–8. For the complete text of the resolution, see Res, UN SC/RES/1373 (2001) United Nations Website <http://www.un.org/terrorism/sc.htm> at 20 February 2004.

- the Border Security Legislation Amendment Bill 2002 (Cth);
- the Telecommunications Interception Legislation Amendment Bill 2002 (Cth);
- the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] (Cth); and
- the Suppression of the Financing of Terrorism Bill 2002 (Cth).

The two most controversial Bills were the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth)(the ASIO Bill) and the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] (Cth).

B *The ASIO Legislation*

Much has been written and said about the ASIO Bill.[4] It sought to give to the Australian Security Intelligence Organisation (ASIO) special powers in relation to terrorism offences. The Bill was the subject of much debate,[5] public inquiry and political negotiation over a period of 15 months, and has been described as 'one of the most controversial pieces of legislation considered by the Parliament in recent times.'[6] The greatest controversy surrounded the provisions dealing with the issuing of warrants which would allow ASIO to take people into custody for questioning for the purposes of intelligence collection in relation to terrorism. The legislation in its final form was passed on 26 June 2003, and represented a significant winding back of the power that the Government originally wanted to give to ASIO. Under those provisions, such warrants could be issued by a judge with any of the questioning being before a judicial officer. Questioning (which must be videotaped) could be over a period of 24 hours and detention could be over a one week period. There was a three

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4 There is an excellent discussion of the legislation and related issues in Jenny Hocking's new book, *Terror Laws, ASIO, Counter-Terrorism and the Threat to Democracy* (2004), (see especially chapter 12). See also various articles by George Williams: for example, George Williams, 'One Year On: Australia's legal response to September 11' (2002) 27 (5) *Alternative Law Journal* 212; George Williams, 'Australian Values and the War against Terrorism' (speech delivered at National Press Club Telstra Australia Day Address, 29 January 2003) viewable at *Terrorism and War Archive* <http://www.gtcentre.unsw.edu.au/> at 17 February 2004. Joo-Cheong Tham has also written extensively on ASIO, see, for example Joo-Cheong Tham, 'ASIO and the Rule of Law' (2002) 27 (5) *Alternative Law Journal* 216. See also Michael Head '"Counter-Terrorism" Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 (3) *Melbourne University Law Review* 34.

5 There was a 27-hour parliamentary debate in the House of Representatives on 12–13 December 2002.

6 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 June 2002, 3193 (David Jull), presenting to Parliament the Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth) (2002) and quoting from report 1, foreword. Also quoted in Hocking, above n 4, 21.

year 'sunset clause' — that is, the legislation was to expire after a three year period — and the whole process would be subject to the ongoing scrutiny of the Inspector General of Intelligence and Security (in effect, an ASIO 'ombudsman').

It was not long, however, before the government sought to further extend ASIO's power. On 18 December 2003, the *ASIO Legislation Amendment Act 2003 (Cth)* commenced, having been passed by Parliament at the very end of 2003 sittings on 5 December 2003. The Act further amended the *Australian Security Intelligence Organisation Act 1979* (Cth) and introduced changes that were represented, at second reading, as a necessary response 'to significant practical limitations'[7] that had been identified by ASIO in relation to the planning and execution of warrants under the new regime. Under the new provisions, the maximum time a person may be questioned under a warrant is doubled from 24 to 48 hours in cases where an interpreter is needed and the subject of a warrant must, if required, surrender all passports. Most controversially, it becomes an offence, punishable by 5 years' imprisonment, for a person to disclose information relating to the issuing of a warrant or the questioning of the subject of a warrant, potentially for a period of two years. It has been suggested that such provisions will 'severely reduce the freedom of the press and the freedom of discussion'.[8]

C *The Terrorism Legislation*

Of greater relevance both to the trends identified in the introduction and to the hypothetical scenario in Part 2 is the second highly controversial piece of legislation. The Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] (Cth) was referred after its introduction into the Senate, along with four other anti-terrorism Bills, to the Senate Legal and Constitutional Legislation Committee.[9] As with the ASIO Bill, the legislation, in its original form, engendered a great deal of debate. The Senate Committee received over 430 submissions, held five public hearings in Sydney, Melbourne and Canberra, and recommended numerous amendments

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7 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2003, 23107 (Philip Ruddock, Attorney-General).

8 Joo-Cheong Tham, 'The Danger to Our Freedoms Posed by the ASIO Bill', *The Age* (Melbourne), 1 December 2003.

9 The five bills were introduced into the House of Representatives on 12 March 2002, but the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) was withdrawn due to a discrepancy with the Bill's name as stated on the notice of presentation and reintroduced as the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) on 13 March 2002. All five Bills were passed in the House on that day, and were introduced into the Senate on 14 March 2002. They were then referred to the Senate Legal and Constitutional Committee on 20 March 2002, to report by 3 May 2002. The Committee reported on 14 May 2002.

in its final report.[10] The Bill was subsequently passed in the Senate with amendments on 27 June 2002 and came into effect as the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), with assent on 5 July 2002.

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which was substantively re-enacted in the *Criminal Code Amendment (Terrorism) Act 2003* (Cth), added a new Part 5.3 (Terrorism) to the *Criminal Code Act 1995* (Cth) (the Criminal Code). In addition, the offence of treason was updated and expanded.

The effect of the Part 5.3 provisions is to prohibit a wide range of activities connected with 'terrorist acts' and 'terrorist organisations'. Financing terrorism is also made an offence punishable by imprisonment for life (s 103.1).

1 *Jurisdictional Issues*

The concept that the criminal law is 'territorial' has been regarded as a 'general thesis of the common law'.[11] However, the jurisdiction provisions that were inserted into the *Criminal Code* in 1999 illustrate one of the trends identified in the introduction — a movement towards the expansion of federal criminal jurisdiction regardless of geographical connection to Australia.[12] The provisions of Division 15 of the *Criminal Code* supplement the default standard geographic jurisdiction under Division 14 of Part 2.7 of the Code, with four extended bases for jurisdiction of varying breadth (Categories A-D). Under these categories, jurisdiction extends overseas because of the citizenship or resident status of the accused and/or because of the nature of offence involved.

By virtue of sections 101.1(2), 101.2(4), 101.4(4), 101.5(5), 101.6(3), 103.1(3) and 102.9, every terrorist offence (see the discussion below) is subject to 'extended geographical jurisdiction — Category D'. Under s 15.4, this means that there will be an offence:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and
(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

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[10] The first four recommendations of the Committee Report deal with the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth). For a detailed discussion of those amendments and how the Bill permutated into its final form, see the excellent legislative comment by Greg Carne in 'Terror and the Ambit Claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth)' (2003) 14 (1) *Public Law Review* 13.

[11] *Thompson v The Queen* (1989) 169 CLR 1, 33 (Deane J).

[12] For a discussion of jurisdictional issues in general and of the trend towards expanded jurisdiction particularly in the context of cybercrime, see Simon Bronitt and Miriam Gani, 'Shifting Boundaries of Cybercrime: from Computer Hacking to Cyber-terrorism' (2003) 27 (6) *Criminal Law Journal* 303, 309–13. For a detailed analysis of jurisdictional issues in the criminal law context see David Lanham, *Cross-Border Criminal Law* (1997).

This potentially gives the legislation extraordinary scope — a scope that the legislature justifies on the basis of the type of offences involved. Such a justification was, indeed, made in the Explanatory Memorandum of the Bill which introduced the new terrorism offences: it was stated that the broad jurisdictional reach of the offence provisions was 'appropriate due to the transnational nature of terrorist activities, and to ensure that a person could not escape prosecution or punishment based on a jurisdictional loophole.'[13] Potentially, then, any person of any nationality, anywhere in the world, could be prosecuted under this legislation. Of course, practical and enforcement considerations mean that it is highly unlikely that foreign nationals in other countries would be pursued under this legislation, except in extraordinary circumstances. Drafters of similarly broad jurisdictional provisions in relation to cybercrime have stated that:

> Naturally, it is intended that extended forms of jurisdiction will only be applied where there is justification for this, having regard to considerations of international law, comity and practice.[14]

2 *Offences related to 'terrorist acts' under the Criminal Code*

In relation to terrorist acts, prohibitions include:

101.1 engaging in a terrorist act (penalty: life imprisonment).

101.2 providing or receiving training connected with terrorist acts where the person either knows that the training is connected with preparation for, engagement in or assistance in a terrorist act (penalty: 25 years) or is reckless as to the existence of that connection (penalty: 15 years).

101.4 possessing things connected with a terrorist act where the person knows of the connection (penalty: 15 years) or is reckless as to its existence (penalty: 10 years).

101.5 collecting or making documents where the document is connected with a terrorist act and the person knows of that connection (penalty: 15 years) or is reckless as to the existence of that connection (penalty: 10 years). There is no offence if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

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[13] Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill [No 2] (Cth), 17.

[14] Model Criminal Code Officers Committee (MCCOC) of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 4: Damage and Computer Offences*, Report (2001), 242.

101.6 doing any act in preparation for or planning a terrorist act (penalty life imprisonment).[15]

Under each of these provisions, with the exception of s 101.1, an offence may be committed even if the relevant terrorist act does not occur. Importantly, then, the legislation is conceptualised and drafted so as to fulfil a preventative function.[16] However, it is necessary to determine what might constitute a terrorist act in order to understand the scope of the provisions.

The term 'terrorist act' is defined under s100.1 to mean:

- an action or threat of action done or made with the intention of advancing a political, religious or ideological cause and, additionally;
- with the intention of: coercing, or influencing by intimidation a government (including that of a foreign country); or intimidating the public or a section of the public.

To constitute a terrorist act, the action must be one which does one of the following:

(a) causes serious physical harm to a person other than the offender
(b) causes serious damage to property
(c) causes death
(d) endangers another's life
(e) creates a serious risk to the health or safety of the public
(f) seriously interferes with, disrupts or destroys an electronic system (including listed examples which include an information system, a telecommunications system; or a system used for the delivery of essential government services).

There is an important exclusion for non-violent political action from the definition of 'terrorist act'. Under the s 100.1 definition, advocacy, protest, dissent or industrial action which is not intended to bring about physical harm or risk of physical harm is excluded.

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[15] This is the offence with which a Sydney man identified as Zeky or Zak Mullah was charged in December 2003 – the first such terrorism charge laid in Australia. Reports allege that police took possession of a number of video tapes found at the man's home: J Dowling, 'Sydney Man on Terror Charge', *The Age* (Melbourne), 4 December 2003.

[16] This preventative function was emphasised by the Attorney-General's Department in asserting that not only was the new legislation necessary but that a primary reason for its development was the prevention of terrorism. See the discussion in Attorney-General's Department, *Submission 383A*, 1–3 . See *Criminal Code Act 1995* (Cth) ss 101.2(3), 101.4(3), 101.5(3). 101.6(2).

3 *Fault Element Issues: Intention, Knowledge and Recklessness*

As can be seen from the description above, the fault or mental element of these offences is 'knowledge' or 'recklessness'. In addition, inquiries as to 'intention' are integral to determining what constitutes a 'terrorist act'. These elements are all defined in Chapter 2 (General Principles of Criminal Responsibility) of the, which applies to all offences under Commonwealth law. In relation to 'intention', subsection 5.2 of the *Criminal Code Act 1995* (Cth) defines this in the following terms:

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.
(2) A person has intention with respect to circumstance if he or she believes that it exists or will exist.
(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Under s 5.3 of the Code, a person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events. Under s 5.4 (1) a person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

In relation to the terrorist act offences, the relevant circumstance would be the existence of a connection with preparation for, engagement in or assistance in a terrorist act. Under sub-s (3), the question whether taking a risk is unjustifiable is one of fact to be left to the jury. In assessing whether or not risk taking is justifiable, the social value of the conduct in relation to the risk would be a relevant consideration.[17]

While there is some continuing uncertainty about the potential scope of the terrorist act provisions,[18] they conform to the conventional criminal law model in attaching criminal liability to individual behaviour that causes or is intended to cause harm to others—the traditional justification for punitive interference with individual liberty.[19]

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[17] See the discussion of risk taking and social value in Brent Fisse, *Howard's Criminal Law* (5th ed, 1990) 489–90.

[18] Note that some submissions to the Senate Legal and Constitutional Legislation Committee in relation to these provisions criticised the breadth of the drafting of what constituted a terrorist act (in the original Bill there was no requirement of an intention to intimidate) and also the fact that they were originally conceived as absolute liability offences (with no fault or mental element), see the Committee Report, above n 2, 35–45.

[19] For a discussion of the foundational nature of liberal political theory for the modern criminal law, and particularly the views of John Stuart Mill, see a good Criminal Law textbook, for example, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, (2001) 49.

4 *Offences Related to Terrorist Organisations*

More conceptually troubling are the offences in the Criminal Code relating to 'terrorist organisations' — conceptually troubling because, rather than founding criminality solely on an individual's responsibility for his or her own acts, liability rests on that individual's connections with a proscribed organisation — a form of 'guilt by association'. While such a basis for criminal liability is not unprecedented,[20] it is instructive to contrast the treatment of terrorist organisations in the *Criminal Code* and in other post 9/11 legislation with older legislative provisions relating to proscribed or unlawful associations.

(a) Proscribed Organisations Before and After 11 September 2001

A statutory power to declare organisations unlawful has existed under Commonwealth law since at least 1926.[21] Under Part IIA (Protection of the Constitution and of public and other services) of the *Crimes Act 1914* (Cth), there are longstanding provisions dealing with 'unlawful associations'. These are declared in s 30A of the Act to be:

(a) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages:
  (i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;
  (ii) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilised country or of organised government; or
  (iii) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States;
  or which is, or purports to be, affiliated with any organisation which advocates or encourages any of the doctrines or practices specified in this paragraph
  (b) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention as defined in section 24A.

In addition, s 30AA allows the Attorney-General to apply to the Federal Court[22] for: 'an order calling upon any body of persons, incorporated or

[20] For example, accessorial and corporate liability are important features of the criminal law.
[21] Prior to that, unofficial labour organisations were sometimes held to be 'unlawful associations' at common law if engaged in activities in constraint of free trade: see *The Amalgamated Society of Engineers v Smith* (1913) 16 CLR 537; *Williams v Hursey* (1959) 103 CLR 30.
[22] Originally, the High Court.

unincorporated, to show cause why it should not be declared to be an unlawful association.'

Various criminal offences could apply to those who, for example, are officers or representatives of such associations, who publish or sell their written material or who give or solicit funds to or for them.[23] The penalties that apply to these offences range from 6 months' to 1 year's imprisonment. Although these *Crimes Act* provisions have been in force for some 80 years, it appears that a declaration under s 30AA has never been sought by a Commonwealth Attorney-General. Consequently, no criminal prosecution for any offence that is contingent upon proscription under the *Crimes Act* has ever been brought.[24] The famous prohibition of the Communist Party of Australia in the 1950s was facilitated by passage of special legislation, declared by the High Court to be unconstitutional in 1951.[25] Thus, the constitutional validity of the unlawful associations provisions of the *Crimes Act* appears never to have been decisively tested.[26]

In addition to the 'unlawful association' provisions in the Commonwealth *Crimes Act*, proscription powers and offences relating to the organisations so proscribed also exist under the *Charter of the United Nations Act 1945* (Cth) (the UN Act).[27] Like the 'terrorist organisation' offences in the Criminal Code (discussed below), these have emerged in the post-9/11 environment[28] and apply significant penalties to certain types of behaviour associated with listed organisations. Under s 15(2),[29] the responsible Minister must, where satisfied that an organisation is involved in terrorist acts, list that organisation with the effect that its assets become frozen.[30] It is a criminal

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[23] See *Crimes Act 1914* (Cth), ss 30B, 30F, 30D.

[24] In contrast to prosecutions not contingent on proscription: see *The King v Hush* (1932) 48 CLR 487, an appeal against prosecution under s 30D (soliciting contributions for an unlawful association).

[25] See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. The *Communist Party Dissolution Act 1950* (Cth) included provisions allowing specified government officials to declare an association unlawful (eg groups affiliated to the Communist Party).

[26] Though they were mentioned in *obiter* in the *Communist Party* case by way of contrast to the provisions there under consideration: [8] (Fullagar J). See also *The King v Hush* (1932) 48 CLR 487, though the constitutional validity of the relevant provisions was not substantively addressed.

[27] See the brief discussion in Joo-Cheong Tham, *How Not to Fight the 'War on Terrorism': the Criminal Code Amendment (Terrorist Organisations) Bill 2003* (2003), Civil Rights Network <> at 9 February 2004.

[28] They are part of Australia's response to Res 1373 (2001) of the Security Council of the United Nations (see above n 21 for further details).

[29] Read with regulation 6(1) of the Charter Of The United Nations (Terrorism And Dealings With Assets) Regulations 2002 which states that: 'For subsection 15 (2) of the Act, the Minister must list a person or entity if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1 (c) of Resolution 1373'.

[30] Paragraph 1 (c) of Resolution 1373 (2001) of the Security Council of the United Nations requires States to:

> Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such

offence, punishable by 5 years' imprisonment, either to deal with freezable assets[31] or to give an asset to a proscribed person or entity.[32] The novelty of the asset-freezing mechanism and the dependent criminal offences is two-fold. First, there is the emphasis on prevention rather than punishment — the rationale being that if the assets of an organisation are frozen it cannot continue to function.[33] Second is a feature which makes this mechanism an even more marked deviation from the normal criminal model: that is that consequences (not just asset freezing but liability for dealing with freezable assets) are not contingent upon any processing through the courts or upon a criminal conviction. They are simply dependent upon listing by the Minister.

Until the events in New York in September 2001, then, provisions allowing the proscription of organisations and creating offences (with relatively minor penalties) for a narrow range of behaviour associated with those organisations languished on the statute books for over eight decades. What is apparent, though, both in the UN Act (discussed above), and in the terrorist organisation offences of the Commonwealth *Criminal Code* (discussed below) is a significant shift in the wake of 9/11 to treat an increasing variety of behaviours in relation to certain organisations as criminal and to apply increasingly severe penalties to those behaviours. While so-called 'status' offences dealing with 'criminal types' such as vagrants, prostitutes and drunks are a familiar feature of nineteenth century criminal law,[34] the concept of attaching as serious a penalty as 25 years' imprisonment to status offences (such as membership of an organisation) reinforces the novelty and breadth of the new provisions.

(b) Terrorist Organisations under the Criminal Code

The definition of 'terrorist organisation' in section 102.1(1) of the *Criminal Code Act 1995* (Cth) is complex, but includes the following:

(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
(b) an organisation that is specified by the regulations to be a terrorist organisation.

Thus, an organisation can be a terrorist organisation either by virtue of

persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities. Assets can also be listed under s 15(3).

31 Under the definition in s 14 these can be either assets that are held by a proscribed entity or assets that themselves have been listed (see above n 30).

32 Sections 20 and 21 respectively.

33 See Tham, *How Not to Fight the 'War on Terrorism*, above n 27.

34 See the discussion in Bronitt and McSherry, above n 19, 10.

meeting the definition under limb (a), or by virtue of proscription under limb (b).

As the legislation operated before March 2004, for a terrorist organisation to be listed under the regulations, it first had to be listed by the Security Council of the United Nations.[35] Thirteen organisations were listed in Schedule 1 to the *Criminal Code Regulations 2002* (Cth) under this mechanism. Al Qa'ida headed this list, while Jemaah Islamiyah (JI) was added on 27 October 2002, shortly after the Bali bombings for which several JI members have since been successfully prosecuted in Indonesian courts.[36] Four more groups were listed in November 2002, and in April 2003 a further six were added.[37] The requirement for United Nations Security Council listing was removed with the passage of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth), which received assent on 10 March 2004 (see Section F of Part 2 of this paper for details about the new proscription mechanism.)

An alternative method by which to designate an organisation that has not been listed by the Security Council as a 'terrorist organisation' for the purposes of *the Criminal Code* is for the Parliament to pass specific legislation.[38] This occurred on three occasions in relation to Hizballah, Hamas and Lashkar-e-Tayyiba (also known as Lashkar-e-Toiba) operating in the Middle East. These organisations have been listed under Schedule 1A of the Criminal Code Regulations.[39] Whilst this alternative method is still available, it is unlikely to be used in future given the amendments introduced by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth)(see Section F).

Offences relating to terrorist organisations are:

102.2 intentionally directing the activities of a terrorist organisation,

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[35] The government originally sought executive proscription powers. These were re-sought in the Criminal Code Amendment (Terrorist Organisations) Bill 2003 (Cth) (which became an Act in March 2004 and is discussed in Section F of Part 2) and were argued to be necessary because 'the Security Council has only ever operated as a mechanism for identifying terrorist organisations linked to the Taliban and al-Qaeda': Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2003, 15398 (Daryl Williams, Attorney-General) in the Second Reading Speech of the Criminal Code Amendment (Terrorist Organisations) Bill 2003.

[36] Attorney-General, Commonwealth of Australia, 'Jemaah Islamiyah Listing', (Media Release, 27 Oct 2002).

[37] Attorney-General, Commonwealth of Australia, 'Four More Terrorist Organisations Listed', (Media Release, 14 Nov 2002), and 'Six More Groups Listed as Terrorist Organisations', (Media Release, 11 April 2003).

[38] The government has argued that this method of listing through specific legislation (necessitated because of the circumstances described in n 35 above) is 'unworkable': Commonwealth, *Parliamentary Debates*, House of Representatives, above n 35, 15398.

[39] The last two organisations to be listed were added by the *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003*, which was introduced into the House of Representatives on 5 November 2003 and the Senate on 7 November, with listing effective on 9 November 2003.

knowing that it is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years);

102.3 intentionally being a member of a terrorist organisation that is listed by regulations made under the Act, where the person knows the organisation is a terrorist organisation (penalty: 10 years). Under subsection 2, an accused may escape liability if he/she proves that he/she took all reasonable steps to cease to be a member of the organisation as soon as practicable after learning that this was a terrorist organisation.[40]

102.4 intentionally recruiting a person to join or participate in the activities of a terrorist organisation, knowing that it is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years).[41]

102.5 intentionally providing training to or receiving training from a terrorist organisation, knowing that it is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years)[42]

102.6 intentionally receiving funds from or making funds available to a terrorist organisation (whether directly or indirectly), knowing the organisation is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years). There is an exception for funds received solely for the purpose of

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[40] There are moves to amend this provision currently before the Parliament in the Anti-terrorism Bill 2004. The Bill was introduced into the House of Representatives on 31 March 2004 and was referred to the Legal and Constitutional Legislation Committee on the same date. The report is due on 11 May 2004. The provisions of the new Bill seek to extend the operation of this provision to include membership of an organisation which falls within paragraph (a) of the definition of a terrorist organisation in section 102.1. The Bill also seeks to amend section 102.5, including by increasing the penalty where the accused is reckless as to whether the organisation is a terrorist organisation to 25 years' imprisonment and introducing elements of strict liability into the offence where the organisation is a listed terrorist organisation (i.e. a terrorist organisation by proscription or legislation).

[41] On 22 April 2004, Faheem Khalid Lodhi was charged with this offence, along with other offences including, according to the charge sheet, 'doing acts in preparation for a terrorist act, namely upon a major infrastructure facility' (under s 101.6). The recruiting charges relate to the terrorist organisation Lashkar-e-Toiba (LeT) and concern alleged activity in Sydney and Pakistan between April 2001 and March 2003. Lodhi is alleged to have tried to recruit Izhar ul-Haque to participate in LeT activities (see n 42 below). He was refused bail was remanded in Goulburn jail's high-security section until his next court appearance on 2 June 2004: Ellen Connolly, Les Kennedy and Freya Petersen, 'Architect planned Sydney Bomb, Court Told', *Sydney Morning Herald* (Sydney), 23 April 2004, 1.

[42] A week prior to Lodhi (see n 41 above), medical student, Izhar ul-Haque, was charged with receiving training from a terrorist organisation (LeT). It is alleged that he trained with the group in Pakistan in January 2003. He was also refused bail and will appear in court on 5 May 2004: Ellen Connolly, Les Kennedy, Louise Dodson and Matthew Thompson, 'Pakistani Trained for Terror, Court Told', *Sydney Morning Herald* (Sydney), 16 April 2004, 3. The charges against both Lodhi and ul-Haque relate to periods before LeT became a proscribed terrorist organisation under legislation passed in November 2003. See above n 39.

providing legal representation for a person in proceedings related to terrorist offences or for assisting the organisation to comply with the law.

102.7 intentionally providing to a terrorist organisation support or resources that would help the organisation engage (directly or indirectly) in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs), knowing that the organisation is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years).

Again, crucial to these offences are the mental states of intention, knowledge and recklessness (see discussion above).

(v) Constitutional issues

Section 100.3 of the *Criminal Code Act 1995* (Cth) sets out the constitutional basis of Part 5.3, in broad terms calculated to enliven the full spectrum of constitutional power. Four areas of operation are distinguished, identifying in each case which sections of the Constitution are envisaged as providing a head of legislative power supporting the legislation:

(1) operation in a 'referring State' is based on s 51(xxxvii) of the Commonwealth Constitution, supplementing any other bases of Commonwealth power in s 51;
(2) operation in a 'non-referring State' is based on s 51, without any supplementation through s 51(xxxvii);
(3) operation in a Territory is based on s122, as well as any other bases of power under s 51 (apart from s 51(xxxvii));
(4) operation outside Australia is based on the external affairs power under s 51(xxix), as well as any other bases of power under s 51 (apart from s 51(xxxvii)).

The reliance on referral of powers under s 51(xxxvii) was added to s100.3 by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). Since this legislation was enacted, in May 2003, all six Australian States have passed legislation referring power to the Commonwealth under the s 51(xxxvii) procedure.[43] This means that all States are now 'referring States' under s

[43] *Criminal Code Amendment (Terrorism) Act 2003* (Cth).
Terrorism (Commonwealth Powers) Act 2002 (NSW).
Terrorism (Commonwealth Powers) Act 2002 (Qld).
Terrorism (Commonwealth Powers) Act 2002 (SA).
Terrorism (Commonwealth Powers) Act 2002 (Tas).
Terrorism (Commonwealth Powers) Act 2003 (Vic).
Terrorism (Commonwealth Powers) Act 2002 (WA).

100.3(1), and subsection (2) has no application. The common form of these referrals includes a definition of 'terrorist act' which exactly mirrors that set out in s 100.1 of the *Criminal Code Act*. Thus, the Commonwealth's power in relation to such acts is augmented, in relation to acts occurring within the States, to the extent that the States would themselves have legislative power. Under subsections 100.3(3) and (4), the operation of Part 5.3 within Territories is premised on the power under s 122, while its operation outside Australia is based on s 51(xxix), the external affairs power. The latter has been interpreted very broadly by the High Court in the past, for example, in relation to war crimes.[44]

As is evident from s 100.3, reliance on the s 51(xxxvii) referral mechanism is supplemented by other legislative powers under s 51 which may be relevant to terrorist activities. These are partly indicated in s 100.4(5), which provides that the terrorism provisions apply to acts and threats which would:

- affect the interests of the Commonwealth or a Commonwealth authority or involve Commonwealth land (relying on the incidental powers of s 51(xxxix));
- affect the interests of a constitutional corporation (relying on s 51(xx));
- involve a postal service or other like service, including an electronic communication (relying on s 51(v));
- disrupt trade or commerce between Australia and places outside Australia, between the States, or involving a Territory (relying on s 51(i) and s 122);
- disrupt banking, other than State banking (relying on s 51(xiii);
- disrupt insurance, other than State insurance (relying on s 51(xiv)); or
- constitute an action or threat in relation to which the Commonwealth is obliged to create an offence under international law (relying on s 51(xxix)).

In addition to those powers indicated by the wording of s 100.4(5), there are two other bases on which Commonwealth national security legislation might arguably rely:

- the defence power under s 51(vi); and
- the implied 'nationhood' power.[45]

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[44] See *Polyukovich v Commonwealth* (1991) 172 CLR 501.

[45] There is also a potential argument based on s 119 of the Constitution, obliging the Commonwealth to protect States from invasion and 'domestic violence', that might be used to support anti-terrorism legislation. This section has received little judicial attention and is not further explored in this paper.

Of these, the defence power might seem particularly apposite, at least so far as the rhetoric of a 'war on terror' is taken literally.[46] Traditionally, this power has been interpreted as purposive in its nature and therefore 'elastic' in its scope, depending upon the prevailing circumstances. In wartime, s 51(vi) becomes a 'paramount source of power', though contracting in post-war periods, and very greatly reduced in peacetime.[47] Some guidance as to how the defence power might validly be used in the absence of a declared state of war (against another nation), but in the context of an Australian strategic commitment to regional or global security, may be afforded by the *Communist Party* case.[48]

The *Communist Party Dissolution Act 1950* (Cth) contained a number of recitals, including one justifying the dissolution of the Communist Party on the ground that this was necessary for the 'security and defence of Australia'. The substantive provisions of the Act declared the Party to be an unlawful association, and provided for declarations of other associations as unlawful if the Governor-General was satisfied that the continued existence of such bodies 'would be prejudicial to the security and defence of the Commonwealth or to the exercise or maintenance of the Constitution or of the laws of the Commonwealth'. As noted earlier, the High Court held this legislation to be invalid on a number of grounds, most notably because its provisions allowed the Parliament to 'recite itself' into power, subject at most to the Executive having formed the view that security and defence interests required the dissolution of the organisations involved. While the defence power was elastic in its scope, this did not mean that judicial review of the required factual basis for the exercise of power under s 51(vi) could be ousted by Parliament simply declaring the relevant state of affairs to exist.

The *Communist Party* case also considered the implied 'nationhood' power, as it is generally described, as a basis for legislation to proscribe bodies dedicated to the overthrow of the system of government. This

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[46] The rhetoric of the 'war on terror' has been enthusiastically adopted by the Government, including in a paper entitled 'The Commonwealth Response to September 11: The Rule of Law and National Security' delivered by the new Attorney-General, Philip Ruddock, at the National Forum on Terrorism and the Rule of Law in Sydney on 10 November 2003: the text of the paper is available at the Gilbert & Tobin Centre of Public Law <http://www.gtcentre.unsw.edu.au/Philip%20Ruddock%20Paper.doc> at 17 February 2004. Such statements as 'this is a war against evil' (above at paragraph 13) may be seen as a tacit argument for the community to accept expanded state powers as a cost associated with protecting itself from the terrorist threat. See, for example, the Attorney-General's statement that, in such a war 'many of the subtleties usually associated with the fair and even application of the rule of law are not neatly applied.' (above at [8]). See also the Attorney-General's second reading speech for the second ASIO Amendment Bill, above n 7, 23107. For a discussion on the politics of language in relation to terrorism see Hocking, above n 4, chapter 1 (in particular page 7 in relation to the notion of a war on terror).

[47] *Stenhouse v Coleman* (1944) 69 CLR 457; *R v Foster* (1949) 79 CLR 43; *Re Tracey; ex parte Ryan* (1989) 166 CLR 518.

[48] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (see discussion at n 25 above).

power is generally conceived either as an attribute of 'the executive power of the Commonwealth' under s 61 of the Constitution, aided by the incidental legislative power under s 51(xxxix), or as simply inherent in the existence of the Commonwealth as a national government.[49] Again, it was held that this power could not be used to justify the legislative proscription of the Communist Party, with Dixon J remarking:

> Wide as may be the scope of such an ancillary or incidental power, I do not think it extends to legislation which is not addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance and yet does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject, but proceeds directly against particular bodies or persons by name or classification ... so as to affect adversely their status, rights and liabilities once and for all.[50]

Similarly, the proscription of organisations as undertaken through the anti-terrorist provisions of the *Criminal Code*, might be challenged to the extent that they rely on any wide powers to defend against perceived threats to national security interests. Whether the more specific bases for Commonwealth legislative power, as indicated by s 100.3 and s 100.4(5), provide a more solid foundation remains to be determined. However, given the recent referral of powers under s 51(xxxvii), the Commonwealth's anti-terrorist legislation is unlikely to founder on a lack of legislative power. The more likely point of attack is that the laws contravene express or implied limitations arising from other sections of the Constitution.

Constitutional limitations on legislative power arising from separation of powers considerations, or more precisely from attempts to vest legislative or judicial functions in the Executive, are illustrated by the *Communist Party* case.[51] In addition, there are implied rights recognised by the High Court that may be unduly compromised by proscription legislation. Most obviously, the implied freedom of political communication, recognised by the High Court in the 1990s, may prevent legislative interference with the political activities of citizens.[52] Even where restrictions are otherwise justified, the way in which legislation sets out to achieve its purposes may be disproportionate or excessive. This is well illustrated by the 'nationhood power' case of *Davis v Commonwealth*, in which legislation prohibiting the use of certain expressions relating to the Bicentennial

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[49] *Victoria v Commonwealth and Hayden* (the 'AAP case') (1975) 134 CLR 338; *Davis v Commonwealth* (1988) 166 CLR 79.

[50] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 192.

[51] Also discussed in Submission 8 to the Senate Committee Inquiry (Williams and Gentle).

[52] See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald v Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* [1997] HCA 25; *Levy v State of Victoria* [1997] HCA 31.

year was held to be unconstitutional as it unduly interfered with political communication.[53] Again, the extent to which this type of limitation might be applicable to recent Commonwealth anti-terrorist laws remains to be judicially examined.

Part 2: Application of the Legislation to a Hypothetical Scenario

What, then, are the implications of some of the legislative trends that we have identified in Part 1 of this article when applied to a real life scenario? This Part addresses a question that has received little academic attention: how will these offences apply to a real situation? We test the possible application of section 102.7 of the *Criminal Code* by means of the following scenario.

A *Hypothetical Scenario*

A young Australian medical worker joins Médecins Sans Frontières (Doctors without Borders) and travels to Sri Lanka to work in a camp for displaced people near Vavuniya. Unexpectedly, peace talks between the Sri Lankan Government and the Tamil Tigers break down and the ceasefire, which has been in place since February 2002, ends. The Tigers launch a coordinated bombing attack on government and commercial buildings in several cities and towns, including Vavuniya. The attacks kill hundreds of people. Many more are injured. At the camp where the Australian medical worker is based there are several days of chaos. She treats many bomb victims over a 72 hour period, working constantly and getting very little sleep. Several days after the bombing, some local young men come into her makeshift clinic seeking treatment. They have weapons and are carrying untreated injuries that are several days old. Their wounds need to be cleaned and they need stitches, antibiotics and pain killers. As she treats them, she works out, from scraps of conversation, that they were involved with planting one of the bombs that exploded in Vavuniya. Against her advice, they insist that they must leave immediately and she gives them supplies of pain killers and antibiotics to take with them to enable them to fully recover from their injuries. Several weeks later, these same young men carry out another bomb attack in Vavuniya.

Has the Australian medical worker working in Sri Lanka committed a crime under Australian law? Intuitively, we might doubt that this could be the case. She is not on Australian soil. No Australians, as far as is known, have been injured in any of the attacks throughout Sri Lanka. Australia has no part to play in the internal political struggle in that country.

[53] *Davis v Commonwealth* (1988) 166 CLR 79.

Neither the Australian government nor the Australian public has been directly affected by what has occurred. She is in Sri Lanka working for a humanitarian organisation providing health services to a populace in dire need of her skills. In a time of crisis, she is treating everyone who comes to her clinic as best she can and providing the only follow up care that is available in the circumstances — giving out antibiotics and pain killers. She is following the precepts and ethical imperatives of her own profession. She is adhering to the charter of Doctors Without Borders, which is premised on the belief that all people have the right to medical care regardless of race, religion, creed or political affiliation, and that the needs of these people supersede respect for national borders.[54]

However, it is nonetheless possible that she has committed an offence under s 102.7 of the *Criminal Code Act 1995* (Cth): that is, that she has intentionally provided to an organisation support or resources that would help the organisation engage in a terrorist activity, probably knowing that the organisation is a terrorist organisation but at least being reckless as to that fact. Assessing her criminal liability under the provision involves considering whether she is within the jurisdiction of the legislation, whether she has committed the physical elements of the offence and whether she had the requisite mental state to found liability. If the elements of the offence are in place, consideration must also be given to whether any defences are available to her or whether there are other ways she may avoid liability (specifically, the constitutionality of the legislation).

1 *Jurisdiction*

The effect of the extended jurisdiction applying to s 102.7 (discussed above) is that despite the fact that the Australian medical worker in the hypothetical scenario is working in Sri Lanka when she engages in the conduct in question, she may still have committed an offence under Australian law and be vulnerable to prosecution for her actions upon her return to Australia.

2 *Elements of the Offence*

(a) Physical Elements

The issues to be addressed here are whether the medical worker has provided a terrorist organisation support or resources that would help it engage (directly or indirectly) in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs).

[54] This charter is viewable at <http://www.doctorswithoutborders.org/about/charter.shtml> at 9 February 2004.

Is the organisation that she has allegedly assisted a 'terrorist organisation' for the purposes of the Act? The Tamil Tigers are not currently listed under regulations proscribing terrorist organisations made under paragraph (b) of the s102.1 definition, but the more general description under paragraph (a) ostensibly covers this type of insurgent group: 'an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)' where the relevant terrorist act would be any action intended to coerce a foreign government, causing death or harm, and done with the intention of advancing a political, religious or ideological cause (s 101.1). It is probable that an Australian court asked to decide the question would find the Tamil Tigers to be a terrorist organisation under the definition in s 102.1.

The terms 'support' and 'resources' are not defined in the Act. By contrast, the equivalent provision in United States legislation does define 'material support and resources' for the offence of providing material support to terrorists. Notably, 'medicine' is specifically excluded from that definition.[55] However, in the Australian provision, these terms were left deliberately broad so as not to create, in the words of the drafters, 'a risk that some types of support may not be covered'.[56] Much will turn on how broadly those words are interpreted by the Courts. But given what appears to be a parliamentary intention to give them breadth, it is at least arguable that our young medical worker did provide resources (in the form of drugs) and even possibly support (in the form of medical care) to several members of a terrorist organisation.

So, what has been the effect of the provision of this assistance? The wording of the offence is that a person is prohibited from intentionally providing support and resources that 'would help' the organisation engage in a terrorist act. If what our medical worker did constitutes the provision of support and resources, then that provision has in fact helped the organisation engage in a terrorist act, because those same fighters that she treated and supplied with medicine have gone on to commit further bomb attacks.

It would appear, then, that the requisite physical elements for an offence under s102.7 could be established.

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[55] The term 'material support or resources' is defined under paragraph (b) of s 2339A of the US Criminal Code (Title 18) to mean 'currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.' For a discussion of UK and US terrorist laws, see Hancock, above n 2, [2.1.2] and Nathan Hancock, *Terrorism and The Law in Australia: Supporting Materials*, Research Paper No 13 2001-02 (2002), Documents 2 and 3.

[56] See the Committee Report, above n 2, which quotes this reasoning from the submission by the Attorney-General's Department (*Submission 38*, 13) at 54 of the Report.

(b) *Fault elements*

Next, does the Australian medical worker have the requisite mental state (fault element) for s102.7? Specifically, has she intentionally provided support or resources either knowing that or being reckless as to whether the organisation is a terrorist organisation? There are several issues to consider here.

Clearly, providing support or resources constitutes conduct, so that conduct is intentional if the person 'means to engage' in it (see the discussion of s 5.2(1) above). Certainly, she means to provide the medical treatment she is giving. The question here is whether the intention extends to intending that such provision 'would help the organisation engage in' a terrorist act. The answer might depend on whether this is to be interpreted as a circumstance or as a result. As explained above, under s 5.2(2) and (3) of the *Criminal Code*, intention with respect to a circumstance requires belief that the circumstance exists or will exist, and with respect to a result requires at the minimum an awareness that it will occur in the ordinary course of events. If the provision is interpreted as requiring this extra level of intention, then it would need to be shown that the medical worker believed, or perhaps was aware, that her provision of support would help the Tamil Tigers. On the facts of the hypothetical scenario, she may well have had such a belief or awareness, and yet have engaged in the conduct that assisted the organisation (treating the wounded) because of her overriding humanitarian commitment. As will be seen from the discussion below, this altruistic motive may be legally irrelevant to the medical worker's liability under s 102.7.

What about the additional mental element — knowledge or recklessness as to the nature of the organisation? It might be unclear whether she is aware of the fact that some of the people she is treating are, or are likely to be, engaged in the acts of a terrorist organisation, but the fact that she overheard details of the young men's involvement in the original bombing suggests that she knows or suspects their involvement. At the least, she may have been reckless as to this circumstance (in that she is aware of a substantial risk that they are and has taken that risk), though there may be issues as to whether this was unjustifiable in the humanitarian context. It may be here that consideration of the social justifiability of a risk[57] may leave a large degree of latitude for a jury to incorporate the humanitarian motives of the medical worker into their decision processes.

Arguably then, many of the elements that would found liability for the Australian medical worker appear to be in place. If so, then the criminality of her behaviour under s 102.7 may turn critically on the following:

- the interpretation and scope of the word 'intentionally' in this context; and the (arguably) linked question of

[57] See the discussion of Fisse's work, above n 17.

- whether providing resources to *members* of an organisation constitutes providing the *organisation itself* with support or resources.

Whilst motive is legally distinct from the question of intention, recognition of the humanitarian context is likely to influence the sympathies of a jury. Accordingly, it might be likely to fasten on these two issues as the way to allow a defendant in this situation to escape liability.

On one argument she does appear to have the necessary intention, nonetheless it is likely that a court would accept that this intention was extremely limited in two important senses: in terms of *what* she intended to provide and in terms of *who* she intended to provide it to.

She clearly did not intend her conduct to constitute the provision of support or resources *of a kind that 'would help* the organisation engage in a terrorist act'. In this sense she did not mean to engage in conduct that represented or might be interpreted as the provision of support or resources to a terrorist organisation, nor did she mean to engage in behaviour that would help an organisation engage in terrorist activity.

Further, she did not intend her conduct to be directed to any entity that was a *terrorist organisation*. Indeed she did not mean to provide a terrorist organisation with anything at all. Rather she intended to provide necessary care to severely injured individuals. In the light of the presumption of statutory interpretation that criminal provisions are strictly construed in favour of the defendant, this may be a crucial argument in her case.[58]

Nonetheless, the fact that the fate of the medical worker might rest on such fine technical points and arguments should put us all on notice of the startling and unnecessary breadth of these provisions. Why should a humanitarian aid worker be potentially liable for treating patients — for doing her job – simply because those patients are members of a terrorist organisation? In failing to recognise the relevance of her motive in acting as she did, the provisions cannot appropriately deal with her situation.

3 *Defences and Exceptions*

Are there other ways in which she can avoid liability? Under s 10.3 of the *Criminal Code*, the common law defence of necessity is replaced by the defence of 'sudden or extraordinary emergency'. Under s 10.3(1), a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency (s10.3(2)):

> This section applies if and only if the person carrying out the conduct reasonably believes that:

[58] *Chew v R* (1992) 173 CLR 626, 632 (Mason CJ, Brennan, Gaudron and McHugh JJ).

(a) circumstances of sudden or extraordinary emergency exist; and
(b) committing the offence is the only reasonable way to deal with the emergency; and
(c) the conduct is a reasonable response to the emergency.

In the circumstances of the scenario, it may be difficult to show that this was a sudden or extraordinary emergency since treatment is occurring several days after the bombing. If that is the case, it may further be difficult to show a reasonable belief on the part of the medical worker in relation to sub-ss (2)(b) and (c) if other medical workers were available to treat the young men.

Is it possible to assert that s 102.7 is not intended to apply to aid workers? That there is a humanitarian exception? Certainly, no such exception is explicit in s 102.7. This stands in marked contrast to the new definition of treason in Division 80 of the *Criminal Code Act 1995* (Cth). In addition to being designated a category D offence for the purposes of extending the geographical jurisdiction of the offence, treason now includes under s 80.1(1)(f) engaging 'in conduct that assists by any means whatever, with intent to assist: (i) another country; or (ii) an organisation; that is engaged in armed hostilities against the Australian Defence Force. As a result of submissions which were concerned about the possible application of this definition to humanitarian aid workers,[59] the Committee recommended that the provision be amended so as to ensure that the definition made clear that humanitarian aid was excluded.[60] As a result, the provision of humanitarian aid is now specifically excluded from key parts of the treason offence.[61]

It would have been simple to add a similar exclusion from provision 102.7. This did not occur. On the *expressio unius* principle,[62] therefore, this may indicate a parliamentary intention not to exclude humanitarian aid in relation to providing support or resources to a terrorist organisation in s 102.7. A similar argument could be made in relation to the express exclusions of advocacy, protest, dissent and industrial action (not intended to bring about physical harm or the risk of physical harm) in the definition

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[59] See Committee Report, above n 2, 29-30.

[60] This was in fact recommendation 1 of the Committee Report, above n 2, 32):

> The Committee recommends that proposed section 80.1 in the Bill be amended so that the Terms 'conduct that assists by any means whatever' and 'engaged in armed hostilities' are defined, in order to ensure that the humanitarian activities of aid agencies are not caught within the ambit of the offence of treason.

[61] Section 80.1(1A) provides: Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature'.

[62] The maxim *expressio unius est exclusio alterius* (roughly translatable as 'an express reference to one matter indicates that other matters are excluded') is a grammatical aid to interpretation still applied, though very carefully, by the courts: see *Salemi v Minister for Immigration and Ethnic Affairs (No 2)* (1977) 14 ALR 1. The need for caution in applying the maxim is often remarked upon by the High Court. See for example *O'Sullivan v Farrer* (1989) 168 CLR 210; *Re Wakim* (1999) 198 CLR 511.

of a 'terrorist act' in s 100.1. So, it is at least arguable that the Parliament intended to include humanitarian aid in section 102.7.[63] Certainly, were a Court to consider extrinsic material in determining the intention of Parliament in this matter, it would find that there is nothing in the Committee report or other relevant material[64] that addresses the possible exclusion of humanitarian aid in relation to this particular provision.[65]

4 *Constitutional Arguments*

Given that the application of the *Criminal Code* provisions relating to terrorist organisations outside Australia are based on the broadly interpreted external affairs power, it is unlikely that someone in the position of the medical worker in the scenario would be able to attack their constitutionality on the basis of lack of Commonwealth legislative power.

More promising might be an argument based on implied limitations to Commonwealth legislative power, such as those which have succeeded in relation to freedom of political communication. However, it is doubtful that a case such as that described in the scenario would be a suitable vehicle for arguing along these lines. The medical worker under the spotlight is not engaged in anything that could reasonably be said to constitute political communication — indeed, the intent accompanying the delivery of humanitarian assistance in such cases is decidedly apolitical, as exemplified by the philosophy of Médecins Sans Frontières.

5 *Prosecutorial Discretion*

The scenario demonstrates some of the dangers of attaching criminal liability to association or connection with an organisation that has been proscribed or declared unlawful. With such broadly drawn offences the only safeguards from liability become prosecutorial or judicial discretion. And, of course, that is the argument that the drafters have put in response to criticisms of the provisions relating to proscribed organisations. We have to trust in prosecutorial discretion, in the fact that the provisions will not be abused:

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[63] The internal consistency of a Code is arguably even more important than with normal legislation. See the comments by Kirby J *Charlie v R* (1999) 199 CLR 387, 394: 'The first loyalty, as it has been often put, is to the code ... before deciding that there is ambiguity, the code in question must be read as a whole.'

[64] Such as the second reading speech and explanatory memorandum.

[65] Under the *Acts Interpretation Act 1901* (Cth) s 15AB(1).

> Read literally and out of context, many statutes could be construed so as to create unintended consequences with the result that virtually all Australians would commit an offence every day ... [A] court would read the counter-terrorism provisions as a whole in the context that they are provisions directed at terrorism, not minor instances of civil disorder.

Certainly, in relation to the medical worker in our scenario it may be unlikely that a prosecution would be launched against her, particularly in light of the emphasis placed on 'public interest factors' in the exercise of Commonwealth prosecutorial discretion.[66] But what kind of comfort is that to the potential accused? In short, is the response quoted above a good enough answer? Justice Dowd, making a submission on the original Bill on behalf of the International Commission of Jurists suggests that it is not. He noted that the very existence of such offences created the potential for abuse.

> ... once you give this power, you give the power to investigating policemen or policewomen to say, 'I can charge you with this.' It makes it very easy when you have alternative Commonwealth and State offences to say, 'We could charge you under the Terrorism Act,' and it becomes much easier for you to plead guilty to a street offence or a minor property offence under a state law because you have that sanction. Do not lightly give law enforcement agencies powers because, although we have a very good record in Australia with law enforcement agencies, available powers can be abused.[67]

In the case of the medical worker and other humanitarian aid workers, the answer suggests itself as the express exclusion detailed above.

However, despite the availability of (and arguably urgency for) this specific solution in relation to s 102.7, we should not be distracted from the inherent problems of attaching liability to association with proscribed organisations. This is particularly so given the passage of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) through Parliament in March 2004.

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[66] Under the prosecutorial guidelines for the Commonwealth Department of Public Prosecutions 'public interest factors' including the degree of culpability of the alleged offender and consideration of whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute are crucial to the exercise of prosecutorial discretion. For the prosecution policy including a complete list of 'public interest factors' see <http://www.cdpp.gov.au/Prosecutions/Policy/Part2.aspx> at 21 February 2004.

[67] Committee Report, above n 2, 38.

6 *Executive Proscription*

The Criminal Code Amendment (Terrorist Organisations) Bill 2003 (Cth) was introduced into the House of Representatives on 29 May 2003 and into the Senate on 16 June 2003. Originally, it appeared that the government accepted that the Bill was unlikely to be passed[68] and it languished on the Senate Bills List until early 2004. However, statements in December 2003 by the Australian Labor Party (ALP) spokesman on homeland security, Robert McClelland, indicated that the Opposition was modifying its view,[69] and further negotiations with the Government resulted in the Bill's passage on 4 March 2004. The *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) came into effect on 10 March 2004.

The Act makes proscription of terrorist organisations purely an act of the executive arm of government without any reference to UN Security Council listing. All that the Attorney-General needs to be satisfied of, on reasonable grounds, is that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). In addition, a new subsection 102.1(2A) requires that before any new regulation proscribing a terrorist organisation is made, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed. There is also a de-listing mechanism under s 102.1(4), and a new s 102.1A provides for review of new listing regulations by the Parliamentary Joint Committee on ASIO, ASIS and DSD. Any listing regulation is a disallowable instrument, with extensions of the applicable disallowance period provided for under s 102.1A in relation to reviews of such regulations by the Committee.

Making proscription a purely executive act was strenuously argued against in Parliament and in Committee submissions when it was proposed in the original Security Legislation Amendment (Terrorism) Bill 2002 (Cth). Such a process was characterised by Dr Jenny Hocking in a submission to the Committee as:

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[68] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2003, 15399 (Attorney-General) (Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2003 (Cth)): 'the opposition has indicated that it will not support the [Terrorist Organisations] Bill.'

[69] Mr McClelland was quoted in The Australian newspaper as saying that executive proscription powers were 'workable': 'We are in Discussions with the Government Aimed at Developing an Executive Proscription Model with Adequate Safeguards': S Lewis, 'Latham to Get Tougher on Security', The Australian, 17 December 2003. See also ABC Local Radio, "Robert McClelland interview with Ross Solly", The World Today, 17 December 2003, <http://www.abc.net.au/worldtoday/content/2003/s1011897.htm> at 17 February 2004.

> subversive of the rule of law in its failure to allow for a trial in this aspect, it breaches the notion of equality before the law in its creation of groups for which the usual judicial process does not apply and it breaches absolutely the separation of powers in even allowing for such a use of Executive power.[70]

The possible implications of allowing the power of proscription to fall into executive hands were also described to the Senate Committee by Mr Cameron Murphy, President of the NSW Council for Civil Liberties:

> There is a belief that this power is safe because none of us would use it to outlaw the Catholic Church or the Australian Labor Party or some other group that might not be supporting the government of the day. But none of us can predict who will be in power or when this legislation will be used, and that is the danger of putting this sort of legislation on the statute books.[71]

These and similar concerns were reiterated both by Greens Senator Bob Brown in the Senate debate,[72] and in a submission made by the Law Council of Australia to the Attorney-General and various senators.[73] Nevertheless, the Bill passed into law. On 3 May 2004, a further organisation, the Palestinian Islamic Jihad (PIJ), was listed in the regulations as a terrorist organisation, the first listing under the new executive proscription powers.[74]

Conclusion

This article has attempted to identify trends in the development of terrorism law which have worrying implications in the practical application of that legislation. The relatively simple scenario demonstrates the over-breadth, especially, of the provisions dealing with terrorist organisations. This is of particular concern in light of proposed legislation currently before Parliament which seeks both to further expand some of the terrorist organisation offences and to increase

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70 Quoted in the Committee Report, above n 2, 47.
71 Quoted in the Committee Report, above n 2, 46-47.
72 See for example Commonwealth, *Parliamentary Debates*, Senate, 3 March 2004, 20663 (Senator Bob Brown).
73 See 'Submission no. 1710, Being a Letter Addressed to the Hon. Phillip Ruddock, Attorney-General' (2004) Law Council, www.lawcouncil.asn.au/sublist.html at 5 May 2004. The second author of this paper was a drafter of this Law Council letter, which was also sent to Senators while the Bill was being debated.
74 Attorney-General, Commonwealth of Australia, 'Palestinian Islamic Jihad Listed As A Terrorist Organisation' (Media Release, 3 May 2004).

penalties.[75] Particular problems are apparent in the application of the *Criminal Code* provisions dealing with culpability. The focus on the technicalities of intention may, in the end, mean that legislation in the area of terrorism does not adequately deal with the problem at its core, the problem of motive. In the area of terrorism, we can never escape the question of the motives of the accused. In reality, it will be the touchstone to which juries will intuitively turn when reaching their decisions.

[75] See the discussion of the Anti-terrorism Bill 2004 in n 40 above. Interestingly, in view of the scenario discussed in this paper, the submission by the Law Council of Australia on the Anti-Terrorism Bill (submission no.1731, dated 26 April 2004, addressed to the Senate Legal and Constitutional Committee) seeks an assurance from the Government that the Bill's proposed amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* 'will not apply to Australian people who work in communities in which terrorist organisations operate to provide medical or community aid assistance (but not armed assistance) in the field of battle': see <http://www.lawcouncil.asn.au/sublist.html> at 5 May 2004.