



Research Paper
No. 12 2001–02

Terrorism and the Law in Australia: Legislation, Commentary and Constraints

Acknowledgments

The editor would like to thank Grant Wardlaw and Andrew Byrnes for their valuable comments in relation to the paper and to acknowledge the assistance and contributions of the Law and Bills Digest Group, particularly Dy Spooner, Sean Brennan, Mark Tapley, Jennifer Norberry, Ian Ireland and Angus Martyn.

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Major Issues

To most of us 'terrorism' is a foreign phenomenon which has rarely, if ever, been practised in Australia. However, following the events of September 11 2001 the Australian Parliament and the Australian community have been drawn into a discussion about the nature and extent of the terrorist threat in Australia and the Australian response. The discussion has been prompted by events and circumstances which have included new techniques of violence, a larger scale of damage and casualties and a higher standard of planning and coordination than has previously been the case. It has been informed by the threats and responses in the United States and the United Kingdom. It has been held in the context of our growing awareness of terrorist networks and the latent anger that has prompted and sustained terrorist causes.

Australia's first real exposure to international terrorism was probably the bombing of the Sydney Hilton Hotel in March 1978. The bombing and the subsequent 'Siege of Bowral' highlighted our relative unpreparedness, in an administrative and legislative sense, for terrorist events and the range of terrorist responses that may be required. Just one aspect of the response, the call out of the armed forces during the siege, raised legal issues which remained largely unresolved for two decades, despite various reports examining the need for legislation dealing with terrorism and military aid to the civil power. The necessary legislation was broadly envisaged as early as 1979. Indeed, it was drafted and periodically reviewed between 1980 and 2000. But it was only introduced some twenty years later, because of the need to address security concerns for the Sydney Olympics.

Australia has had experiences with related issues such as politically motivated violence, organised crime and national security. But we have had few real experiences widely accepted as *terrorism* per se. Similarly, we have enacted laws dealing with foreign incursions, serious offences, defence aid to the civil power, intelligence services and implementation of international law. But, with limited exception, there is no specific anti-terrorism legislation in Australia. Australia's only domestic model is a regime tucked away in the Northern Territory *Criminal Code*. It was modelled on the United Kingdom Prevention of Terrorism (Temporary Provisions) Act 1974-1976. But it was enacted without any real justification based on real or potential threats to the Northern Territory.

Now, following September 11 2001, Australia will be making its first serious attempts at developing a comprehensive anti-terrorism legislative package. No doubt there have already been significant military and diplomatic responses. Invariably, anti-terrorist laws deal with issues such as control over terrorist organisations, specific terrorist offences and

enhanced law enforcement powers. But these must be viewed against a broader canvas of existing laws dealing with intelligence gathering, preventative measures, crisis management and investigative and enforcement powers. It could be argued that this broader canvas is largely complete in Australia. However, we have a limited understanding of what constitutes 'terrorism' and what constitutes 'the terrorist threat' in Australia. We have limited knowledge of how the legislation will affect these issues or how it will affect the broader landscape of laws, civil liberties and human rights.

If Parliament is satisfied that legislation is the way to go (or an appropriate part of the response), the next logical question is one of proportionality, specifically proportionality between the proposed measure and the perceived threat to Australian society. This requires a critical assessment of the specific suspected or perceived threat, using means appropriate to Parliament's central role in our constitutional system while paying due regard to considerations of secrecy and national security. It then requires a careful balance between the possible responses to that threat and their potential impact upon civil liberties. Parliament is entitled to ask whether the gains to security from enacting new laws that enhance the state's coercive powers outweigh the costs to civil liberties.

The major issue for Parliament is that it would be enacting strong laws largely in response to overseas events. Any possible threat to Australia is largely unknown and the responses are unfamiliar. While overseas measures may offer some suggested approaches, they must be placed in context. The United Kingdom may have a range of counter-terrorist laws, but it should be kept in mind that those laws have a very specific context: the enduring conflict in Northern Ireland during which threats to civilian targets became a sometimes daily experience. Likewise, the United States has recently enacted new counter-terrorist measures, but has done so in the aftermath of September 11. Comparative approaches to counter-terrorism are a relevant part of the debate in Australia, but so too is a measured appreciation of the specific threat to Australia posed by terrorism.

Arguably, Parliament will need to approach 'terrorism' as if there were no precedents. It will need to assess for itself whether the proposed measures are necessary, sufficient and proportionate in relation to the actual or potential terrorist threat in Australia. It will need to define clearly the subject matter of the laws (what distinguishes terrorism from other offences or national security concerns?), and the standards against which they will be measured in terms of intended effects (will the laws guarantee security?) and incidental effects (to what extent will they infringe civil liberties and human rights?).

The issue of definition may be critical. Few Australians would dispute that hijacking commercial aircraft and flying them into a city skyscraper, killing thousands of civilians, is an act of terrorism. But any national, let alone international, consensus over what is or is not terrorism rapidly evaporates as one moves away from the shocking immediacy of the events of September 11. Are Chechens engaged in armed conflict with Russia 'terrorists'? Is India engaged in a war on 'terrorism' in Kashmir? Did Australians who, before 1991, donated money to the African National Congress (an organisation committed to the overthrow of the apartheid regime in South Africa) help to finance a terrorist organisation?

As this paper demonstrates, a number of Commonwealth agencies already have a significant array of powers to deal with criminal conduct and a number of offences already apply in relation to terrorist-style activities. Before agreeing to augment those powers or offences, it is legitimate for Parliament to ask whether such laws are a necessary or appropriate part of the response to the events of 11 September 2001. The core issue here is proportionality and the appropriate balance between safety and liberty:

Journalist: Is it realistic that a government can stop a terrorist who is prepared to take his own life...? **Prime Minister:** [T]hat's a very hard question for me to answer. It is realistic that a Government do everything that is consistent with our way of life to minimise to the maximum extent possible the risk of what we're talking about occurring. No person, no Prime Minister, no government can give absolute guarantees in an area like this. Nobody can. What I can promise you and promise the Australian public is that we will do everything we fairly and reasonably and practically can to minimise the risk consistent with not trampling on what are valuable rights of the Australian people. We don't believe anything that we've decided so far does that.

The Hon. John Howard, MP [Transcript of Press Conference](#), October 2001

Given the chance [in 1951] to vote on the proposal to change the Constitution, the people of Australia, fifty years ago, refused. When the issues were explained, they rejected the enlargement of federal power. History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States. Keeping proportion. Adhering to the ways of democracies. Upholding constitutionalism and the rule of law. Defending, even under assault, the legal rights of suspects. These are the way to maintain the love and confidence of the people over the long haul. We should never forget these lessons. ... Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the *Communist Party case* of 1951.

Justice Michael Kirby, '[Australian law, after September 11, 2001](#)', October 2001.

Introduction

This project, *Terrorism and the Law in Australia*, arose in response to the proposals put forward in following September 11 2001. It was prompted by a need to draw together threads which form the core of a discussion on Australia's legislative preparedness for terrorism. Australia has had little exposure to international terrorism and little experience of enduring anti-terrorist responses. Unlike other countries, particularly the United States, Australia has a poorly developed body of (public) literature on the topic of legislative preparedness. Perhaps the threat or potential threat of international terrorism is too remote to sustain this level of discussion. Perhaps the level of community awareness or interest is too slight to justify bringing this discussion from the private to the public domain. Either way when the project began it seemed clear that there was a gap in the Australia literature.

The first step in the project was to identify specific anti-terrorism laws in Australia. Having found little material on this topic, the next step was to develop a schema to identify other laws that may serve the same or similar purposes. In blunt terms, by default or design, there are no specific anti-terrorism laws in Australia. However, there is a wide and almost comprehensive range of laws that may be applicable in the anticipation of and response to an act of international terrorism that directly or indirectly affects Australia.

The second step was to identify an evaluation framework to assess the new proposals. The initial research highlighted the legal situation in the United Kingdom and United States. It also highlighted the growing body of legal commentary on the competition between safety and liberty in relation to anti-terrorism laws. The commentary seemed to have emerged slowly despite the long history of some of these laws. But it seemed to have reached a critical mass with the introduction and passage of laws in response to September 11.

In the process a number of issues and themes arose as possible points for discussion. An obvious example was the impact of proposed anti-terrorism laws on civil liberties and human rights. Other examples included the difficulty with attempting to define terrorism and the competing characterisation of terrorism as crime and terrorism as warfare. Less obvious examples involved the scope and limits of legislative power and relationships between the Parliament and the Judiciary and the Commonwealth and the States.

The project has been produced and presented in two parts. The first part, *Legislation, Commentary and Constraints*, describes proposals announced in anticipation of legislation introduced in 2002 in context of existing arrangements. It also a framework and criteria for evaluation of those laws and some more detailed analysis for parliamentary consideration. The second part, *Supporting Materials*, comprises a series of documents on specific issues related to legislative and administrative arrangements.

The purpose of the present paper is to provide information and commentary in the context of a parliamentary debate over anti-terrorist legislation. It assumes that the basic concern prompted by terrorism is the security of individuals and institutions in Australia. Governments have a range of options for responding to that fear and insecurity, and to the events which generated them. They may take military action directed at the suspected aggressors. They may join multilateral campaigns to curb or discourage such activity. They may pursue foreign policies designed to undermine support for extremist activities and/or address grievances. Domestically, they may take administrative steps such as tightening airport security and putting defence and other personnel on a higher level of alert. They may also enact laws that attempt to dismantle terrorist networks and to enhance the coercive powers of the state to investigate, prosecute and punish various conduct.

The Commonwealth Government has already taken administrative steps, and has introduced a suite of significant legislative amendments, in order to reinforce domestic legal responses to the perceived threat of terrorism and the possible existence of terrorist cells in Australia. This paper, along with its companion piece *Supporting Materials*, reviews existing statutory arrangements at the national level, including specific anti-terrorist measures related to investigation and law enforcement, and more general measures relevant to other prevention and response activities by various agencies. It briefly reviews comparative proposals in the United States and United Kingdom, focusing on the historical development of those laws in response to terrorist threats over time. In the process, the paper examines what is meant by the term 'terrorism' and it briefly considers some legal and policy issues and problems in the legislative treatment of the concept.

Part 1 of this paper surveys the broad range of laws relevant to 'terrorism' in Australia under the key headings of intelligence, prevention, crisis management and investigation. It will be of interest to readers looking for basic materials on the legislative framework for dealing with terrorism and the broad context for specific anti-terrorist laws in Australia.

Part 2 briefly describes and applies an evaluation framework to these laws and to the government's proposals announced in anticipation of legislation introduced in 2002. It will be of interest to readers looking for a basic assessment of whether specific measures are necessary, sufficient and proportionate in relation to the terrorist threat in Australia.

Part 3 broadens the focus to consider legislative powers and limits and the relationships that Parliament may have to deal with in enacting and implementing these laws. It will be of interest to readers seeking a basic institutional critique of anti-terrorism law in light of the underlying constitutional, judicial and federal features of the Australian legal system.

This paper has consciously sought to avoid conclusions or projections. If there is a thesis it is that there are dangers in *underestimating* our legislative and administrative preparedness and that there are difficulties in striking an appropriate balance between safety and liberty. While precedents are useful, we will need our own views regarding the terrorist threat in Australia and whether the measures in question are necessary, sufficient and proportionate.

Part 1 Current and Proposed Measures

The following discussion briefly examines the actions taken and legislative measures proposed by the Government in the aftermath of September 11 2001. The dominant focus, which has been refined over time, has been on controls over terrorist financing. But, there have also been a suite of other proposals which form the basis of the discussion in Part 2.

Most of the discussion in this part deals with the broader legislative environment viewed through the lens of a schema borrowed from the United Kingdom and United States. The discussion is predominantly descriptive and does not lend itself to particular conclusions. Some issues and themes arising from this discussion are pursued in Part 2 and Part 3.

1.1 Actions

On 3 October 2001 the Reserve Bank of Australia (RBA) announced that the Government had directed it to take steps under the Banking (Foreign Exchange) Regulations to block accounts which might be held by persons or organisations identified by the United Nations and United States. The list of prohibited accounts was based on the list contained in the Terrorist Financing [Executive Order 13224](#) issued by President George W. Bush that was updated on 9 November 2001. It included 27 people and groups associated with Osama bin Laden or the *Al-Qa'ida* network. These regulations have been deployed against the Taliban and Taliban-associated entities since December 1999.¹

On 8 October the Government made regulations pursuant to the *Charter of the United Nations Act 1945* (Cth) and United Nations Security Council Resolutions [1267](#) and [1373](#). The regulations would 'prevent Australian[s] or people in Australia from dealing with the financial and other assets of people or entities that engage in or support terrorism'.² The Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 prevent Australian citizens or persons in Australia from dealing with financial assets of persons or entities that engage in or support terrorism, or are under the direct or indirect control of such persons or entities. The Charter of the United Nations (Sanctions–Afghanistan) Regulations 2001 prohibit a person in Australia or a citizen of Australia from doing anything that assists, or results in provision of military equipment or services or drug related chemicals from being sold, supplied or transferred to a person in Taliban territory.

1.2 Proposals

On 28 September 2001 the Government announced measures relating to financial support for terrorist networks. The measures also included strengthening Australia's ability to combat the use of false identities in the conduct of financial transactions, enhancing the extraterritorial application of Australian laws and improving information sharing.³

On 2 October the Government announced proposed amendments to legislation to:

- permit, under warrant, the formal questioning by ASIO of people 'who may have information that may be relevant to ASIO's investigations into politically motivated violence' and the arrest by State or Federal police of people 'in order to protect the public from politically motivated violence';
- introduce new general offences based on the Terrorist Act 1994 (UK) covering 'violent attacks and threats of violent attacks intended to advance a political, religious or ideological cause which are directed against or endanger Commonwealth interests'; and
- increase AFP powers 'to search for and seize property of any kind that is used or intended to be used for terrorism or is the proceeds of terrorism'.⁴

During the General Election, on 16 October the Government announced that, if re-elected, it would introduce a retrospective criminal hoax offence 'to specifically target those who seek to terrorise others by exploiting their fear of terrorism'.⁵ On 13 February 2002, the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 was introduced.

On 28 October the Prime Minister recommended a summit of State and Territory leaders 'to develop a new framework under which transnational crime and terrorism can be dealt with by law enforcement at a Commonwealth level'. One objective of the summit would be '[a] reference of constitutional power to the Commonwealth to support an effective national response to the threats of transnational crime and terrorism'.⁶ The summit would also consider the reformation, abolition or replacement of the National Crime Authority.

After the election, on 19 November the Government announced that it would introduce air marshals 'selectively on flights provided by Australian air carriers'. The Air Security Officer Programme would be implemented by the Australian Protective Service.⁷

On 16 December the Government restated its commitment to introduce 'a specific offence of terrorism and a related offence of preparing or planning, terrorist acts' and to amend the *Proceeds of Crimes Act 1987* 'so that terrorist property can be frozen and seized'.⁸ On 18 December Cabinet agreed to a range of anti-terrorist measures including the new terrorist and terrorist financing offences and expanded powers of arrest and detention for the Australian Security Intelligence Organisation.

On 18 December the Government also announced that the first group of Air Security Officers (Air Marshals) would complete their training to help ensure aviation safety.⁹ It also restated its commitment to the various legislative changes previously foreshadowed.¹⁰

On 21 December 2001 the Government listed in the Australian Government *Gazette* the names of terrorists and terrorist organisations whose assets must be frozen by the holder of those assets under the Charter of the United Nations (Anti-terrorism Measures) Regulations 2001. It also announced a review of the performance and cost-effectiveness of

the NCA by the former AFP Commissioner, Mick Palmer and the former Secretary of the Attorney-General's Department, Tony Blunn.¹¹ The review was completed in early 2002.

1.3 Legislation in Other Countries

In 1996 Lord Lloyd of Berwick conducted a major British inquiry into anti-terrorist laws. Among other things the *Inquiry into Legislation Against Terrorism* surveyed terrorism legislation in twenty-four jurisdictions. Of those, less than half made specific provision for terrorist crime in their criminal laws, although a wide range of provisions had some application to terrorism. One quarter dealt with proscription of terrorist organisations. Most commonly, legislation dealt with special law enforcement or criminal procedures.¹² Similarly, a recent study of four decades of counter-terrorist measures in the United States suggested that the relevant laws fell into four main areas: 'alterations in surveillance measures, pursuit of suspected terrorists through the judicial system, increased penalties associated with terrorist activity, and the introduction of weapons-specific initiatives'.¹³

In terms of specific anti-terrorist legislation, if there is a typical model it is probably reflected in the following description. Terrorist laws, it has been said, generally contain:

A power for the [relevant Minister, etc.] to proscribe terrorist organisations, backed up by a series of offences connected with such organisations (membership, fundraising etc); other specific offences connected with terrorism (such as fund-raising for terrorist purposes, training in the use of firearms for terrorist purposes, etc); and a range of police powers (powers of investigation, arrest, stop and search, detention, etc).¹⁴

1.4 Legislative Framework in Australia

1.4.1 Legislative Power

The Commonwealth Parliament has no general power to legislate with respect to crime. Therefore, offences must either fall within, or be incidental to the exercise of, a head of constitutional power. 'In short, and generally speaking,' it is said, 'Commonwealth criminal law is ancillary to the performance of the responsibility of the Commonwealth to protect itself, its Constitution, its institutions and services and to enforce its own laws.'¹⁵

In particular, legislative power to deal with terrorism may be derived from a mosaic of various direct and indirect sources. Section 51 of the Constitution provides that the Commonwealth may make laws with respect to 'defence of the Commonwealth ... and the control of forces to execute and maintain the laws of the Commonwealth', 'external affairs' or 'matters incidental to the execution of any power vested by this Constitution in

Parliament'. It also gives power over corporations, banking, aliens and interstate and overseas trade and commerce. Section 122 gives it plenary power to legislate for the government of the Territories. The Commonwealth may also be able to derive relevant legislative power from its 'inherent right of self-protection' and/or its 'character and status of the Commonwealth as a national government'. On the other hand Commonwealth legislative power is hemmed in by express and implied limits which operate to protect individual liberties. Further information on these issues can be found in Part 3. Powers, Limits and Relationships under Section 3.1. Legislative Powers.

1.4.2 Specific Laws and Concepts

With the Northern Territory exception, there is no specific anti-terrorist law in Australia. Even the word 'terrorism' is seldom used to describe terrorist acts or activities. However, there are laws dealing with approximate topics such as 'politically motivated violence', 'treason', 'treachery', 'foreign incursions', 'national security', and 'organised crime'.

Terrorism

The expression 'terrorism' appears in a very limited number of Commonwealth statutes. For example, it is included in the text of incorporated international instruments.¹⁶ It is also used in the context of crisis planning agreements between defence authorities and carriers or carriage service providers under the *Telecommunications Act 1997* and in the context of a ministerial power to declare a state of emergency in relation to safety of life, vessels or installations under the *Petroleum (Submerged Lands) Act 1967*.¹⁷ In addition, it appears in the Crimes Regulations 1990 to define a 'serious Commonwealth offence' for the purposes of controlled operations under the *Crimes Act 1914* and the Air Navigation Regulations 1947 to define qualification requirements for security force personnel.¹⁸

In State and Territory legislation, 'terrorism' is also seldom used. It appears in the context of a defence against prosecution and recovery of costs arising from maritime pollution, and emergency use of surveillance devices.¹⁹ But it forms a specific division of 'offences against public order' under the *Criminal Code* in the Northern Territory which was modelled on the Prevention of Terrorism (Temporary Provisions) Act 1974-76 (UK).

Politically Motivated Violence

Significantly, 'terrorism' once appeared in the *Australian Security Intelligence Organisation Act 1979*. It was included in a list of matters incorporated by the definition of 'security' (see below). It was defined to mean 'acts of violence for the purpose of achieving a political objective in Australia or in a foreign country'; 'training, planning,

preparations or other activities for the purposes of [such acts or] violent subversion in a foreign country' and offences related to internationally protected persons or aviation.²⁰

In 1986, following the Second Hope Royal Commission,²¹ 'terrorism' was deleted from the legislation, and merged with 'subversion', to form a wider expression 'politically motivated violence'. The definition was not intended to exclude any matters originally covered. It would cover 'terrorism and related activities of the kind covered by the present definition' including 'threats of or acts causing unlawful harm to achieve a political end'.²² Thus, 'politically motivated violence' is defined to mean acts that include or may include acts or threats of violence or harm for the purpose of influencing domestic or foreign governments or overthrowing or destroying a domestic government or constitutional system. It also includes offences related to foreign incursions, hostages, ships and fixed platforms and aviation and offences related to internationally protected persons.²³

Following the Honan and Thompson review in 1993,²⁴ the broader expression was incorporated into the National Anti Terrorist Plan (NATP) *alongside* the older, narrower expression 'in recognition that many of the preventative measures applicable to countering terrorism are also appropriate against other forms of politically motivated violence'.²⁵ So, 'terrorism' is defined in the NATP as 'an extreme form of politically motivated violence'.²⁶

Treason, Treachery and Foreign Incursions

Allied to 'politically motivated violence' are offences such as 'treason', 'treachery' and 'foreign incursions'. 'Treason' covers levying war against the Commonwealth, assisting an identified enemy at war with the Commonwealth or instigating a foreigner to invade the Commonwealth. 'Treachery' covers attempts to overthrow the Constitution, attempts by force or violence to overthrow an established government in Australia or abroad, and acts of treason directed against certain proclaimed countries. 'Foreign incursions' covers attempts to overthrow a government by force or violence, armed hostilities in a foreign state, acts which place a foreign public in fear or damage foreign public property. All of these offences are covered in discrete criminal laws which are dealt with in Section 1.5.7.

National Security

While 'terrorism' is rarely used in federal statutes, 'national security' is fairly common.

The expression is used in a wider variety of statutory contexts. It is used to describe the purposes for which assistance must be provided by telecommunications carriers or carriage service providers; limits on functions of intelligence agencies; limits on access by the Inspector General of Intelligence and Security to documents; control over various space activities; a range of exempt documents for the purposes of freedom of information legislation; limits on disclosure of information in economic and fiscal reports, annual

reports of selected agencies, and suppression orders relating to pre-trial proceedings; circumstances empowering a call out of the Reserves; definition of 'serious Commonwealth offences'; conditions for refusal or cancellation of visas; exceptions to the application of environment protection laws and measures to the Commonwealth; exemptions from various copyright restrictions; and other matters.

However, while the expression 'national security' may be often used, it is seldom defined. The *Australian Security Intelligence Organisation Act 1979* defines 'security' as 'the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, or acts of foreign interference whether directed from, or committed within, Australia or not'. It includes 'the carrying out of Australia's responsibilities to any foreign country' in these matters.²⁷ This definition is incorporated, where relevant, into the *Intelligence Services Act 2001* which defines and regulates the activities of Australia's foreign intelligence agencies.²⁸

Equally, while the courts have often been called upon to consider the impact of national security on the exercise of legislative, executive and judicial power, they have seldom sought to define the concept. From what little has been said it seems clear that 'national security' is not limited to external threats but encompasses internal threats as well. It also 'looks to matters affecting the country in general rather than individual persons'.²⁹

Academically, at least, 'national security' would seem to have a double meaning. In a narrow sense it is generally used to mean intelligence and related law enforcement activity. In a wider sense it is 'capable of referring to political, social, economic, financial or military security'.³⁰ Thus, it may encompass 'all that is associated with the preservation of vital national interests' including 'important policy aspects of defence, foreign relations, trade, science and technology, and relevant aspects of general economic policy'.³¹ In this context, the references to 'national security' above probably relate to *physical* security.

Organised Crime

The concept of organised crime is relevant to terrorism in at least two ways. First, the criminal acts that constitute terrorism may involve a number of offenders and networks. Second, the participants may be involved in a diverse and integrated range of criminal activities. Thus, terrorist organisations have reportedly been using drug trafficking to raise funds and 'money laundering methodologies' to conceal and preserve the proceeds of these crimes.³² Similarly, suggestions were recently made that *Al-Qa'ida* drew substantial profits from 'short selling' of aircraft and insurance stock prior to September 11. Some links between terrorism and money laundering are explored in *Supporting Materials* 'Document 13: Money Laundering'.

Like 'terrorism', 'organised crime' has been difficult to define. The reality does not necessarily conform to stereotypical notions of hierarchical familial or cultural networks. Nor is it static, instead 'it is characterised by opportunistic, entrepreneurial and fluid affiliations of criminals where syndicates form and dissolve for particular activities'.³³ However, it is generally thought to involve sophisticated, systematic or integrated criminal networks that are formed for the purpose of satisfying a collective motive such as profit.

As with 'terrorism', few Australian statutes deal expressly with 'organised crime'.

The *National Crime Authority Act 1984* deals with the subject by defining a 'relevant offence' for the purposes of activities by the National Crime Authority. A 'relevant offence' is defined as an offence under Commonwealth, State or Territory law involving two or more persons in substantial planning and organisation using sophisticated techniques. Further, it must involve an offence such as theft, fraud, tax evasion or illegal drug dealing which is punishable by imprisonment for at least three years (s. 4). The NCA's working definition of organised crime is 'a systematic conspiracy to commit serious offences'.³⁴

1.5 General Legislation in Australia

Despite the limited use of terms such as 'terrorism' and 'politically motivated violence', and while few statutes deal specifically with 'national security', various Acts deal with issues relevant to terrorism. They may be grouped by subject matter, for example: intelligence, surveillance, migration and quarantine control, nuclear, chemical and biological weapons, aviation safety, and criminal laws. They may also be grouped according to purpose. The *Protective Security Review* suggested four categories: **intelligence** 'including threat assessments relating to terrorism and domestic violence'; **prevention** 'to deny potential terrorists the means and opportunity to achieve their purpose and to defend the likely targets of their attacks'; **crisis management** '[involving] law enforcement and other executive action in the event of a terrorist incident'; and **investigation** or, in more explicit terms, 'criminal investigation, detection, apprehension and prosecution'.³⁵

1.5.1 Intelligence

The *Protective Security Review* stated that '[i]ntelligence is the first line of defence against terrorism'.³⁶ Similarly, the 1993 Honan and Thompson review asserted that '[a] sound intelligence process, with highly trained analysts, is fundamental to crisis management'³⁷ and the 1996 British *Inquiry into Legislation against Terrorism* commented that intelligence was 'the single most important weapon in fighting terrorism'.³⁸ While these statements are perhaps obvious, the *Protective Security Review* statement was made along with a warning that 'this truism will be taken so much for granted that it will be merely paid lip service and more attention given to secondary and more visible lines of defence'.³⁹

The Australian Intelligence Community

The Australian Intelligence Community comprises: the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Signals Directorate (DSD), Office of National Assessments (ONA), Defence Intelligence Organisation (DIO), and the Defence Imagery and Geospatial Organisation (DIGO).

Broadly, ASIO, ASIS and DSD collect intelligence which is analysed by ONA, DIO and DIGO. ASIS collects intelligence outside Australia whereas ASIO collects intelligence inside Australia. ASIS collects human intelligence while DSD collects signals or communications intelligence. While ASIS collects and analyses intelligence, ASIO may also advise government(s) regarding security threats and take action to address those threats. DSD also advises government(s) regarding security of electronic information. ONA exists under the auspices of the Department of the Prime Minister and Cabinet, ASIO under the Attorney-General's Portfolio, ASIS under the Department of Foreign Affairs and Trade Portfolio whereas DSD, DIO and DIGO come under the control of the Department of Defence (DoD). Generally, the activities of these agencies are subject to scrutiny by the Inspector-General of Intelligence and Security (IGIS).

Until recently, the Australian Intelligence Community was largely ignored by statute. Thus, for seven years after its foundation in 1949, ASIO existed as a purely executive organisation until it was placed on a statutory footing in 1956.⁴⁰ Similarly, for nearly fifty years after it was established in 1952, ASIS existed pursuant to an executive order until it was given statutory clothing by the *Intelligence Services Act 2001*.⁴¹

For further information on the Australian Intelligence Community see the *Supporting Materials* paper, 'Document 6: Intelligence Agencies'.

1.5.2 Prevention

The *Protective Security Review* viewed prevention as the 'second line of defence', covering 'controls on entry to Australia, denial of means and protection of potential terrorist targets'.⁴² Similarly, the *SAC-PAV Review* saw 'prevention' as incorporating 'both the machinery to prevent entry to Australia of suspected terrorists and activities within Australia aimed at reducing the incidence of politically motivated violence'.⁴³ The *Protective Security Review* expressed the view that preventative measures needed to 'go beyond the capabilities of terrorists' in order to serve an effective protective function. But, they could also serve a deterrent function 'even if falling short of that standard'.⁴⁴

Migration

Historically, immigration control has been a significant aspect of preventive measures. For example, the first attempts at an international response to terrorism emphasised extra-territorial jurisdiction, extradition and immigration control.⁴⁵ The *Protective Security Review* of 1979 did canvass the issue of entry controls, emphasising border protection alongside control over breaches of temporary entry conditions, but the bulk of its discussion was excised from the main report in a classified appendix.⁴⁶

Generally visa applicants must meet various public interest criteria. These include that the applicant passes the character test, that he or she is not assessed (by ASIO, etc.) to be directly or indirectly a risk to national security, and that his or her presence in Australia will not (according to the Foreign Minister) prejudice international relations or be directly or indirectly associated with the proliferation of weapons of mass destruction.⁴⁷ An applicant will fail the character test if, among other things, he or she has a substantial criminal record; if, having regard to his or her past or present general or criminal conduct, he or she is of bad character; or if he or she poses a significant risk in relation to inciting discord in or representing a danger to the community or a segment thereof.⁴⁸ In considering an applicant's past or present general conduct a decision maker may take into account any 'activities indicating contempt, or disregard, for the law or for human rights', including his or her involvement in activities such as 'terrorism [or] political extremism'.⁴⁹

The statutory natural justice procedures apply unless the decision is made personally by the Minister. The provisions permit the Minister *on the grounds of national interest* to set aside favourable decisions made by his or her delegate and to issue 'conclusive certificates', effectively preventing merits review of these decisions.⁵⁰ The character test provisions were essentially introduced with the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1999*.

The Minister *may* refuse or cancel a visa where the person fails the character test. The Minister *may* also cancel a visa if he or she is satisfied that the visa holder's presence in Australia 'is, or would be, a risk to the health, safety or good order of the community'.⁵¹ He or she *must* cancel a visa if various prescribed grounds exist, including, that the visa holder has been assessed as posing a direct or indirect threat to national security, or that his or her presence in Australia would be prejudicial to international relations or may be directly or indirectly associated with the proliferation of weapons of mass destruction.⁵²

It is worth noting that the Government may, in accordance with international law, amend the Migration Regulations 1994 to exclude government officials from a particular country based on that country's complicity in acts of terrorism. For example, under regulations made in 1996, Sudanese government and armed forces members and officials are not eligible for *any* visa unless the Minister is satisfied that there are compelling reasons.⁵³

The Minister may order the deportation of non-citizens in various circumstances. These include that the non-citizen has been a permanent resident for less than 10 years and has

been sentenced to imprisonment for at least a year, that he or she has been the subject of an adverse security assessment by ASIO and his or her conduct, whether inside or outside Australia, constitutes a security threat to the Commonwealth, a State or Territory, or that he or she has been convicted of a specified or prescribed serious offence.⁵⁴ Under the Department of Immigration and Multicultural and Indigenous Affairs *Migration Series Instructions*, these 'serious offences' include (undefined) 'terrorist activity'.⁵⁵

In considering whether to allow a person who has failed the character test to enter or remain in Australia, any 'terrorist activity' is considered to be a 'very serious offence'.⁵⁶ Similarly, in considering whether to deport a person, 'terrorist activity' may also constitute a 'serious offence'.⁵⁷ Perhaps significantly, 'terrorist activity' is included in these lists without any requirement that the activity involve any criminal charges or convictions.

Proscription

Australia has had a long history of proscription, beginning in the context of World War I and expanding significantly in the aftermath of the Russian Revolution of 1916. Under the *Unlawful Associations Act 1916* any organisation which 'by its constitution or propaganda, advocates or encourages ... the taking or endangering of human life, or the destruction of property' was an unlawful association. The *Unlawful Associations Act 1917* expanded these measures by empowering the Governor-General to declare unlawful associations, creating offences relating to membership and contributions and dealing with forfeiture.

The current unlawful associations provisions, which focus on revolutionary and seditious conduct, were introduced primarily by the *Crimes Act 1926*. During the 1925 General Election, the incumbent Bruce Government had asserted that 'the paramount issue in this campaign is the maintenance of law and order, and the supremacy of constitutional government'.⁵⁸ The provisions, which were introduced alongside provisions dealing with powers of arrest without warrant and offences related to serious industrial disputes, were considered to reflect a 'clear and definite mandate'⁵⁹ to 'defeat the nefarious designs of the extremists in our midst'.⁶⁰ They were 'aimed chiefly at the rising Communist Party'.⁶¹

The *Communist Party Dissolution Act 1950* sought largely to continue this tradition, but with a specific focus on the Australian Communist Party. The Act attempted to dissolve this organisation and provided means to declare related associations unlawful. As noted in Section 3.1.3 it was held to be constitutionally invalid in the *Communist Party case*.⁶²

Part IIA of the *Crimes Act 1914* declares unlawful any association which directly or indirectly 'by its constitution or propaganda or otherwise advocates or encourages the overthrow of the Constitution ... by revolution or sabotage' or the overthrow by force or violence of the established government of the Commonwealth or of a State'. The Federal Court, on the motion of the Attorney-General and after providing a hearing, may declare an association to be unlawful. It is an offence to be a member of, or to represent, an

unlawful association. Similarly, it is an offence to publish, sell or distribute material produced by an unlawful association, or to let premises to such an association.⁶³

Contributions, Financial Assistance and Forfeiture

As with proscription, there is no Commonwealth Act which deals explicitly with contributions or assistance to terrorist organisations or forfeiture of terrorist property. However, under the unlawful associations provisions in the *Crimes Act 1914* it is an offence to 'give or contribute money or goods' or 'receive or solicit subscriptions or contributions of money or goods' for an unlawful association (s. 30D) and any property held by or for the benefit of an unlawful association is forfeited to the Commonwealth (s. 30G). The Commonwealth Government has also taken non-legislative steps in relation to controlling financial assistance to terrorist organisations. On 21 October 2001 it signed the [*Convention for the Suppression of the Financing of Terrorism of 1999*](#).⁶⁴ The Convention states that countries will take action against people or countries that provide or collect funds for terrorist purposes. Essentially the Convention aims to starve terrorists of assets.

Proceeds of Crime

Under the *Proceeds of Crime Act 1987* authorities have the power to confiscate assets or money used in, or acquired as a result of, serious offences against Commonwealth or Territory laws. Assets may be frozen to prevent them being dissipated or removed from the jurisdiction. Authorities also have extra powers of search and seizure to trace and identify the proceeds, benefits or property of crime. Property that remains confiscated or restrained six months after conviction is forfeited automatically to the Commonwealth.

Asset Freezing and Transaction Blocking

One of the first responses in the United States to the September 11 attacks was to freeze the assets of organisations associated with *Al-Qa'ida*. On September 23 President Bush issued the Terrorist Financing [*Executive Order 13224*](#) which imposed financial sanctions on a list of proscribed organisations. The President described these measures as 'a major thrust of our war on terrorism'⁶⁵ and as 'the first strike in the war against terror'.⁶⁶ On November 7 the President announced that the United States had blocked assets of a further 62 organisations and individuals under the authority of *Executive Order 13224*. *Executive Order 13224* was issued pursuant to various statutory authorities dealing with national security and foreign relations,⁶⁷ particularly in light of United Nations Security Council Resolutions (see *Supporting Materials*, 'Document 4: Terrorism and the United Nations').

While there is no Commonwealth Act expressly permitting asset-freezing or transaction-blocking in respect of terrorism and terrorist activities, the Commonwealth has also been able to take measures to implement various international resolutions. As indicated above, the Government has made regulations designed to implement aspects of the United Nations Security Council Resolutions [1267](#) and [1333](#) under the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001. Under the *Charter of the United Nations Act 1945* the Government has power to give effect to resolutions of the United Nations in domestic law. The Governor-General may make regulations giving effect to binding decisions that the Security Council has made under Chapter VII of the Charter of the United Nations in so far as those decisions require Australia to apply measures not involving the use of armed force (s. 6).

The Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 allow the Minister (currently the Foreign Minister) to 'proscribe' a person or entity involved in terrorist acts. The Minister may also list assets or classes of assets that are owned or controlled by such persons. The regulations provide that a legal person (for example a bank) who holds assets that are owned or controlled by a proscribed person or entity must not use or deal with or allow an asset to be used or dealt with. A fine of up to \$5500 applies for a breach. It is also an offence if a person makes an asset available to a proscribed person and is reckless to whether or not the person or entity is proscribed. The provision requires institutions such as banks to thoroughly examine their accounts to ensure that they do not hold assets belonging to a proscribed person. Use or dealings can be authorised to allow humanitarian activities to take place.

The Charter of the United Nations (Sanctions–Afghanistan) Regulations 2001 prohibit a person in Australia or a citizen of Australia from doing anything that assists, or results in:

- arms or related materiel being sold, supplied or transferred to Taliban territory; or
- technical advice, training and other assistance in relation to the military activities of the armed personnel of the Taliban being sold, supplied or transferred to the Taliban;
- acetic anhydride, a chemical used in the cultivation of opium poppy, being sold, supplied or transferred to a person in Taliban territory, or to a person for the purpose of an activity carried on in, or operated from, Taliban territory.

The regulations also prohibit the use of Australian aircraft or ships in relation to points 1 or 2 above and prohibit a person in Australia, or a citizen of Australia, from dealing with financial assets of the Taliban or Osama bin Laden, or individuals associated with them. A fine of up to \$5500 applies for a breach of the regulations.

1.5.3 Crisis Management

Aid to the Civil Power / Aid to the Civil Community

From the Commonwealth's perspective, one of the most important forms of response to a terrorist incident is the use of the Australian Defence Forces and Reserves. Generally, the Australian Defence Force may provide either Defence Assistance to the Civil Community (DACC) or Defence Aid to the Civil Power (DACP). The essential difference is that the former involves non-controversial assistance to civilian authorities whereas the latter involves assistance to law enforcement agencies that expressly contemplates the use of force. In common parlance, defence aid to the civil power is 'calling out the troops'.⁶⁸

Further details on DACC and DACP can be found in *Supporting Materials*, 'Document 8: Role of the Defence Force'.

Disaster Legislation

Various State and Territory Acts deal with disaster management.⁶⁹ However, disaster management is primarily an administrative issue and little if any nexus with legislation. A brief overview of the issues and structures can be found in *Supporting Materials*, 'Document 9: Crisis Management Issues and Structure'.

1.5.4 Investigation

Clearly, to the extent that terrorism is characterised as a criminal issue, 'investigation' will be a significant part of the pre-emptive and responsive counter-terrorist machinery. As noted above, where jurisdictions have enacted specific anti-terrorist laws, those laws have most commonly dealt with special law enforcement or criminal procedures. Specifically, it seems that most specific measures in this area have focused on 'alterations in surveillance measures, pursuit of suspected terrorists through the judicial system, increased penalties associated with terrorist activity, and the introduction of weapons-specific initiatives'.⁷⁰

The following discussion examines the framework of Australian 'investigation' laws. For present purposes the key categories are **law enforcement agencies** and **law enforcement methods, offences and cooperation with foreign countries**.

1.5.5 Law Enforcement Agencies

Various law enforcement agencies have a potential counter-terrorist role, including the Australian Federal Police (AFP), the National Crime Authority (NCA) and the Australian Protective Service (APS). Mention should also be made of the Australian Bureau of Criminal Intelligence (ABCI) and the Office of Strategic Crime Assessments (OSCA).

While the AFP currently has a more significant role in relation to counter-terrorism, arguably, the NCA has the most significant functions and powers. It has two types of functions which may be of particular relevance to terrorist investigations.

Its general functions are to 'investigate and combat serious organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence' to law enforcement agencies and public inquiries to which it is relevant.⁷¹ These functions can be exercised on its own initiative.⁷² They include collecting, analysing and disseminating criminal information and intelligence, investigating matters of its own choosing, making arrangements for the establishment of task forces and co-ordinating their work. The NCA's coercive powers cannot be exercised in relation to its general functions.

Its special functions are to investigate matters referred to it, which relate to 'a federally relevant criminal activity'.⁷³ A 'federally relevant criminal activity' includes any 'relevant offence' against Commonwealth law or State or Territory law which has 'a federal aspect'.⁷⁴ A State or Territory offence will have a 'federal aspect' if its physical elements or the circumstances in which it was committed fall within federal legislative power.⁷⁵

As indicated above, the Government has recommended that a summit of State and Territory leaders consider improving law enforcement networks to deal with transnational crime and terrorism, including the reformation, abolition or replacement of the NCA. One commentator has suggested that '[t]he Government is likely to seek to expand its national role, but place it under the management of the Australian Federal Police'.⁷⁶

Further details on the law enforcement agencies can be found in *Supporting Materials*, 'Document 7: Law Enforcement Agencies'.

1.5.6 Law Enforcement Methods

Telecommunications Interception

Under the *Telecommunications Act 1997* carriers and carriage service providers are required to give officers and authorities of the Commonwealth 'such help as is reasonably necessary' to enforce criminal laws and to safeguard national security such help includes the provision of interception services including services covered by interception warrants

under the *Telecommunications (Interception) Act 1979*. Generally, assistance is given in accordance with an agreement between the carrier or carriage service provider and the relevant authority and is to be given on a cost-neutral basis.⁷⁷

Under the *Telecommunications (Interception) Act 1979* warrants can be obtained for two purposes. The first is national security. The second is law enforcement. The Attorney-General may issue warrants for the interception of telecommunications where the subject of the warrant is reasonably suspected of engaging in activities prejudicial to national security. An application is made to the Attorney-General by ASIO's Director-General. In certain circumstances, the Director-General may issue a warrant for a limited period if waiting for the Attorney-General's response would seriously prejudice national security.

Where a law enforcement agency wishes to obtain an interception warrant, an application must be made to an 'eligible judge' or a nominated member of the Administrative Appeals Tribunal. Interception warrants can only be issued in relation to the investigation of what are called class 1 and class 2 offences. Class 1 offences include murder, kidnapping and narcotics offences. Class 2 offences include offences punishable by imprisonment for life or a period of at least seven years and offences where the offender's conduct involves serious personal injury, drug trafficking or serious fraud.

The Act also enables warrants to be issued in respect of telecommunications services and named persons (ie in relation to any telecommunications service that a named person uses or is likely to use).

Before the Parliament was prorogued for the 2001 General Election, the Telecommunications Interception Legislation Amendment Bill 2001 was introduced to enable telecommunications interception warrants to be issued for the purposes of investigating serious arson and child pornography where the relevant offence attracts a penalty of at least seven years imprisonment. The Bill lapsed when the election was called.

Listening Devices

Three Commonwealth laws govern the issuing and use of listening device warrants. They are the *Customs Act 1901*, the *Australian Federal Police Act 1979* and the *Australian Security and Intelligence Organisation Act 1979*. Under the Customs Act, listening device warrants can be obtained for the investigation of narcotics offences. Under the Australian Federal Police Act, listening device warrants can be obtained for the investigation of non-narcotics offences categorised as either class 1 general offences or class 2 general offences. Class 1 offences include murder and kidnapping. Class 2 offences include offences carrying a penalty of 7 years or more imprisonment which involve a risk of loss of life, serious personal injury or serious damage to property and drug trafficking.

Under the *Australian Federal Police Act 1979*, a judge or, following amendments to the Act in 1997, certain nominated members of the Administrative Appeals Tribunal may issue listening device warrants.⁷⁸ They may relate to a particular person, particular premises, or, following amendments in 2001, a particular item.⁷⁹ Under the *Australian Security and Intelligence Organisation Act 1979* the Minister may issue listening device warrants.⁸⁰ The Act provides expressly for warrants in relation to a particular person or a particular premises, but is silent as to whether devices can be used for particular items. It is possible that such warrants could not be issued by the Minister under the Act.⁸¹

Tracking Devices

The *Australian Security and Intelligence Organisation Act 1979* provides for warrants which allow ASIO to use devices to track persons or objects where the Attorney-General is satisfied there is a reasonable suspicion of activities prejudicial to security and a likelihood that the device will assist ASIO in gathering intelligence.⁸²

Computer Access

The *Australian Security and Intelligence Organisation Act 1979* provides for search warrants which allow ASIO to use computers to access data relevant to security, to print copies to take away from the premises, to make electronic copies and to alter, add to or delete data. It also provides for 'computer access warrants' which permit the use of electronic means to access data relevant to security which is stored in a target computer.⁸³ This includes the ability to add, delete or alter data in the target computer, copy data, do anything necessary to conceal activities under the warrant and do anything else reasonably incidental. A note in the legislation makes clear that acting under a warrant will exempt an ASIO operative from criminal liability which would otherwise apply.

Controlled Operations

It is often thought that convictions cannot be obtained by 'entrapment'. In *Ridgeway v. Queen* the High Court clarified this misconception, rejecting the suggestion that there was a substantive defence of 'entrapment' in the common law,⁸⁴ but confirming that evidence obtained by criminal inducement could be ruled inadmissible as a matter of public policy.⁸⁵ As a result most jurisdictions passed statutory 'controlled operations' regimes.⁸⁶

Under the *Crimes Act 1914* law enforcement officers are protected from civil and criminal liability arising from conduct undertaken in a 'controlled operation' for the prosecution of a 'serious Commonwealth offence'. To be protected, the officer must act in accordance with a controlled operations certificate and must not intentionally induce a person to commit an

offence that they would not otherwise have intended to commit. An authorised officer may issue a 'controlled operation' certificate if he or she is satisfied, among other things, that the controlled operation is justified and there are limits or controls on the extent of unlawful activity, possession of illicit goods or harm to others.⁸⁷ Controlled operations are subject to some ministerial and parliamentary scrutiny.⁸⁸

'Serious Commonwealth offences' include crimes subject to 3 or more years imprisonment that involve money laundering, armament dealings, espionage, sabotage, threats to national security, misuse of computer or electronic communications and importation of prohibited imports or exportation of prohibited exports. They also include offences subject to 3 or more years imprisonment that involve 'violence' or 'terrorism'.⁸⁹

Assumed Identities

The *Measures to Combat Serious and Organised Crime Act 2001* enables intelligence officers and law enforcement officers⁹⁰ to use a statutory regime for assumed (false) identities. The Minister's Second Reading Speech explained the assumed identities provisions in the following way: 'Assumed identities are false identities adopted to facilitate intelligence and investigative functions, or infiltration of a criminal, hostile or insure environment with a view to collecting information and investigating offences'.⁹¹

Special Hearings

The *National Crime Authority Act 1984* empowers the NCA to exercise special powers when carrying out its special functions. These include 'hearings, including compulsory appearances and production of documents, imposition of penalties and warrants for search and seizure, for arrest and for interception of communications'.⁹² In the hearings context, a member of the NCA may require a person to appear before him or her and produce a specified document or thing that is relevant to a special investigation. Failure to comply is an indictable offence subject to a maximum fine of \$20 000 or 5 years' imprisonment.⁹³

1.5.7 Offences

Terrorism

As indicated, there is no Commonwealth offence of 'terrorism', but it is worth considering the law in the Northern Territory. Under the *Criminal Code* (NT) it is an offence to commit a terrorist act, which is liable to imprisonment for life. A terrorist act involves 'the use or threatened use of violence to procure or attempt to procure the alteration, cessation

or doing of any matter or thing established by a law of ... a legally constituted government or other political body'. It is an offence to obtain or procure goods or services for the purposes of a terrorist act and a court may order that such property be forfeited. It is also an offence to knowingly belong to, be involved in, or assist, support an unlawful organisation. It is even an offence to address a meeting of an unlawful organisation. An 'unlawful organisation' is one that, in the opinion of the court, 'uses, threatens to use or advocates the use of unlawful violence in the Territory to achieve its ends'.⁹⁴

According to the Northern Territory Government the provisions were enacted in response to various domestic and international concerns: 'Darwin was only 320 kilometres from Indonesia; there had been considerable terrorist action around the world by Moluccan guerillas; and there had been an aeroplane hijacking incident in Alice Springs in 1972'.⁹⁵ According to its drafters, the terrorism provisions were drafted so as to take into account 'the Territory's isolation and its geographical position as a gateway to Australia'.⁹⁶ While it is difficult to measure the significance of these arguments or incidents in retrospect,⁹⁷ it seems clear that any of these concerns could have been dealt with under Commonwealth law. Some two years later, in correspondence with the Prime Minister, the Chief Minister suggested 'there are acts that are not and cannot be the subject of Commonwealth law', citing a hypothetical example 'where a person threatened to set off explosions in public places unless a demand-such as the release of a prisoner-was complied with'.⁹⁸ At the time the Northern Territory Opposition Leader, acknowledging that the Commonwealth might have 'constitutional limitations', recommended that it assume jurisdiction through a referral of powers by the States under section 51(xxxiii) of the Constitution.⁹⁹

Treason, Treachery, Sabotage and Sedition.

The *Crimes Act 1914* deals with a number of offences against the government including treason, treachery, sabotage and sedition. These offences were largely codified from the common law in a wholesale reform of the *Crimes Act 1914* by the *Crimes Act 1960*. The reform implicitly acknowledged the threat of 'non-conventional' or 'asymmetric' warfare and the need to address external threats to the Constitution, government or defence of Australia and internal threats to the government or defence of foreign countries. 'Treason' covers levying war against the Commonwealth, assisting an identified enemy at war with the Commonwealth or instigating a foreigner to invade the Commonwealth. 'Treachery' includes any act done with the intent to overthrow the Constitution by revolution or sabotage. It includes 'the overthrow by force or violence of the established government of the Commonwealth, of a State or of a proclaimed country' and acts of treason committed within the Commonwealth directed against a proclaimed country. (These are similar acts to those covered in 'politically motivated violence' and unlawful associations provisions.) 'Sabotage' includes destroying or damaging weapons or articles used by the ADF with the intention of prejudicing the safety or defence of the Commonwealth (s. 24AB).

The *Crimes Act 1914* also contains offences of unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, and taking unlawful soundings.¹⁰⁰ Before Parliament was dissolved for the 2001 General Election, the Government introduced a Criminal Code Amendment (Espionage and Related Offences) Bill 2001 which would have reformed the law relating to espionage and similar activities, introduced some increased penalties and repealed some existing offences (eg harbouring spies and unlawful drilling). The Minister's Second Reading Speech stated that the Government sought 'to ensure that the offences in the Bill establish an effective legal framework that both deters, and punishes, people who intend to betray Australia's security interests':

As part of our review we have considered such things as technological advances in information management and communication as well as international standards and experience. As a result, the proposed offences are consistent with equivalent provisions in the United States, the United Kingdom, New Zealand and Canada.¹⁰¹

The Bill lapsed when Parliament was dissolved.

Foreign Incursions

The *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence to recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil. It is an offence to 'engage in hostile activity in a foreign state' or to 'enter a foreign state with intent to [do so]'. It is also an offence to do preparatory things for the same purposes. And it is an offence to 'give money or goods to, or perform services for, any other person or any body or association of persons for the purpose of supporting or promoting [these activities]'. 'Hostile activities' include any acts done for the purpose of overthrowing a government by force or violence, engaging in armed hostilities in a foreign state, placing a foreign public in fear and causing damage to foreign public property. They exclude activities undertaken in the service of a foreign power's armed forces.¹⁰²

In essence this corresponds to the offence of treason committed against a foreign power.

The offender must be an Australian citizen, ordinarily resident in Australia or resident in Australia for at least a year for purposes connected to these acts. Proceedings may not commence unless the Attorney-General has given his or her consent. Pending this consent, a person may lawfully be arrested, charged or remanded in custody or on bail.¹⁰³

Other Offences

Aside from these specific offences there are a wide range of other general offences which may apply to a particular terrorist incident. These include offences relating to (federal) property, computers, postal and telecommunications services, hostage taking, heads of

state and other internationally protected persons, aviation, shipping, biological, chemical and nuclear weapons and weapons of mass destruction.

Further information on these general offences can be found in *Supporting Materials*, 'Document 10: General Commonwealth Offences'.

1.5.8 Cooperation with Foreign Countries

It is a paradox that our laws are largely domestic but the threat is largely international. In the *Protective Security Review*, Justice Hope suggested that the threat of international terrorism in Australia was more significant than the threat of civil unrest: 'the greatest risk appears to be the possibility of international terrorist activity originating from abroad'.¹⁰⁴

A wide range of issues may arise in relation to criminal procedure where foreign countries are drawn into the picture. Particular issues may arise in relation to extraterritorial application of Australian laws, extradition, mutual assistance with other countries in criminal matters, prisoner exchange arrangements and other practical considerations.

The issue of extraterritoriality is discussed further in *Supporting Materials*, 'Document 11: Extraterritorial Application of Australian Laws' and further information on issues related to extradition, mutual assistance, etc. is in 'Document 12: International Cooperation'.

Part 2 Evaluation Commentary and Issues

The following discussion seeks to draw out the key issues and themes arising from the descriptive survey of legislation provided in Part 1. The focus of attention is largely on the proposals announced by the government prior to the introduction of legislation in 2002. It leaves open some of the broader institutional issues which are considered in Part 3.

One of the key difficulties for the Parliament when considering anti-terrorist legislation is how the terrorist threat to Australia can be measured independently of the threat to other countries which may be considered by virtue of the apparent precedent value of their laws. Having identified a real or feared threat to Australia, and having decided that a response is necessary, Parliament must then determine its nature and extent, taking into account the difficulties in defining and dealing with terrorist behaviour and the need to balance the protection of collective public safety with the protection of individual civil liberties.

2.1 The Pressure to Act

Australia is under pressure from two sides to take measures to address terrorism both locally and globally. On one side is an open-ended requirement from the United Nations Security Council requiring States to take comprehensive measures to combat terrorism. On the other side are strong precedents set by the United Kingdom and United States which far exceed these requirements, particularly in the context of law enforcement powers.

2.1.1 United Nations

In Resolution [1373](#) the Security Council consolidated its previous comments on the need for stronger and more cooperative measures among States. It 'decided' that 'all States shall ... prevent and suppress the financing of terrorist acts [and shall] [c]riminalize the wilful provision or collection ... of [terrorist] funds by their nationals or in their territories'. It also required States to ensure that terrorists, their accomplices and supporters are brought to justice, and that 'terrorist acts are established as serious criminal offences in domestic laws ... and that the punishment duly reflects the seriousness of such terrorist acts'.¹⁰⁵ On 17 November 2001, the International Monetary Fund backed this move by expressing grave concern at the use of the international financial system to finance terrorists acts and to launder the proceeds of illegal activities. It called on all member countries to ratify and implement fully the UN instruments to counter terrorism, particularly Resolution [1373](#).

Resolution [1373](#) was not the first exhortation in relation to anti-terrorism measures. The General Assembly has made repeated calls over three decades for States to enact anti-terrorist laws which deal with criminalising terrorist acts, state sponsorship of terrorism and the links between terrorism and organised crime. The Security Council has made calls over recent years dealing specifically with Afghanistan, the Taliban and Osama bin Laden. For further information see *Supporting Materials*, 'Document 4: Terrorism and the United Nations'.

At the same time, other United Nations bodies have recently urged caution. For example The United Nations Committee Against Torture recently reminded states in considering anti-terrorist laws of the 'non-derogable nature of most of the obligations undertaken by them in ratifying the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]'.¹⁰⁶ The High Commissioner for Human Rights also urged states enacting such laws 'to refrain from any excessive steps, which would violate fundamental freedoms and undermine legitimate dissent'¹⁰⁷ and expressed concern over the detention of prisoners at the United States Naval Base at Guantanamo Bay, Cuba.¹⁰⁸

2.1.2 United Kingdom and United States

Recently the United Kingdom and United States have enacted laws to further strengthen their suite of anti-terrorism laws in the aftermath of the September 11 Attacks. The [Anti-Terrorism, Crime and Security Act 2001](#) (UK) amended the Terrorism Act 2000 to increase powers over terrorist financing, immigration, terrorist weapons, aviation safety, criminal investigation and law enforcement. The [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act](#) of 2001 (US) amended and extended a range of existing laws to strengthen treatment of terrorist financing, immigration, organised crime, criminal investigation and intelligence gathering.

As with the resolutions above, these measures have a considerable historical context. For example, the United Kingdom legislation is based in large part on legislation that was first introduced over six decades ago in response to attacks by the Irish Republican Army. Between 1974 and 2000 a series of Prevention of Terrorism (Temporary Provisions) Acts were passed to address the changing situation and concomitant threat in Northern Ireland. Similarly, the United States legislation supplements measures that were first taken at least two decades ago in response to a long cycle of terrorist acts against the United States. The measures were amended and extended in response to various incidents, including the Oklahoma City bombing in April 1995. Both the United Kingdom and United States laws can be characterised as the result of a piecemeal increase in anti-terrorist powers in response to particular terrorist incidents or patterns over time that correspond to a gradual decrease in civil liberties protection by incremental amendment and extension.

For further information on these jurisdictions see *Supporting Materials*, 'Document 2: Legislation in the United Kingdom' and 'Document 3: Legislation in the United States'.

2.1.3 The Obligation to Act

While there may seem to be strong pressure on Australia to enact tough anti-terrorist laws, realistically the obligations are far less exacting. Substantively, all that Resolution [1373](#) requires is that Australia ensure that its laws criminalise terrorist activities, that those laws deal with terrorist financing and material support for terrorist organisations and that they be applied or enforced in conformity or conjunction with other foreign jurisdictions. Arguably, anything more, for example along the lines of the United Kingdom and United States approaches, exceeds our obligations to the international community. Following these precedents may be dangerous for Australia. First, overseas *experiences* may provide little guidance as to the particular threat facing Australia. Second, overseas *reactions* may provide little certainty regarding the extent to which safety can be guaranteed. Third, overseas *critiques* may provide ample evidence of the impact on civil liberties.

2.2 The Framework for Action

2.2.1 The Evaluation Framework

In the report, *Inquiry into Legislation Against Terrorism*, Lord Lloyd of Berwick observed that '[i]t is an illusion to believe that the fanaticism and determination of well established terrorist organizations can be defeated by laws alone, even of the most severe and punitive kind'.¹⁰⁹ He concluded that 'there is no legislative "fix" or panacea against terrorism'.

Various commentators have put forward general principles that should govern legislation dealing with terrorism and counter-terrorism. In the United Kingdom one set of commentators suggested three principles: 'equality of treatment before the law; fairness in application of the law and respect for certain basic principles of human dignity'.¹¹⁰ The inquiry by Lord Lloyd of Berwick, which preceded the enactment of the Terrorism Act 2000 (UK), expanded upon these categories, emphasising proportionality:

- (i) legislation should approximate as closely as possible to the ordinary criminal law and procedure;
- (ii) additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual;
- (iii) the need for additional safeguards should be considered alongside any additional powers; [and]
- (iv) the law should comply with [the nation's] obligations in international law.¹¹¹

The inquiry also put forward three principles regarding administration of these laws:

- (i) all aspects of the anti-terrorist policy and its implementation should be under the overall control of the civil authorities and, hence, democratically accountable;
- (ii) the government and security forces must conduct all antiterrorist operations within the law;
- (iii) special powers, which may become necessary to deal with a terrorist emergency, should be approved by the legislature only for a fixed and limited period.¹¹²

2.2.2 Balancing Safety with Liberty

One of the strongest themes in terrorism and antiterrorism discourse is the difficulty of balancing safety with liberty. In theory, it is possible to achieve security objectives without threatening individual liberty and the protection of the rule of law. However, in the 'heat of the moment' there may be a strong tendency toward conflict and compromise. So, 'as the dynamics have taken over America's response to terrorism ... a battle between civil liberties, on the one hand, and vulnerability to terrorism, on the other, has emerged'.¹¹³

The judiciary has expressed caution against potential excess. Member of the judiciary in the United States,¹¹⁴ the United Kingdom¹¹⁵ and Australia¹¹⁶ have urged caution against potential excess. Other arms of government have found it more difficult to be so adamant. The standard line in the United States, the United Kingdom and Australia has been simply to acknowledge if not resolve the complex competing interests of safety and liberty.¹¹⁷ More recently the Prime Minister expressed the standard line in the following way:

On the one hand we don't want to move away from the relatively easy carefree approach that Australians traditionally have adopted in relation to both domestic and overseas travel. ... On the other hand we do need to take measures to upgrade security ... [I]n a sense a government is damned if it does and it damned if it doesn't. If we don't respond and an incident occurs people are entitled to criticise us. And there's always the haunting worry of course that whatever response is taken an incident might still occur.¹¹⁸

These observations emphasise the need for proportionality not only in relation to each individual measure and its effect on terrorism, but across the broad range of legislative and executive measures in existence at any given time, and across the various amendments and alterations that appear in response to or anticipation of particular terrorist incidents.¹¹⁹

2.3 Applying the Framework

The above discussion suggests the key questions for Parliament are whether the existing laws are necessary, sufficient or proportionate in relation to the particular threat facing Australia. Comparative approaches to counter-terrorism are a relevant part of the debate in Australia as is a measured appreciation of the specific terrorist threat in Australia.

In order to deal with the issues comprehensively, a clear appreciation is needed of:

- the subject matter of the laws (terrorism v other offences or national security issues?)
- the actual or possible terrorist threat facing Australia (domestic v global?)
- our present level of preparedness (are present arrangements sufficient?) and
- the standards against which they will be measured in terms of:
 - intended effects (to what extent will the laws guarantee security?) and
 - incidental effects (to what extent will they infringe civil liberties?)

2.3.1 The Subject Matter

One of the most difficult issues in anti-terrorism discourse is the problem of definition. There has been a longstanding debate on the causes and consequences of terrorism, but the debate on the threshold question of definition has been even more enduring. As one commentator has noted '109 different definitions of the term were advanced between 1936 and 1981, and more have appeared since'.¹²⁰ Another commentator likened discussion on terrorism to the Bermuda Triangle – 'much goes in, but not much comes out'.¹²¹

Clearly, a large number of definitions have been proposed domestically and internationally to describe terrorism but no comprehensive working definition has emerged. On the one hand, they may reflect differences in precision, emphasis or perspective. On the other hand, they may reflect differences in the underlying phenomena. Assuming that the definitions deal with a common phenomenon, the following may be representative:

[T]he use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and/or fear-inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to ... political [etc.] demands.¹²²

Thus, across the various definitions in current use, there appear to be a few core elements: acts or threats of violence or criminality that are significant in seriousness or magnitude which are motivated by political, social or ideological objectives and/or intended to influence a government or intimidate or coerce the public or a section of the public.

The issue for present purposes is not that there is a degree of consensus on definitions. The issue is that the consensus is event driven and that it waxes and wanes over time and place. In reality, 'terrorism' is multi-faceted. It is difficult to conceptualise or operationalise. While the elements of criminality, seriousness, motivation and intention may be identifiable, a terrorist act does not fall neatly into legislative categories such as war powers, criminal laws or rules of personal liberty, or disaster management laws.

Moreover, 'terrorism' is subjective. It is a label which is 'both political and perjorative'. The classic statement is that '[w]hat might appear as an evil act of terrorism to people in an affluent Western society may seem like a reasonable and legitimate political action to a liberation or rebel movement operating in the poverty-stricken and desperate conditions in the Third World'.¹²³ 'One person's terrorist is another person's freedom fighter'.

These tensions are particularly evident in the competition between the criminal and military characterisation of terrorist acts. One side views terrorism as a form of 'asymmetric' warfare in which one participant to a conflict simply avoids the conventional military strengths of the other and focuses on its civilian weaknesses. The other side views it as a crime, distinguishable perhaps by its seriousness, motivation or intention.

These observations have equal relevance in relation to Australia. Having canvassed some of the issues above, an official report noted in 1993 that: '[w]e suspect that the nature of

terrorism and its relationship to politically motivated violence probably means that no one 'definition' would be satisfactory, or widely accepted in the Australian community'.¹²⁴ For this reason perhaps, 'defining the term itself creates more problems than it solves'.¹²⁵

For further information on definitional issues see *Supporting Materials*, 'Document 1: What is Terrorism?'

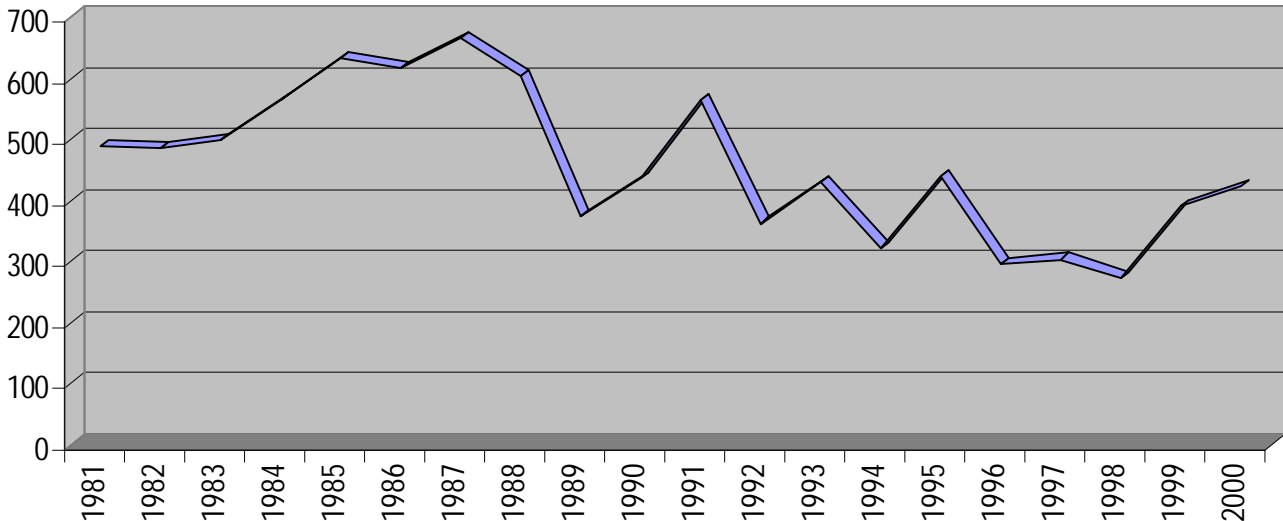
2.3.2 The Threat in Australia

Clearly, Australia has not had the same exposure to terrorism or experience with anti-terrorism laws as the United Kingdom or United States. And there does not seem to be any public awareness of the threat, or possible threat, of international terrorism in Australia.

Possibly our first and only exposure to international terrorism was the bombing of the Sydney Hilton Hotel in March 1978. Since then we have been exposed to possible terrorist threats particularly in the context of the Commonwealth Games in 1982, the Sydney Olympics in 2000 and the Commonwealth Heads of Government Meeting in 2002.

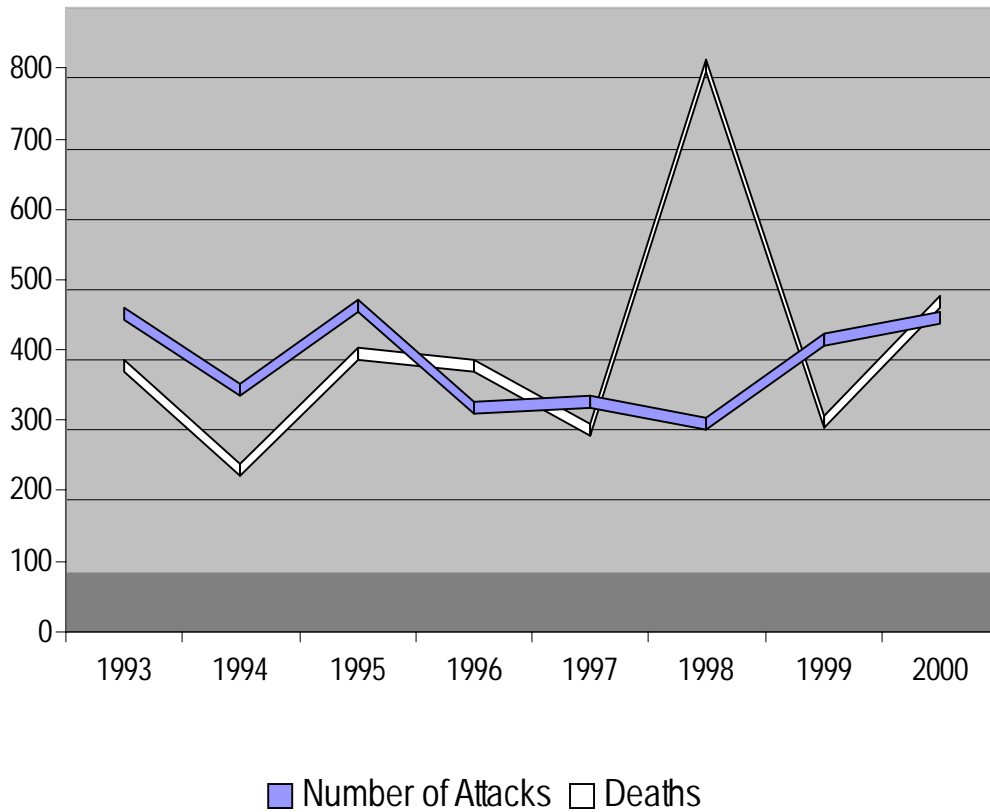
Total International Terrorist Attacks (1981-2000)

US Department of State, *Patterns of Global Terrorism 2000*, April 30 2000, [Appendix C](#)



International Terrorist Attacks x Deaths (1993-2000)

US Department of State, *Patterns of Global Terrorism 2000*, April 30 2000.



2.3.3 Legislative and Administrative Preparedness

At an international level there is a wealth of literature on the issue of 'preparedness'. In the United States there are public and private institutes dedicated solely to the examination of legislative and administrative preparedness in the event of a mainland terrorist incident. However, that level of discussion, at least in the public arena, is absent from Australia.

There may be strong arguments in favour of our administrative preparedness. One of the obligations flowing from Resolution [1373](#) is a requirement that States submit implementation reports to the Counter-Terrorism Committee of the UNSC. In its report Australia stated that it had 'a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies'. The report stated that Australia 'already had in place extensive measures to prevent in Australia the financing of, preparations for and basing from Australia of terrorist attacks on other countries' and that it had 'an extensive network of ... law enforcement liaison officers and

bilateral treaties on extradition and mutual legal assistance ... to facilitate cooperation with other countries in the prevention, investigation and prosecution of terrorist acts'.¹²⁶

Moreover, there is a wealth of evidence to argue in favour of our legislative preparedness. Assuming that terrorism is a crime, distinguishable perhaps by its seriousness, motivation or intention, there are a wide range of laws which address the four core elements above. We have laws dealing with intelligence, prevention, crisis management and investigation. In terms of investigation, we have laws which deal in some detail with law enforcement agencies and law enforcement methods, offences and cooperation with foreign countries.

At the same time, there is some acceptance of the limitations in that preparedness. In its report, Australia acknowledged that there were gaps in its 'systemic and legislative preparedness to prevent or to respond to [terrorist attacks] and to freeze [terrorist assets]'.¹²⁷ In theory, these gaps could relate to a range of issues including the extraterritorial reach of our laws, the absence of specific terrorist offences or terrorist financing provisions or, simply, the disjunction between the terrorist phenomena and the various existing laws. This disjunction may raise no more than drafting concerns, acknowledging the limits that any laws may have in dealing with the breadth of human behaviour. Questions of coverage in terms of extraterritorial operation, specific offences and terrorist financing raise more significant concerns requiring close examination.

2.3.4 Gaps in Legislative Preparedness

It was noted that terrorism does not fit neatly into existing legislative categories such as war powers, rules of personal liberty or disaster management. To the extent that 'terrorism' is seen as distinct from other heinous crimes, this observation is true in Australia. So, while a range of Commonwealth legislation may be relevant to 'terrorism', it may not fit neatly into present conceptions of 'politically motivated violence' and the like.

For example, under the *Australian Security Intelligence Organisation Act 1979* ASIO may gather intelligence and make assessments on matters relevant to 'security'. But a terrorist act may not meet the criteria for a relevant matter of security concern. The matters covered are espionage, sabotage, politically motivated violence, communal violence, attacks on defence systems, or foreign interference. In particular, while ASIO may focus its attention on 'politically motivated violence' it could be argued that it may be forbidden from focusing its resources on non-violent political crimes, on violence which has a social or ideological motivation, or on violent political crimes that are directed not at 'influencing or overthrowing or destroying' a government but at intimidating the public, for example.

Perhaps of equal concern, while the Federal Court may declare an association to be unlawful, a terrorist organisation may not fit within the existing legislative definitions. In particular, the Court may not be empowered to declare an association to be unlawful if it advocates violence which is directed not at the overthrow but the impairment, extortion or

punishment of a government or if it advocates the destruction of property that is owned by a State government or is not involved in interstate or international trade and commerce. (The Banking (Foreign Exchange) Regulations and the recent Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 indicate that, at least in financial terms, it is possible to achieve results without using the unlawful association provisions by relying on the external affairs power and associated domestic implementation legislation.)

Conversely the AFP may conduct a controlled operation over a wide range of terrorist activities precisely because 'terrorism' is not defined for the purposes of the *Crimes Act 1914*. Similarly, the Minister for Industry Tourism and Resources may declare a state of emergency in relation to various offshore acts because 'terrorist activities' are not defined in the *Petroleum (Submerged Lands) Act 1967* other than to include 'extortion'.

Similarly, under the *Crimes (Foreign Incursions and Recruitment) Act 1978* a person may be charged with an offence if they seek to conduct hostilities at home or abroad. But a state sponsored terrorist act may not meet the criteria for a relevant aspect of the offence. The offence of foreign incursion covers acts done for the purpose of overthrowing a government by force or violence, engaging in armed hostilities in a foreign state, placing a foreign public in fear and causing damage to foreign public property. But it does not cover activities undertaken in the service of a foreign power's armed forces. Thus, while David Hicks, the Australian volunteer in Afghanistan currently detained by the United States, has allegedly been engaged in armed hostilities or acts which place a foreign public in fear, he may also have been in the service of the Taliban and therefore beyond the Act.

2.3.5 A Specific Terrorist Offence?

The proposals announced on 2 October 2001 would establish new offences covering 'violent attacks and threats of violent attacks intended to advance a political, religious or ideological cause which are directed against or endanger Commonwealth interests'.¹²⁸

In the *Protective Security Review*, Justice Hope acknowledged bluntly that '[v]irtually all terrorist acts involve what might be called ordinary crimes – murder, kidnapping, assault, malicious damage, and so on – albeit for political motives'. On this basis there was little apparent need to enact specific offences to target terrorists and their associates. 'The appropriate objective for a government,' he commented, 'is to bring them to justice'.¹²⁹

Clearly, most, if not all, definitions recognise that terrorist acts are criminal acts. However, as one commentator has suggested, 'if ... an act of terrorism is simply "a heinous crime", much of the modern rhetoric surrounding efforts to define terrorism as a separable phenomenon appears insignificant'. Moreover, 'if the inherent political nature of terrorism is ignored, terrorist acts can be identified more easily for the purposes of prosecution'.¹³⁰ Labelling an act as 'terrorism' may not assist investigation or prosecution and may in fact

harm these processes, especially in the context of exercising extraterritorial jurisdiction, or negotiating extradition arrangements and mutual assistance.

Similarly, other 'core elements' such as seriousness or motivation do not necessarily assist. A single incident involving multiple deaths may cause alarm because it is indiscriminate or newsworthy but these factors exist in other well established offences. Moreover, as one Australian commentator noted, '[t]he circumstances that the criminal activities of a terrorist group are designed to achieve', namely some political or ideological ends rather than some individual or collective financial benefit, 'does not seem ... to make the existence or the operations of the group less pernicious, nor to create any less difficulty for law enforcement agencies in the discharge of their duties.'¹³¹ On the other hand, as Lord Lloyd of Berwick commented, '[t]he reason for making explicit the terrorist element where it exists is, quite simply, that this is how it is seen by the public. Murder in the course of a terrorist activity is thought of as a more serious offence than 'ordinary' murder'.¹³² To the government and the wider community it would seem 'terrorist crime is seen as an attack on society as a whole, and our democratic institutions. It is akin to an act of war'.¹³³

Arguably, much of the pressure for creating a separate or separate terrorist offence is the need to acknowledge a community affront at a perceived attack on society. Nowhere has this been more evident than in the United Kingdom which has the oldest specific anti-terrorist statute. As one commentator has put it, passage of the Prevention of Terrorism (Temporary Provisions) Act 1974 (UK) was 'influenced by two conflicting considerations':

On the one hand, there was the unavoidable truth that terrorism could not be abolished by legislative fiat and that much could already be achieved by the fullest application of the regular criminal law. On the other hand, there was a strong desire to respond to what was perceived as 'the greatest threat since the end of the Second World War'. In short, as one Member observed 'The House wants blood'.¹³⁴

Lord Lloyd of Berwick canvassed the issue of a specific terrorist offence in his 1996 report. He offered two arguments in favour of a specific offence: 'that terrorism presents an exceptionally serious threat to society' and 'that terrorists have proved particularly difficult to catch and convict without special offences and additional police powers'. He also noted five characteristics which distinguished terrorism from ordinary crime: it is directed at the public, it frequently involves lethal force, it creates fear, it has a political or ideological purpose and it is frequently perpetrated by overseas professionals.¹³⁵

In Australia, arguments in favour of a separate terrorist offence would seem also to include the need to establish clear links between terrorism and other preventative or investigative powers such as intelligence gathering, surveillance, proscription and deportation. Overseas experience demonstrates that many anti-terrorist measures rely or ought to rely on the existence of an offence of terrorism with clear and workable physical and mental elements. Australian experience demonstrates a similar, albeit more limited, trend. For example, ASIO intelligence gathering powers are conditioned on the threat of politically motivated violence, the Federal Court's proscription power is dependent on a similar threat

of revolutionary and seditious conduct, AFP powers in relation to controlled operations are conditioned on the threat of serious offences involving potential imprisonment for 3 years.

In this context, it is difficult to weigh arguments arising from our international obligations. As we have seen, there is a requirement arising out of Resolution [1373](#) that Australia ensure that 'terrorist acts are established as serious criminal offences in domestic laws ... and that the punishment duly reflects the seriousness of such terrorist acts'.¹³⁶ However, it is unclear whether this translates as a requirement to create separate terrorist offences, or a requirement to provide statutory guidance in relation to sentencing decisions. Assuming that it is not possible or practicable to establish a complete set of terrorist offences, it may be possible to develop sentencing guidelines which focus attention on factors such as political motivation or intention to influence government or coerce the public. At the same time, it may be necessary to consider whether this would unduly interfere with judicial discretion and with the domestic and international jurisprudence on sentencing theory. It may also need to consider whether sentencing guidelines interfere with the requirement for separation of powers between the Judiciary and Parliament. The general sentencing jurisprudence is discussed in more detail in the context of arbitrary detention at 2.3.13.

If the Commonwealth was to enact a separate terrorist offence it would need to address issues of definition, constitutional limitations and the potential effectiveness of prosecutions. Using a collage of the points raised above, and noting the above discussion of the difficulty and politics in defining 'terrorism', such an offence might target offences subject to 3 or more years imprisonment, or acts or threats of violence, of national concern involving individuals or sophisticated, systematic or integrated criminal networks that are motivated by political, social or ideological objectives and/or intended to influence the government or intimidate or coerce the public or a section of the public.

2.3.6 Terrorist Financing

The Government's proposals include strengthening Australia's ability to combat the use of false identities in the conduct of financial transactions and amendments to the *Proceeds of Crimes Act 1987* 'so that terrorist property can be frozen and seized'.¹³⁷

The need for measures to combat terrorist financing will arise because it is expected that terrorists will take the precaution of covering their identities and resort to using a complex network of companies, trusts and partnerships. Further, the underground or black economies of all jurisdictions offer scope for concealed transfers of funds.

At least one commentator has suggested that implementing Security Council Resolution [1373](#) might be immensely difficult, particularly given the close relationships between financial institutions and business leaders that have sympathies with the Taliban or *Al-Qa'ida*.¹³⁸ A study for the United Nations Office for Drug Control and Crime Prevention in 1998 took a more critical approach. It stated that jurisdictions which offer high levels of

secrecy and a variety of financial mechanisms, and institutions providing anonymity for the beneficial owners, are highly attractive to criminals for a wide variety of reasons. These include the potential cover and protection they offer for money laundering and various exercises in financial fraud. It found that jurisdictions which provide offshore banking and secrecy protections were highly congenial for those trying to launder and hide the proceeds of crime as well as those who typically exploit loopholes and variations in tax and other laws. This highlights the difficulty of identifying the legitimate from the illegitimate users of offshore banking and tracing funds intended for terrorist activities.¹³⁹

The existence of tax havens in the global financial system is also a major obstacle. In November 2000 the Organisation for Economic Co-operation and Development (OECD) identified certain jurisdictions engaged in harmful tax practices in the sense that they are either tax havens or have potentially harmful preferential tax regimes.¹⁴⁰ The OECD has fixed 28 February 2002 for 35 tax havens to agree to comply with its drive to eliminate harmful tax competition. Sanctions could be applied as early as April 2003 although there are indications that it could be extended to 31 December 2005.

The existence of trusts, partnerships and nominee companies may create similar problems. Resolution [1373](#) applies the asset freezing and transaction blocking requirements not only to terrorists, accomplices and supporters, but to 'entities owned or controlled directly or indirectly by such persons', and 'entities acting on behalf of, or at the direction of such persons and entities' and the property owned or controlled directly or indirectly by them.¹⁴¹ While there is a list of 'proscribed organisations' associated with Resolution [1373](#) there is no guarantee that it is complete. Moreover, there may be difficulties in any attempts to complete such lists. There is no requirement at present for trusts and partnerships to be registered with a public authority as companies are obliged to do with the Australian Securities and Investments Commission (ASIC) under the *Corporations Act 2001*.¹⁴²

2.3.7 Extraterritorial Application of Australian Law

The Government's proposals on 28 September 2001 would seek to enhance the extraterritorial application of Australian anti-terrorist laws. ¹⁴³

It is unclear at this stage whether the extension of anti-terrorist laws would be designed to capture Australians who commit terrorist or terrorist financing offences overseas or to establish more in the nature of a universal jurisdiction to try terrorists of all nationalities.

Generally, offences are presumed to be local and territorial.¹⁴⁴ Australian statutes are presumed to extend only to the territorial limits of Australia, unless a contrary intention is expressed.¹⁴⁵ Specifically, they are presumed not to extend to cases governed by foreign law.¹⁴⁶ Neither are they presumed to extend to actions of foreigners overseas.¹⁴⁷ The presumption can be rebutted, but only by express intention or by necessary implication from the nature, purpose and policy of the legislation.¹⁴⁸ Thus, while the *Crimes Act 1914*

is generally expressed to operate 'beyond the Commonwealth and the Territories' (s. 3A) there are few offences that are expressly intended to capture foreign offenders overseas.¹⁴⁹

As a matter of constitutional law, the Commonwealth Parliament has a plenary power to legislate extraterritorially that is not limited in respect of any nexus with the 'peace, order and good government' of the Commonwealth.¹⁵⁰ Indeed, it is said that extraterritorial criminal laws are supportable whenever a valid basis exists for enacting a criminal law.¹⁵¹ The authority to legislate extraterritorially can be derived from the external affairs power because it relates to matters that are 'physically external' to Australia.¹⁵² But it may also be derived from the other legislative powers of the Commonwealth either directly or indirectly, using the incidental power in section 51(xxviii) of the Constitution. Significantly, Parliament, when *not* exercising the external affairs power, is not confined to enacting laws that are consistent with the requirements of international law.¹⁵³

Arguably, there is a policy tension between prescriptive and enforcement jurisdictions. Clearly, the Commonwealth has the power to enact extraterritorial laws. Similarly it has a power to enforce those laws at least in terms of a physical or personal jurisdiction.¹⁵⁴ But, while there is a growing jurisprudence regarding the capacity to legislate extraterritorially, there is a lack of clear understanding regarding the desirability of doing so. In civil cases, 'choice of law' rules determine the law to be applied to the particular action. In criminal cases, these rules are largely unknown, but there may be some development of these rules. Accordingly, courts may come to place emphasis on notions of 'international comity'. This principle, originally proposed as a theory of criminal jurisdiction, would seem to have relevance here: 'each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign states where that conduct has no harmful consequences within the territory of the state which imposes the punishment'.¹⁵⁵ One commentator has put forward a range of similar policy considerations or guidelines that include: there should be no legal vacuum; penalties should not exceed those under the most appropriate law; defences under the most appropriate law should be available wherever the defendant is tried; and international sensitivities should be respected.¹⁵⁶

For further information see *Supporting Materials*, 'Document 11: Extraterritorial Application of Australian Laws'.

2.3.8 Detention Issues

The conflict between safety and civil liberties has been clearly visible in the context of the United Kingdom where the maintenance of certain anti-terrorist measures required a formal derogation from international human rights standards. A key provision in the Prevention of Terrorism legislation was the power to arrest and detain, etc. persons suspected of being 'concerned in the commission, preparation or instigation of acts of terrorism'.¹⁵⁷ It was remarkable because the act in question, namely being 'concerned in the commission ... of acts of terrorism', was *not* an offence. The fact that significant law

enforcement powers may be exercised without warrant or reasonable grounds for suspecting that a specific offence has been committed has given rise to arguments that the provision breaches the European Convention on Human Rights.¹⁵⁸ Yet, it seems clear that this was always the intention. As Lord Lloyd noted, 'the very utility of [the provision] consists in the ability to arrest a potential terrorist when the police do not have grounds to suspect that he has committed or is about to commit a specific offence'.¹⁵⁹ A related provision was the power to stop and search persons at ports or borders. The fact that it could be exercised in the absence of a reasonable suspicion also raised concern.¹⁶⁰ Another key provision was the Secretary of State's power to extend detention. The fact that detention was not authorised or monitored by a judicial authority gave rise to a successful argument that the provision also breached the European Convention on Human Rights. In *Brogan v United Kingdom*,¹⁶¹ the European Court of Human Rights held that the provision breached a convention requirement that detainees be brought before a judge and tried within a reasonable period of time.¹⁶² Subsequently, the United Kingdom entered a derogation from that requirement based on the 'public emergency' in Northern Ireland. The derogation was held to be effective in *Brannigan and McBride v United Kingdom*.¹⁶³

The detention issue has also been of concern to other international bodies. As we have seen the United Nations Committee Against Torture has warned States to be careful that anti-terrorist laws do not breach binding obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Similar concerns have been expressed by the High Commissioner for Human Rights particularly in relation to the detention of prisoners at the United States Naval Base in Guantanamo Bay, Cuba.

It has been suggested that in all of these arguments, the key issue is whether the provisions, or, given the width of the provisions, their application in a given case, comply with a test of *proportionality* or reasonableness in the context of a clear terrorist threat.¹⁶⁴

2.3.9 Proscription Issues

The *Inquiry into Legislation Against Terrorism*, argued that the 'terrorist organisation' is a 'key concept ... in terms of *permanent* counter terrorist legislation'. It suggested that proscription had a twofold purpose. 'First it will furnish a conclusive presumption that an organisation which is for the time being proscribed is a terrorist organisation. This will facilitate the burden of proof in terrorist cases'. Second, it argued, 'proscription will be the starting point for the creation of a number of fundraising and other offences, especially fundraising for terrorism overseas'. However, it was acknowledged that proscription could make intelligence gathering and law enforcement tasks more difficult,¹⁶⁵ at least in part because it tends to put distance between law enforcement agencies and informants.¹⁶⁶ Indeed, it was conceded that the primary purpose of proscription was 'to give legislative expression to public revulsion and reassurance that severe measures were being taken'.¹⁶⁷ Thus it has been viewed by some as 'essentially a cosmetic part' of anti-terrorist laws. The long-standing proscription provisions in the United Kingdom have been criticised by

various commentators. One commentator has argued that 'judicial review of [proscription] orders ... is likely to be minimal. No procedural safeguards will be implied, and the relevant substantive checks will prohibit only the most flagrant abuses'.¹⁶⁸

An obvious concern in the proscription debate is the process for proscribing organisations. The unlawful association provisions in the *Crimes Act 1914* presume judicial scrutiny. The process for 'proscription' involves a hearing before the Federal Court in which an officer or member of a relevant association must show cause as to why it should not be proscribed. Appeals may be lodged to the Full Court and, presumably, the High Court of Australia.¹⁶⁹ The proscription regime achieved by the Banking (Foreign Exchange) Regulations, Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 do not seem to presume any scrutiny at all. For example the latter regulations provide for mandatory proscription of persons or entities on the basis that they are mentioned in Resolution [1373](#). There is no avenue for appeal in the Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 or the *Charter of the United Nations Act 1945*.

2.3.10 Procedural Fairness

Given the effect of proscription, it is not surprising that it raises issues at the intersection between the Judiciary, the Parliament and the Executive. At one extreme are constitutional considerations regarding the power of Parliament to unilaterally apply criminal sanctions in order to ensure the defence of national security or the institutions of government. At another extreme are administrative considerations arising out of the obligation to afford procedural fairness to persons affected by decisions made by the Executive. Clearly, there are a number of concerns which are discussed in Part 3. Powers, Limits and Relationships. The present concern is with the relationship between proscription and procedural fairness.

The obligation to accord procedural fairness, or 'natural justice' or 'due process', is described as 'a common law duty to act fairly... in the making of administrative decisions that affect rights, interests and legitimate expectations'.¹⁷⁰ As a principle of fairness, the content of the obligation must be flexible to take account of what is fair in the circumstances,¹⁷¹ but it often obliges the decision maker to provide a hearing¹⁷² and an opportunity to deal with adverse information that is 'credible, relevant and significant to the decision to be made'.¹⁷³ Above all, there is a duty to disclose information regarding matters *personal* to the individual whose interests are affected by the decision.¹⁷⁴ So, it has been said that the right to a hearing and the right to cross examine others arise where there are grave allegations¹⁷⁵ or where the decision rests on personal characteristics.¹⁷⁶ Without doubt, national security considerations may affect the content of procedural fairness. However, they must be placed among other considerations in determining these issues.

Simply put, while Australia may seek to expand its measures to combat terrorist financing, it may need to exercise caution in relation to processes such as proscription. A member or associate of a proscribed organisation may have a legitimate expectation that they will not

be subject to restrictions in relation to banking and trade on the basis of a ministerial decision or an international resolution without the opportunity to challenge.

It is worth noting that the Northern Territory provisions originally applied to 'proscribed organisations'. These were identified by the Administrator, acting on the advice of the Executive Council, with a simple parliamentary tabling requirement.¹⁷⁷ Early drafts of these provisions 'contained no criteria or procedures relating to such proscription'.¹⁷⁸ As enacted, they simply required, in the opinion of the Administrator, the organisation 'has as its object or one of its objects the use of violence to achieve its end' or that the members have 'demonstrated a propensity to use violence to achieve the organisation's ends'. The power to 'proscribe organisations' was strongly criticised on the basis that it had 'potential implications for interference with a number of civil rights'¹⁷⁹ and, on that basis, should be 'the subject of impartial judicial consideration'.¹⁸⁰ The response at the time was that an appeal to the courts would take a sensitive issue out of the legislature. It would be 'an extraordinary, novel and dangerous precedent'¹⁸¹ and would 'politicise the judiciary'.¹⁸² But, within a year the issue was reviewed and, pursuant to an agreement between the Commonwealth and the Northern Territory,¹⁸³ control was surrendered to the courts.¹⁸⁴ The effective proscription of the Communist Party of Australia in 1950 ran into constitutional problems as will be seen in Part 3. Powers, Limits and Relationships.

2.3.11 Entry Search and Seizure

The proposals announced on 2 October 2001 increase AFP powers of search and seizure. They would permit the AFP to 'search for and seize property of any kind that is used or intended to be used for terrorism or is the proceeds of terrorism'.¹⁸⁵

Traditionally, the common law has sought to limit powers of entry, search and seizure. Originally, search warrants were permitted for stolen goods, had to be issued by judges and had to describe what was to be searched and seized and/or the related offence. Recognising the need to balance individual privacy with public interest in law and order, these powers have been extended to allow police officers to seize other property they discover by chance which they reasonably believe reveal other offences.¹⁸⁶ Otherwise the common law 'was, and remains, hostile to any greater degree of generality'.¹⁸⁷

These powers have been extended by statute. First, there have been piecemeal extensions to cover particular classes of offences. Second, there have been extensions which largely codify the common law rules relating to search warrants. Third, there have been measures which provide for 'general warrants'¹⁸⁸ which may be unlimited as to place, time or the offences to which they relate or, while partially limited, may be issued not by a judicial officer but by an administrative officer, for example, a commissioner of police. Fourth, there have been measures which grant these powers beyond the traditional law enforcement domain to other officials.¹⁸⁹

The general position at law is that search warrants require concrete information.¹⁹⁰ Moreover in issuing a search warrant a judge must balance, at arms length, the competing interests in light of this information. He or she must 'stand between the police and the citizen' and give 'real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen'.¹⁹¹

2.3.12 Compelling Disclosure

The proposals announced on 2 October 2001 increase ASIO and AFP powers in relation to 'politically motivated violence'. The measures would empower ASIO to seek warrants from a Federal Magistrate or certain members of the Administrative Appeals Tribunal to require non-suspects to appear and answer questions before a prescribed authority in relation to an investigation into 'politically motivated violence'.¹⁹²

A key provision in the United Kingdom anti-terrorist legislation is the duty to give information regarding terrorism. Lord Lloyd of Berwick identified two criticisms. First, while citizens have a moral obligation to assist the police, he argued that 'the state should be reluctant to transform this into a legal duty'. Second, while the duty is expressed generally he observed 'prosecutions are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties'.¹⁹³ A Home Office Circular apparently defended the duty on the basis that it is seldom used.¹⁹⁴ In his report Lord Lloyd of Berwick commented: 'I do not regard it as satisfactory to create a wider-ranging offence, and then circumscribe it by a Home Office Circular'.¹⁹⁵

In Australia, there appear to be few if any examples of a mandatory *duty* to inform. Under the *Crimes Act 1914* it is an offence for a person who knows that another person intends to commit treason not to provide information to a constable or take preventative measures (s. 24(2)(b)). The only other parallel may be the various statutory powers to issue production notices. Production notices are administrative orders for the production of documents, information, etc. While there are many examples in the judicial sphere there are fewer examples in the executive domain. Examples exist in customs, taxation, civil aviation safety, consumer protection, companies and securities regulation, therapeutic goods, social security, workplace relations, immigration, and national security. Under the *National Crime Authority Act 1984* an officer may, in the context of a hearing, order a person to produce a document or thing specified in the notice, being a document or thing that is relevant to a special investigation.¹⁹⁶ Under the *Crimes Act 1914* the Attorney-General may require a person to answer questions, furnish information or allow documents to be inspected if he or she believes that the person has any information or documents relating to the money, property, payments or transactions of an unlawful association (s. 30AB).

2.3.13 Protective and Arbitrary Detention

The proposals announced on 2 October 2001 would empower the AFP (or State Police) on the advice of ASIO to arrest suspects and bring them before a prescribed authority for various purposes including to 'protect the public from politically motivated violence'.¹⁹⁷

In principle, domestic and international law are antagonistic to arbitrary detention or the detention of persons without legal authority, without charge or without review.

Traditionally, '[t]o make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison'.¹⁹⁸ In either case, detention would be subject to the supervisory jurisdiction of the courts, a fact which is implicit in the constitutional separation of powers requirement. So, it has been said that, with limited exception, 'the citizens of this country enjoy, *at least in times of peace*, a constitutional immunity from being imprisoned ... except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.¹⁹⁹

In the absence of judicial power, the Constitution only permits administrative detention which is connected with a head of legislative power and which is reasonably necessary for the purpose of its exercise. Thus the mandatory detention of asylum seekers has been held to be a valid exercise of the aliens power provided it is not punitive or is 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.²⁰⁰ The caveat in italics above raises the question as to whether the detention of persons in times of hostilities or threats to national security may be a valid exercise of the defence power.

In the exercise of judicial power, the common law would strive to ensure that detention appropriately serves objectives of rehabilitation, deterrence, retribution and incapacitation. The common law does not sanction arbitrary detention. It requires proportionality between the period of detention and the gravity of the crime.²⁰¹ Nor does it sanction preventative detention. It does not accept excessive periods of detention for the sole purpose of protecting the community from repeat offenders.²⁰² Indeed, imprisonment is generally considered as a last resort and a court will generally strive to impose the minimum sentence necessary to protect the community. Moreover, while community protection is a primary consideration in sentencing,²⁰³ it will be weighed against the personal characteristics and circumstances of the offence and the offender.²⁰⁴

These principles are underscored by various international instruments. For example, the *International Covenant on Civil and Political Rights*²⁰⁵ prohibits arbitrary detention (Art. 9(1)). Moreover, international law recognises that detention may be arbitrary notwithstanding that it is lawful as the concept of arbitrary detention includes 'elements of inappropriateness, injustice and lack of predictability'. The Human Rights Committee has stated that detention 'must not only be lawful but *reasonable* in all the circumstances' and, in addition, 'must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime'.²⁰⁶

Part 3 Powers, Limits and Relationships

The following discussion confronts some of the broader institutional issues associated with the legislative survey in Part 1 and the evaluation commentary in Part 2.

Beyond the coalface of anti-terrorism laws, a wider set of issues may arise for Parliament. Does the Commonwealth have the constitutional power to take action on terrorism? This question has two aspects, in that it deals with powers and limits on powers. First, do the constitutional powers exist which could support Commonwealth counter-terrorist measures? Second, even if they do, will such measures run foul of limits on constitutional power, such as express and implied freedoms enjoyed by individual Australians?

Moreover, how will the exercise of these powers by the Commonwealth be affected by other parties? Conceivably, there are at least two sets of significant relationships. First, there is set of the relationships between the Parliament, Executive and Judiciary. Second, there are the existing and potential relationships among the Commonwealth and the States.

3.1 Legislative Powers

We have seen that terrorism is either partly or entirely about crime, albeit that the criminal acts may be distinguishable by their seriousness, motivation or intention. We have also seen that terrorism does not necessarily fall neatly into legislative categories. And we have seen that some prefer to characterise counter-terrorism in terms of warfare and as a 'war on terrorism'. This gives rise to three issues. First, what is the scope of legislative power with respect to crime? Second, what are the heads of legislative power that may be used to support anti-terrorist laws? Third, does the specific power dealing with 'naval and military defence' provide any constitutional authority to enact counter-terrorist measures?

The question as to the extent of the power over 'naval and military defence' has arisen in a slightly different context before. In the early 1950s the Menzies Government pointed to a tense international situation highlighted by the Korean War and general Cold War hostilities between communist and Western nations, and enacted legislation to suppress communist activity in Australia in reliance on the defence power. By a 6:1 margin the High Court found the *Communist Party Dissolution Act 1950* constitutionally invalid.

The High Court decision in the *Communist Party case* points to limits on the use of the defence power, most specifically in *intermediate* situations, short of total war but characterised by international instability and perceived threats to national security. For that reason it is included in the discussion below in both the context of legislative powers and limits *and* the relationship between the Parliament, Executive and Judiciary.

3.1.1 Power with respect to Crime

The Constitution does not grant the Commonwealth power over 'criminal activity' as such. But there is no doubt that within limits the Parliament can validly make laws which create criminal offences, and provide for their investigation, prosecution and punishment. Generally, offences must either fall within, or be incidental to the exercise of, a head of constitutional power. 'In short, and generally speaking, Commonwealth criminal law is ancillary to the performance of the responsibility of the Commonwealth to protect itself, its *Constitution*, its institutions and services and to enforce its own laws.'²⁰⁷ In effect, the Commonwealth may rely on a mosaic of various constitutional powers, express and implied, and their relevance to counter-terrorism is discussed below.

3.1.2 External Affairs Power

As a general proposition the external affairs power will support a law regulating persons, places and matters which are physically external to Australia. Moreover, it will support a law which implements an international treaty or convention. When a law purports to give domestic effect to an international instrument, the primary question to be asked is whether it has selected means that are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'.²⁰⁸ However, the power is not confined to the implementation of treaties or treaty obligations. It will support measures that address matters of international concern, at least where that concern is reasonably concrete.²⁰⁹ It probably extends also to measures that implement recommendations of international agencies and may extend to measures that pursue agreed international objectives.²¹⁰

Nor is the external affairs power confined to the implementation of a treaty in full. A law is valid even if it only partially implements a treaty,²¹¹ provided the deficiency is not so substantial as to deny the law the character of a measure implementing the treaty.²¹² This provides considerable leeway for domestic implementation of selected parts of a treaty.

This head of power is likely to be a primary basis for anti-terrorism measures in Australia. Over the past decade, various international bodies have made statements regarding action recommended to address terrorism and its root causes (see *Supporting Materials*, 'Document 4: Terrorism and the United Nations'). Some of the statements have been of a more formally binding nature. For example, UN Security Council Resolution [1373](#), and some of the earlier resolutions, include provisions which may be construed as 'decisions' under Chapter VII of the *Charter of the United Nations* which are formally binding on Australia. Key provisions for present purposes include 'decisions' that 'all States shall ... prevent and suppress the financing of terrorist acts [and] [c]riminalize the wilful provision or collection ... of funds by their nationals or in their territories with the intention that the funds should be used ... in order to carry out terrorist acts' and that all States:

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.²¹³

This sort of language may not only support the enactment of anti-terrorist measures such as the ones proposed, it may impose a positive obligation on Australia to do so.

3.1.3 Defence Power

Section 51(vi) of the Constitution permits the Commonwealth to make laws for 'the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth'. It is a purposive power that supports laws that are 'reasonably capable of being regarded as being appropriate and adapted' to 'the defence of the Commonwealth [etc.]'. There are three important things to note about the Commonwealth Parliament's power over 'naval and military' defence.

First, the scope of the defence power is elastic: it expands to a quite formidable extent at times of total war and contracts to very modest proportions in times of peace.

Second, it is concerned with *external* threats to Australia, from beyond its borders. It is not a power for dealing with domestic threats unrelated to the international situation.

Third, it has what is called a primary and a secondary aspect. The primary aspect deals with the essence of military defence, that is, raising armed forces, maintaining and reinforcing them and so on. The secondary aspect is less directly concerned with these issues and more with measures conducive to the successful defence of Australia from external threat. In the Second World War the secondary aspect of the defence power enabled the Commonwealth to reach areas deep inside civilian life, for example regulating rents, conditions of industrial employment and the price of various agricultural commodities, because such measures were treated as part of the overall defence effort. The primary aspect obviously operates during wartime but it also persists as a source of power in times of peace. For example, Australia maintains a standing army, navy and airforce which calls for ongoing legislative and executive regulation. Whether the secondary (and more extensive) aspect also operates at times of peace and/or in intermediate situations of heightened international tension is constitutionally less certain.

It is this constitutional grey area which clouds the question of how far, in its desire to counter and prevent terrorism, the Commonwealth today could use the defence power to regulate domestic areas and activities beyond the strictly military. To a large extent this depends on whether the current international situation amounts to an external threat to Australia's defence. However, it needs to be appreciated that Parliament's judgement on that issue will not be conclusive, nor will the Government's. The High Court will have the final say on whether a measure is for the purpose of national defence. The Court will defer to Parliament's judgment to a reasonable extent and becomes more deferential the closer

the country goes to total war. But the final say on whether anti-terrorist measures can validly rely on the defence power rests with the Court. That much is clear from the *Communist Party case*, which is discussed below.

The other relevant point to emerge from the *Communist Party case* is that in trying to enliven the secondary aspect of the defence power outside situations of total war, the Commonwealth normally cannot resort to bringing copious amounts of evidence in front of the Court to substantiate a claim regarding the existence of an external threat or national emergency. The Court's assessment will be based on what is called 'judicial notice', which means the information within the ordinary knowledge of judges sitting on the case.

In short the Commonwealth is not necessarily precluded from resort to the defence power when it seeks to counter terrorism with measures reaching into ordinary social, economic and political life of a nation not actually at war. But it would certainly move into the same uncertain constitutional territory, where 50 years ago it suffered a very conspicuous defeat.

The second part of section 51(vi) may also come into calculations. It has been argued that the 'execution and maintenance of the laws of the Commonwealth' may extend 'to the preservation of general law and order so far as such order may be disturbed by general disobedience to the laws of the Commonwealth'.²¹⁴ Conversely, it has been argued that these words are directed to 'the general control of the armed forces, including internal discipline, and the relationship among the members of the forces, between those members and outside persons [etc.]'.²¹⁵ The former view would regard section 51(vi) as adding to the Commonwealth's array of powers to prevent, investigate and punish terrorism while the latter view would deny this. There has been little judicial support for the former view.

3.1.4 Territories

Section 122 of the Constitution gives the Commonwealth the power to 'make laws for the government of any territory'. This power has often been described as being full, complete, unqualified or 'plenary'.²¹⁶ That is, legislation enacted in reliance on section 122 does not need to fall within any other head of constitutional power.

The main limitation in this sense is a geographical one—that the law in question has a connection to a Territory. There seems little doubt that Parliament could enact valid legislation dealing with a wide range of counter-terrorist measures in the Territories.

The controversial question is to what extent the express and implied limits on Commonwealth legislative power contained in the Constitution (some of which are discussed below) apply to laws passed under section 122. The question is controversial because the Territories have an uncertain place in a Constitution designed primarily to effect a *federal* division of power between the States and the Commonwealth. It appears that the application of specific limits such as the requirement of just terms compensation for acquisitions of

property, the guarantee of trial by jury and the separation of powers between the Executive and the Judiciary will continue to be worked out on an incremental basis.²¹⁷

3.1.5 Inherent right of Self-Protection

It has been said that the Commonwealth has an 'inherent right of self-protection',²¹⁸ a right to prevent 'intentional excitement of disaffection against the Sovereign and Government'²¹⁹ and a legislative power to preserve its institutions which was seen to 'follow almost necessarily from their existence'.²²⁰ Accordingly, the Commonwealth 'has the power to protect its own existence and the unhindered play of its legitimate activities'²²¹ which might be found in sections 51(vi), the defence power, 51(xxxix), the incidental power, section 61, executive power, and section 68, the vesting of command in chief of naval and military forces in the Governor-General.²²² It might also be found in 'an essential and inescapable implication which must be involved in the legal constitution of any polity'.²²³

While it may expand and contract to meet the exigencies of domestic emergency in an analogous way to the defence power, the Executive probably does not enjoy the same degree of deference from the Judiciary in its exercise. To rely on this power, Parliament would virtually need an *unarguable* case that the matters dealt with in the law are connected to the survival of the Commonwealth.²²⁴

In 1951, the High Court found that the 'inherent right of self protection' if it did exist certainly did not support the *Communist Party Dissolution Act 1950*.

3.1.6 Implied Nationhood Power

The implied nationhood power is largely unexplored. It has been characterised as being incidental to the operation of the Commonwealth's executive power under section 61. It has also been characterised as an implied power that is deduced from the 'character and status of the Commonwealth as a national government'.²²⁵ Broadly, it permits the Commonwealth to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.²²⁶ But its application in areas such as counter-terrorism remains uncertain and has not been reviewed by the High Court for more than ten years. It may be that 'the predilections of the individual judges will be dominant in any decision' on the issue.²²⁷

3.2 Limits on Legislative Power

In a recent text on national security and the law in Australia Sir Anthony Mason noted that '[t]he tension between civil liberty and national security is very considerable'. 'Indeed', he

wrote, 'the tension is more marked than it has ever been, granted the emphasis now given to freedom of information and freedom of expression as indispensable elements of effective representative democracy and government'.²²⁸

The Commonwealth Constitution contains a small number of express rights and guarantees for individual citizens which put limits on how far the Parliament can go under the above legislative powers. Some additional freedoms arise by *implication* from the text and structure of the Constitution. If Parliament decides to enact counter-terrorist legislation such laws may well be tested against the constitutional criteria spelt out in these express and implied limits. Some of the more relevant limits are dealt with briefly below.

3.2.1 Trial by Jury

Many proposed counter-terrorist measures involve use of Commonwealth criminal law. One might expect that section 80 of the Constitution would therefore play a prominent role. It says that the 'trial on indictment of any offence against any law of the Commonwealth shall be by jury'. However:

The High Court has interpreted these words to allow the federal Parliament to itself determine whether a trial is to be on indictment, and thus whether there need be a jury trial. This interpretation has transformed s. 80 into a provision that provides no meaningful guarantee or restriction on Commonwealth power.²²⁹

If section 80 has done little to date to ensure a jury trial except where Parliament decides to require one, it provides strong protection once that precondition is satisfied. For example, in 1993 the High Court insisted that trial by jury mandates a unanimous verdict and that majority verdicts of 10 or 11 jurors did not satisfy the terms of section 80.²³⁰ If Parliament decides on trial on indictment for terrorist offences, it should be aware that section 80 may offer defendants this and other procedural protection yet to be elucidated.

3.2.2 Freedom of Religion

Parliament is perhaps unlikely to single out religious groups for proscriptive legislation. A more realistic possibility is that perhaps someone challenges counter-terrorist legislation of general application on the basis that *in its practical operation* it interferes with the free practice of their religion.

The Constitution contains an express guarantee of freedom of religion in section 116 which, like trial by jury, has been given a narrow interpretation by the High Court. A law of general application is unlikely to fall foul of the guarantee in section 116 because, as presently interpreted, it appears to proscribe only those laws which *specifically* target the practice of religion. Section 116 is not likely to pose problems for Parliament in enacting

counter-terrorist legislation unless it singles out particular religious groups or the High Court shifts ground and applies the requirement for free exercise of religion to laws which make no reference to religion on their face.

3.2.3 Just Terms Compensation

The Commonwealth Parliament cannot make laws about the acquisition of property without providing compensation on just terms. The rule in section 51(xxxi) seems clear but its application has proved troublesome for the High Court.

It is possible that national security measures could involve confiscation of property—it has happened in the past. To establish that these and other losses amount to constitutional acquisitions of property attracting just terms, a plaintiff would need to overcome a series of legal hurdles, some of them higher than others. Even if they were able to show what they lost was 'property' (which has a broad meaning under the Constitution) and that what they suffered constituted an 'acquisition' (which requires a demonstration that the Commonwealth or someone else had obtained an identifiable benefit from their loss) they might still fail on the unpredictable question of characterisation (in that a law may be categorised as one dealing with something other than the acquisition of property).

Nonetheless the High Court has shown an increasing interest in section 51(xxxi) as a limit on Commonwealth power, in a number of sometimes quite unexpected contexts. Because it can have substantial consequences which rebound either financially or legally (in terms of invalidating a law and a whole series of actions relying on that law), Parliament should be mindful of its potential effect when considering counter-terrorist measures.

3.2.4 Separation of Powers

The Constitution effects a partial separation of powers between the Legislature, Executive and Judiciary. The separation of powers principle gives rise to implications which operate to protect individual freedoms and limit the laws which Parliament can pass. To take a potentially relevant example, in general Parliament cannot authorise involuntary detention of Australian citizens in custody. This is because imprisonment is a punishment which, under our system, follows from adjudication of criminal guilt and that is an exclusively judicial function. Some exceptions apply and the High Court has left open whether the defence power would authorise detention orders in times of war.²³¹

It is possible that Chapter III of the Constitution (which effects the separation of powers in respect of the Judiciary) also entrenches constitutional requirements for a criminal trial,²³² but, as with many areas of Chapter III jurisprudence, the detail continues to be explored.

3.2.5 Freedom of Political Communication

There is a constitutionally guaranteed freedom of political communication implied from the text and structure of the Commonwealth Constitution. The High Court agreed unanimously in *Lange v Australian Broadcasting Corporation* on the test to be applied to laws or actions which are alleged to infringe this constitutional guarantee.²³³

The test in *Lange* requires 2 questions to be asked:

- does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- if it does, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of representative and responsible government as set out in the Constitution?

A law will only be unconstitutional on this ground if the answers are 'Yes' and 'No' respectively.

It is conceivable that counter-terrorist measures could impose a prima facie burden on political communication, especially when one notes that communication includes conduct as well as speech and the term 'political' seems to have a broad meaning. This being the case, such laws would project the High Court into the centre of controversy as it engaged in the difficult and somewhat subjective process of assessing whether they imposed a *permissible* burden on political communication.

3.2.6 Other Implied Freedoms

The freedom of political communication is said to derive by implication from the text and structure of the Constitution, particularly in the way it provides for elements of representative government. The same reasoning could well give rise to other implied freedoms. Gaudron J, for example, said in 1992:

The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally.²³⁴

An implied freedom of association, for example, could be an important consideration in the public debate over counter-terrorist measures:

A law that, for example, prevented persons from forming a political party or banned members of certain political organisations from standing for the federal Parliament would, in the absence of meeting the requirements of a test like that in *Lange*, be unconstitutional.²³⁵

3.3 Relationships between the Judiciary, Parliament and Executive

In the United Kingdom it was once said that 'those who are responsible for the national security must be the sole judges of what the national security requires'.²³⁶ In Australia it was said, in the same era, that this proposition was 'unquestionable law'.²³⁷ However, it seems clear that this proposition 'would nowadays be regarded as too absolute'.²³⁸ Thus, it has been said '[t]here is no rule of common law that whenever questions of national security are being considered by any court for any purposes, it is what the Crown thinks to be necessary or expedient that counts, and not what is necessary or expedient in fact'.²³⁹

In Australia the courts are occasionally called upon to resolve dilemmas raised by national security considerations, by reference to constitutional, statutory or common law issues.

3.3.1 Scope of Legislative and Executive Power

A constitutional challenge to measures against terrorism in the name of national security may spring from a variety of sources, notably an absence of legislative power or breach of express or implied limits on federal legislative power. We have seen how legislation enacted against the Communist Party in the Cold War era illustrated how constitutional considerations can bring the courts into the middle of disputes over national security.

One of the most basic tenets in constitutional law is that the courts determine whether the exercise of legislative and executive powers is constitutionally permissible. Thus it is said that the Commonwealth may not 'recite itself into a field previously closed to it'.²⁴⁰ This principle, often referred to as the 'stream and source' doctrine or the doctrine in the *Communist Party case*, has particular application in relation to the defence power.

As indicated above, the defence power is elastic and will support a law which reaches areas deep inside civilian life at least where there the existence, character or threat of hostilities suggests a war or war-like emergency and where the law itself is 'reasonably capable of being regarded as being appropriate and adapted' to addressing that situation. Both these questions are to be answered by the Judiciary not the Parliament or Executive

[T]he validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker or the person who is to do the act that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse. A power to make a proclamation ... with respect to a lighthouse is one thing; a power to make a similar proclamation with respect to anything which in the opinion of the Governor-General is a lighthouse is another thing.²⁴¹

[T]he Court will not substitute an opinion of its own for an opinion of [the Executive] but it will form an opinion as to whether the reasons for the [executive action] can reasonably be regarded as connected with defence preparations.²⁴²

So, once it is satisfied that a law can reasonably be regarded as connected with defence 'the Court will not substitute an opinion of its own for an opinion of [the Executive or Legislature]'.²⁴³ Moreover, once it is prepared to acknowledge the existence of a war or national emergency the Judiciary gives the Legislature or Executive considerable leeway to determine whether particular measures are necessary. In these circumstances, it is said, judicial deference becomes almost absolute: rights and liabilities may be made 'to depend on any event or matter the legislature may choose including administrative opinion'.²⁴⁴

Generally, it seems that these principles apply equally to the powers arising out of the 'inherent right of self-protection'. However, there may be less scope for judicial deference:

There has never yet been occasion to examine closely the scope of this power. It may be that it is elastic in the same sense in which the defence power is elastic. But ... while it may be found to expand very considerably in time of domestic emergency, I think that it is so far of a different nature from the defence power that a law cannot be made under it imposing legal consequences on a legislative or executive opinion which itself supplies the only link between the power and the legal consequences of the opinion.²⁴⁵

Overall, the impact of the 'stream and source' doctrine or the extent of deference may be affected by the extent to which judicial review remedies provide an alternative safety net. In broad terms, the 'stream and source' doctrine can be characterised as a judicial remedy to uphold the Constitution. This 'judicial remedy' is a brutal one in the sense that a law may hang or fall on a fairly delicate issue of whether a legislature or decision maker has been empowered to determine a fact which goes to constitutional validity of the law:

- does an organisation pose a threat to national security for the purposes of section 51(vi)?
- has a prohibited good in fact been imported for the purposes of section 51(i)?
- is a particular strike an industrial dispute for the purposes of section 51(xxxv)?

To a large extent a similar function may be served by other judicial review remedies. The development of administrative law, under the common law and statute, since the 1970s has enhanced the ability of courts to scrutinise *particular* exercises of a coercive power authorised by statute. Courts today may feel less compelled to take the all or nothing approach to constitutional validity which the High Court majority did in the *Communist Party case*, confident that excesses of power will be picked up in individual cases.

On the other hand the development of a greater 'rights consciousness' in the High Court over the last decade—a recognition that beyond federalism the Constitution may also have significant things to say about the relationship between individual and state—points to

new and powerful reasons why legislation similar to the *Communist Party Dissolution Act 1950* could suffer the same constitutional fate it did 50 years ago.

3.3.2 Judicial Review of Executive Action

Assuming the constitutionality of the law in question the courts may become involved at a second level: when individual actions taken under that law are subject to judicial review. A fundamental principle in administrative law is that executive action must have constitutional or legislative authority. The principle is intimately related to the 'stream and source' doctrine and the rule of the law. So, it is said '[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power'.²⁴⁶

As with questions of constitutionality, judicial review invariably involves some form of deference. Indeed, it has been said that executive power 'is almost unlimited where national security is concerned'.²⁴⁷ Thus, while national security agencies may be subject to judicial review,²⁴⁸ where an opinion is based on national security considerations, the scope of judicial review may be confined to allegations of bad faith or unreasonableness.²⁴⁹ It may be insufficient to demonstrate that the decision maker failed to take into account relevant considerations, took into account irrelevant considerations or applied policy inflexibly.²⁵⁰ Opinions based on national security involve wide policy considerations and '[w]hen such a breadth of considerations is involved only something amounting to lack of *bona fides* could justify curial [judicial] intervention in decisions made in the exercise of the power'.²⁵¹

Of course the measure of deference will be affected by the terms of legislation. One of the key functions of a judicial review court is to ensure the compliance of an agency with its statute. Thus, in *Church of Scientology v. Woodward* the High Court was prepared to examine the actions of ASIO for their consistency with the ASIO Act. The Act prohibits ASIO from obtaining, correlating, evaluating or communicating intelligence unless it is 'relevant to security'. While a minority held that the question of relevance was not justiciable,²⁵² the majority held that it was, although a plaintiff might be handicapped:

It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence is "for purposes relevant to security". Courts constantly determine issues of relevance and questions of relevance ... Intelligence is relevant to security if it can reasonably be considered to have a real connexion with that topic, judged in the light of what is known to ASIO at the relevant time. This is a test which the courts are quite capable of applying. It is a test which presents a formidable hurdle to a plaintiff and not only because a successful claim for [public interest immunity] may exclude from consideration the very material on which the plaintiff hopes to base his argument – that there is no real connexion between the intelligence sought and the topic.²⁵³

Thus, while official actions based on national interest or national security considerations may be subject to judicial review, it may be difficult for a plaintiff to succeed unless there is some tangible evidence of bad faith or some basis for concluding that the relevant conduct, decision or opinion was 'manifestly unreasonable' or 'so devoid of any plausible justification' that no reasonable person could have come to it in the circumstances.²⁵⁴

3.3.3 Administration of Justice

The court may become involved at a third level: determining the admissibility of sensitive evidence in civil or criminal litigation. A basic principle of evidence is that courts answer questions of admissibility and weight. Thus it is said that in relation to confidential information 'no obligation of confidence, of itself, entitles the person who owes the duty to refuse to answer a question or to produce a document in the course of legal proceedings'.²⁵⁵ However, courts will consider claims based on a range of privileges and immunities which are themselves based on public interest considerations.

As with the issues canvassed above, questions of privilege and immunity often involve some form of deference by courts to the other arms of government. Thus, while the courts reserve the right to determine claims of public interest immunity, where national security considerations arise 'very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister'. This is not to say that the opinion of the executive will always be conclusive. Thus, while it is said that issues of national interest 'will seldom be wholly within the competence of a court to evaluate'²⁵⁶ and that the public interest in national security will seldom yield to the public interest in the administration of justice,²⁵⁷ it is clear that a court will determine whether national security is threatened and will not be bound by any other opinion 'as to what constitutes security or what is relevant to it'.²⁵⁸

3.4 Relationships between the Commonwealth and the States/Territories

As we have seen, questions may arise regarding Commonwealth legislative power with respect to crime. In announcing the proposed new measures Prime Minister Howard noted that '[o]ne difficulty the Commonwealth has in effectively fighting transnational crime and terrorism is that these crimes may not be strictly federal offences'.²⁵⁹ Moreover he noted potential constitutional limitations: 'it's not absolutely certain that the Commonwealth has the necessary power, complete constitutional power, as I'm advised, to deal in the way that it might think appropriate for a terrorist attack on a particular part of Australia'.²⁶⁰

3.4.1 Coordination Problems

A number of domestic reviews (discussed in *Supporting Materials*, 'Document 5: History of Australian Reviews') have canvassed topics such as protective security, intelligence services and counter-terrorism. A number of these reviews made comments about the legal and practical problems of the federal structure. Sir Robert Mark noted potential coordination problems between the Commonwealth and the States and emphasised the need for 'a willingness to recognise the difficulties which could arise from the shared political responsibility at the Crisis Policy Centre'.²⁶¹ On the one hand Justice Hope noted that '[a]s the only government in Australia with a responsibility for the whole country and with an international personality and international objectives, the Commonwealth ... should play an initiating and coordinating role in counter-terrorism'. On the other hand, he recognised that responsibility rested with the States and Territories:

Basic law enforcement ... is the responsibility of State and Territory police forces. The general rule must be that in any battle against terror, the local law enforcement authorities using the normal processes of the criminal law must be in the vanguard'.

He recommended that the Commonwealth coordinate 'primarily by seeking co-operation between the Commonwealth and State Governments, departments and authorities'.²⁶²

The Senate Standing Committee on Legal and Constitutional Affairs had this to say:

[P]erpetrators [of organised crime] pursue their schemes without regard to territorial (national or state) boundaries. Yet, every royal commissioner who has reported on aspects of organised crime since Mr Justice Moffit in 1974, has remarked upon various difficulties caused by the fragmentation of power and responsibility for law enforcement inherent in the Australian federal system. Compounding these problems is the fact that responsibility for law enforcement is divided among the various agencies.²⁶³

Similarly, Michael Codd recognised the fact that terrorism and politically motivated violence could reach across a range of intergovernmental agencies. He concluded that 'the arrangements in Australia seemed to be fundamentally as well based as they could be in light of our particular circumstances (such as our federal system) and our experience'.²⁶⁴ Around the same time, however, concern was expressed in at least one representation to Honan and Thompson that there could be severe dangers if coordination is overlooked:

Priorities have to be based on a national perspective of a terrorist threat to Australia. If jurisdictions are allowed to set their own priorities in an uncoordinated manner, it would lead to a diverse range of precautionary, response and investigative capabilities across jurisdictions. This would severely impair our/their ability to deal with a terrorist threat.²⁶⁵

3.4.2 The Northern Territory Exception

It was noted above that while there are few references to 'terrorism' or 'politically motivated crime' in State and Territory law, the Northern Territory *Criminal Code* contains a specific division dealing with this topic. The existence of such a specific offence in the Northern Territory, compared with its absence in other jurisdictions, may be a legislative aberration. This possibility is reflected in the fact that the Commonwealth Attorney-General and Prime Minister expressed concern both publicly and privately at the time the offence was introduced in the *Criminal Code Act 1983* (NT).²⁶⁶

In 1983 the Prime Minister wrote to the Chief Minister of the Northern Territory expressing concern that '[w]hilst ... terrorist acts can amount to offences against State or Territory laws ... the laws of the Commonwealth already cover areas included in the Code'. Moreover, '[c]learly any act against overseas and interstate aircraft, internationally protected persons and foreign governments should, in the eyes of the international community, be within the domain of Commonwealth law'. Similar considerations were said to apply to terrorism aimed at the Commonwealth or Commonwealth interests.²⁶⁷

In reply the Chief Minister conceded that 'if there is a Commonwealth law to deal with an act of terrorism that is the end of it'. But, he argued, 'there are acts that are not and cannot be the subject of Commonwealth law. An example would be if a person threatened to set off explosions in public places unless a demand, such as the release of a prisoner, was complied with'. He also stated that the relevant provisions had been considered by a committee acting on behalf of the Law Council of Australia: '[w]e know of no other State which has legislation covering a similar area. In principle, these provisions do not seem inappropriate and it may well be this area is deserving of consideration by other States'.²⁶⁸

3.4.3 The Referral Process

In October the Government recommended a summit of State and Territory leaders 'to develop a new framework under which transnational crime and terrorism can be dealt with by law enforcement at a Commonwealth level'. One objective of the summit would be '[a] reference of constitutional power to the Commonwealth to support an effective national response to the threats of transnational crime and terrorism'.²⁶⁹

Section 51(xxxvii) of the Constitution provides that the Commonwealth Parliament may make laws with respect to: 'Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law'.

The clause was held up by delegates to the Constitutional Conventions of the late 1890s as a mechanism to bring some flexibility to the Constitution.²⁷⁰ It provides that State Parliaments can refer 'matters' to the Commonwealth Parliament and gives the Commonwealth power to

pass laws about them. At least in theory, it makes the division of powers between the Commonwealth and the States quite flexible, by enabling them to change it by agreement between themselves. It is not necessary for all States to refer a matter to the Commonwealth. If only some States make a reference, the Commonwealth law can apply only in those States. Once the law is passed, it may be 'adopted' by the Parliaments of other States and so come into effect there as well.²⁷¹

Over the course of last century, relatively little use has been made of the power. The States have collectively passed 44 referral acts of which only 24 remain in force. A complete list of referral legislation is contained in the notes to the Australian Constitution.

There is, however, some doubt as to the clause's usefulness. The Constitutional Commission of the 1980s concluded that uncertainty about the scope of the power had contributed to the unwillingness of the States to refer matters to the Commonwealth. Three key issues were identified namely: whether a State retains power to legislate on a matter which it has referred to the Commonwealth;²⁷² whether a reference may be made subject to conditions regarding its exercise or duration, and whether the referral can be revoked. While the Commission concluded that 'judicial decisions seem fairly clearly to indicate that the answer to each of these questions is in the affirmative'²⁷³ it supported a proposal to amend the Constitution to put the question beyond doubt.²⁷⁴

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Endnotes

1. The Reserve Bank has since written to institutions seeking details of accounts held by any of the nominated institutions. According to published reports no persons associated with Osama bin Laden or *al-Qa'ida* have accounts in Australia.
2. The Hon. Alexander Downer, MP, 'Government Implements New Anti-Terrorism Regulations', *Media Release*, 15 October 2001.
3. The Hon. John Howard, MP, 'Australian Financial Controls on Terrorists and their Sponsors', *Media Release*, 28 November 2001.
4. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.
5. The Hon. John Howard, MP, 'New Anti-Hoax Legislation', *Media Release*, 16 October 2001. The amendment would 'make it a federal criminal offence to cause an article to be carried by post, courier service, or prescribed method of delivery with the intention of inducing a false belief or fear that the article consists of, encloses or contains an explosive or a dangerous or chemical, biological or radiological substance; or that an explosive, or a dangerous or chemical, biological or radiological substance, is or will be left in any place'. The maximum penalty would be 10 years imprisonment.
6. The Hon. John Howard, MP, '[A Safer More Secure Australia](#)', *Media Release*, 30 October 2001.
7. Senator The Hon. Chris Ellison, '[Air Security Officers](#)', *Media Release*, 19 November 2001.
8. The Hon. Daryl Williams, MP, '[Airport Security Claims Not Justified](#)', *Media Release*, 16 December 2001.
9. The Hon. Daryl Williams, MP, '[Air Security Officers](#)', *Media Release*, 18 December 2001.
10. The Hon. Daryl Williams, MP, '[Upgrading Australia's counter-terrorism capabilities](#)', *Media Release*, 18 December 2001.
11. The Hon. Daryl Williams, MP; Senator The Hon. Chris Ellison, '[Review of National Crime Authority](#)', *Media Release*, 21 December 2001.
12. Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996, Vol. 1, p. 18. The jurisdictions covered were Argentina, Australia, Austria, Belgium, Brazil, Denmark, Finland, Greece, India, Ireland, Italy, Japan, Netherlands, Norway, Pakistan, Portugal, Russia, Spain, Sweden and Turkey.
13. Laura Donohue, 'In the Name of National Security: U.S. Counterterrorist Measures, 1960-2000', *ESDP Discussion Paper ESDP-2001-04*, John F. Kennedy School of Government, Harvard University, August 2001, p. 29.
14. HMSO, [Explanatory Notes to the Terrorism Act 2000](#), 15 August 2000.
15. Sir Garfield Barwick, Crimes Bill 1960, Second Reading Speech, House of Representatives, *Debates*, 8 September 1960, pp. 1020–1021.

16. *Petroleum (Timor Gap Zone of Cooperation) Act 1990*, Schedule 1 (*Timor Gap Treaty*, Article 8(1)(ii) relating to terrorist acts in Area A of the Zone of Cooperation); *Crimes (Ships and Fixed Platforms) Act 1992*, Schedule 1 (*Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Preamble); *International War Crimes Tribunals Act 1995*, Schedule 4 (*Statute of the Rwanda Tribunal*, Article 4(d) relating to the jurisdiction of the tribunal over violations of the Geneva Conventions); *Geneva Conventions Act 1957*, Schedule 4 (Geneva Convention, Article 33, relating to terrorism against protected persons) and Schedule 5 (*Protocol I to the Geneva Conventions*, Article 51, relating to protection of the civilian population); *Crimes (Hostages) Act 1989* Schedule (*International Convention Against the Taking of Hostages*, Preamble).
17. *Telecommunications Act 1997*, section 336(b) and *Petroleum (Submerged Lands) Act 1967*, section 140B. 'Terrorist activities' are defined to include 'activities involving extortion': subsection 140B(6).
18. Crimes Regulations 1990, reg 4A, inserted by the Crimes Amendment Regulations 2001 (No. 4) and Air Navigation Regulations 1947, reg 71.
19. *Protection of Marine Waters (Prevention of Pollution From Ships) Act 1987* (SA), sections 26 and 29; and *Police Powers and Responsibilities Act 2000* (Qld), section 132.
20. That is, offences under the *Crimes (Internationally Protected Persons) Act 1976*, *Crimes (Hijacking of Aircraft) Act 1972* or *Crimes (Protection of Aircraft) Act 1973*.
21. On 17 May 1983 the Hawke Government reappointed Justice Hope to conduct a second Royal Commission into intelligence services. The inquiry was to examine progress in implementing the recommendations from Justice Hope's previous Royal Commission in 1979; arrangements for developing policies, assessing priorities and coordinating activities among the organisations; ministerial and parliamentary accountability; complaints procedures; financial oversight and the agencies' compliance with the law. As with the first Hope Royal Commission, the reports on ASIS and DSD, which included draft legislation on ASIS, were not made public.
22. Lionel Bowen, MP, Australian Security Intelligence Organisation Amendment Bill, Second Reading Speech, House of Representatives, *Debates*, 22 May 1986, p. 3707.
23. *Australian Security Intelligence Organisation Act 1979*, section 4, definition of 'politically motivated violence', paragraphs (a), (b), (c) and (d). Some of these are covered in *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Crimes (Hostages) Act 1989*, Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* and Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*.
24. Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994.
25. Lindsay Hansch, 'Australia's National Anti-Terrorist Plan—Crisis and Response Arrangements', in Alan Thompson (ed.), *Terrorism and the 2000 Olympics*, Australian Defence Studies Centre, Canberra, 1996, p. 97.
26. Protective Security Coordination Centre, [National Anti-Terrorist Plan \(NATP\) – Key Points](#).
27. *Australian Security Intelligence Organisation Act 1979*, section 4, definition of 'security', paragraphs (a) and (b). 'Promotion of communal violence' means 'activities that are directed

to promoting violence between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth'.

28. *Intelligence Services Act 2001*, section 11(1B), relating to limits on ministerial authorisation of specified acts or classes of acts in relation to Australians.
29. *Irving v. Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84 per Davies J at p. 90.
30. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per McTiernan J at p. 210.
31. Gary Brown, *Australia's Security: Issues for the New Century*, Australian Defence Studies Centre, Canberra, 1994, pp. 161–162.
32. National Crime Authority, [NCA Commentary 2001](#), p. 46.
33. Marshall Irwin, '[Policing Organised Crime](#)', Paper delivered to *New Crimes or New Responses: 4th National Outlook Symposium on Crime in Australia*, convened by the Australian Institute of Criminology and held in Canberra 21-22 June 2001.
34. Australian Law Reform Commission, *Integrity: but not by trust alone. AFP & NCA complaints and disciplinary systems*, Report No. 82, AGPS, Canberra, 1996.
35. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 3 and pp. 33–34.
36. *ibid.*, p. 63.
37. Honan and Thompson, *op. cit.*, p. 26.
38. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 8.
39. Protective Security Review, *loc. cit.*, p. 69.
40. Sean Brennan, 'Australian Security Intelligence Organisation Legislation Amendment Bill 1999', [Bills Digest No. 172 1998-99](#).
41. Nathan Hancock, 'Intelligence Services Bill 2001', [Bills Digest No. 11 2001-2001](#).
42. Protective Security Review, *loc. cit.*, p. 87.
43. Honan and Thompson, *op. cit.*, p. iv.
44. Protective Security Review, *loc. cit.*, p. 88.
45. Elizabeth Chadwick, 'Terrorism and the law: Historical contexts, contemporary dilemmas, and the end(s) of democracy', *Crime, Law and Social Change*, Vol. 26(4), 1996/97, pp. 329–350, p. 332.
46. Protective Security Review, *loc. cit.*, pp. 88–89.
47. Migration Regulations 1994, regs 2.02, 2.03(1), 2.03(2), Schedule 4, Public interest criteria 4001; 4002; and 4003.
48. *Migration Act 1958*, paragraph 501(6)(a). A 'substantial criminal record' is one that includes, for example, a sentence of imprisonment of 12 months or more: *Migration Act 1958*, subsection 501(7). This may be disregarded in relation to the character test if the person has

- been pardoned or the conviction nullified (subsection 501(10)); paragraph 501(6)(c); and items 501(6)(d)(iv) and (v).
49. The Hon. Philip Ruddock, MP, 'Direction - Visa Refusal and Cancellation under section 501 - No.17', directions issued pursuant to section 499 of the *Migration Act 1958*, para 1.9(a).
 50. *Migration Act 1958*, sections 501A and 339.
 51. *Migration Act 1958*, section 501 and paragraph 116(1)(e).
 52. *Migration Act 1958*, section 116(1)(e); sections 116(1)(g), 116(3); Migration Regulations 1994, reg. 2.43(2); reg. 2.43(1)(a)(i); and reg. 2.43(1)(a)(ii).
 53. [Migration \(Republic of Sudan - United Nations Security Council Resolution No. 1054\) Regulations 1996](#).
 54. *Migration Act 1958*, section 201 (it is worth noting that any person who, *at any time*, falls into the class of 'unlawful non-citizens' (ie a non-citizen in the migration zone without a visa) can *never* qualify as a permanent resident for the purposes of section 201: subsection 202(d)); section 202 and section 203.
 55. Department of Immigration and Multicultural Affairs, *Msi-06: Removal of Spouses And Dependants who are Lawful Non-Citizens*, Attachment 1, para 12.
 56. *ibid.*, para 2.6(g).
 57. Department of Immigration and Multicultural Affairs, *Msi-06: Removal of Spouses And Dependants who are Lawful Non-Citizens*, Attachment 1, para 12.
 58. Mr Bruce, Policy Speech, Dandenong, Victoria, 5 October 1925.
 59. Mr Latham, 'Crimes Bill', Second Reading Speech, House of Representatives, *Debates*, 18 January 1926, p. 457.
 60. Mr Bruce, *op. cit.*
 61. Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press, 1956, p. 268.
 62. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1.
 63. *Crimes Act 1914*, section 30A; 30AA; 30B; 30D; and 30FC.
 64. The Hon. Alexander Downer, MP, and the Hon. Daryl Williams, MP, 'Australia signs terrorist financing convention', *Media Release*, 21 October 2001.
 65. George W. Bush, '[President Freezes Terrorists' Assets](#)', *Media Release*, 24 September 2001.
 66. George W. Bush, '[President Announces Crackdown on Terrorist Financial Network](#)', *Media Release*, 07 November 2001.
 67. International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)(IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3.
 68. DACC is 'the provision of Defence Force personnel, equipment, facilities or capabilities to perform emergency tasks which are primarily the responsibility of civil authorities or

organisations, and for which the civilian community lacks the necessary equipment or resources': New South Wales State Emergency Management Committee, 'Index to [New South Wales State Disaster Plan] Displan Part 4 b: Roles and Responsibilities' at <http://www.oes.nsw.gov.au/PART4B.HTM> [7/7/00]. DACP is 'the provision of Defence Force aid to civil law authorities in the performance of law enforcement tasks': New South Wales State Emergency Management Committee, 'Index to [New South Wales State Disaster Plan] Displan Part 4 b: Roles and Responsibilities' at <http://www.oes.nsw.gov.au/PART4B.HTM> [7/7/00]. The expression 'call out' traditionally refers to the use of 'reserves, militia and other auxiliary forces' for certain contingencies. In Eighteenth Century England, where regular troops were to be used they were said to be 'called in'. However, in time, the practice was to 'call out' troops in readiness to be 'called in': 'Opinion of Sir Victor Windeyer, KBE, CB, DSO on certain questions concerning the position of members of the Defence Force when called out to aid the civil power', Protective Security Review, op. cit., Appendix 9, p. 282.

69. *State Counter Disaster Organisation Act 1975* (Qld); *Emergency Services Act 1976* (Tas); *State Emergency Services and Civil Defence Act 1972* (NSW); *Disasters Ordinance* (NT).
70. Donohue, op. cit., p. 29.
71. Gary Crooke, QC, (NCA Chairman), ['The Future Directions of the NCA'](#), May 2000.
72. *National Crime Authority Act 1984*, subsection 11(1)
73. *National Crime Authority Act 1984*, section 14.
74. The term, 'relevant offence' is defined as an offence involving two or more persons in substantial planning and organisation using sophisticated techniques. Further, it must involve an offence such as theft, fraud, tax evasion or illegal drug dealing which is punishable by imprisonment for at least three years: *National Crime Authority Act 1984*, sections 4 and 4A.
75. *National Crime Authority Act 1984*, section 4A.
76. Peter Clack, 'National Crime Authority subject of major review', *The Canberra Times*, 23 December 2001.
77. *Telecommunications Act 1997*, paragraphs 313(3)(d) and (e); subsection 313(7) and section 314.
78. *Telecommunications (Interception) And Listening Device Amendment Act 1997*, Schedule 2.
79. *Australian Federal Police Act 1979*, subsection 12G(2); 12G(4); and 12G(5A). Subsection 12G(5A) was inserted by the *Measures to Combat Serious and Organised Crime Act 2001*.
80. *Australian Security and Intelligence Organisation Act 1979*, section 26.
81. *ibid.*, subsection 26(3); subsection 26(4). In *R v. Nicholas* (2000) 1 VR 356 the Victorian Court of Appeal concluded that a warrant issued in relation to a 'particular person, namely a person who obtains or seeks to obtain possession of a [particular] bag' could not be supported by the 'particular person' provisions of the *Customs Act 1901*. The court noted that the warrant did not identify any individual and that it could have included, during its 28 day period of operation, innocent possessors of the bag such as porters and taxi drivers. It reiterated the common law principle that the legal system does not recognise general warrants

in the absence of specific statutory authorisation. General warrants have long been regarded as invasive and unsusceptible to proper controls. However, the Court did not agree that the evidence obtained from the warrant should be excluded. It rejected any suggestion that the officers obtaining the warrant acted dishonestly and drew attention to the fact that a Federal Court judge had issued the warrant.

82. *ibid.*, subsection 26A.
83. *ibid.*, subsection 25(5) and section 25A.
84. That is, 'a person who voluntarily and with the necessary intent commits all the objective elements of a criminal offence is guilty of that offence regardless of whether he or she was induced to act by another, whether private citizen or law enforcement officer': *Ridgeway v. Queen* (1995) 184 CLR 1 per Mason CJ and Deane and Dawson JJ at p. 28.
85. The majority concluded that in the circumstances 'grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; absence of any real indication of official disapproval or retribution; the achievement of an objective of the criminal conduct if evidence be admitted-combine to make the case an extreme one in which the considerations favouring rejection of evidence on public policy grounds are extremely strong': *ibid.*, at pp. 42–43.
86. *Criminal Law (Undercover Operations) Act 1995* (SA); *Law Enforcement (Controlled Operations) Act 1997* (NSW); *Police Powers and Responsibilities Act 2000* (Qld); *Crimes Amendment (Controlled Operations) Act 1996* (Cth).
87. *Crimes Act 1914*, sections 15IA; 15I; 15IB; and 15M.
88. *ibid.*, sections 15R, 15S and 15T.
89. *ibid.*, section 15HB; Crimes Regulations 1990, reg 4A, inserted by the Crimes Amendment Regulations 2001 (No. 4).
90. Including officers of the AFP, Customs, ASIO, ASIS, DSD and DIO. Officers of foreign law enforcement, intelligence or security agencies may also be 'approved officers' under the Act.
91. Dr Sharman Stone, MP, Measures to Combat Serious and Organised Crime Act 2001, [Second Reading Speech](#), House of Representatives, *Debates*, 20 September 2001, p. 31198.
92. Alan Leaver, *Investigating Crime. A Guide to the Powers of Agencies Involved in the Investigation of Crime*, LBC Information Services, Sydney, 1997, p. 350.
93. *National Crime Authority Act 1984*, subsection 29(1) and 29(3A).
94. *Criminal Code* (NT), sections 54; 55; and 51; paragraph 51(1)(c); and section 50.
95. Greg Wilesmith, 'Protest signs may mean jail in NT', *Sydney Morning Herald*, 6 August 1981.
96. Denise Kitchen, 'World Search for New Criminal Code', *Territory Digest*, Vol. 4(1) 1982, pp. 18–20.
97. Although, it may be significant that the only domestic issue, the highjacking in Alice Springs, does not appear on the list of 'significant incidents of politically motivated violence in Australia' in Honan and Thompson, *op. cit.*, Annex C.

98. Letter from the Chief Minister of the Northern Territory to the Prime Minister, 15/12/83, tabled by Senator Bernie Kilgariff in Adjournment, ['Northern Territory Criminal Code-Presentation of Petitions'](#), Senate, *Debates*, 15 December 1983, p. 3932.
99. Mr Bob Collins, MLA, Legislative Assembly of the Northern Territory, *Parliamentary Record*, 17 August 1982, p. 2587.
100. *Crimes Act 1914*, sections 27; 78; 79; 80; 81; and 83.
101. The Hon. Daryl Williams, MP, Criminal Code Amendment (Espionage and Related Offences) Bill 2001, [Second Reading Speech](#), House of Representatives, *Debates*, 27 September 2001, p. 31631.
102. *Crimes (Foreign Incursions and Recruitment) Act 1978*, subsection 6(1); section 7; paragraph 7(1)(e); subsection 6(3); and subsection 6(4).
103. *ibid.*, subsections 6(2) and 7(2); and section 10.
104. Protective Security Review, *op. cit.*, p. xv.
105. Resolution 1373, para 1(a), 1(b) and 2(e).
106. Statement of the Committee against Torture, [CAT/C/XXVII/Misc.7.](#), 22 November 2001.
107. [Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights](#), 29 November 2001.
108. [Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba](#), 16 January 2002.
109. Lord Lloyd of Berwick, *op. cit.*, Vol. 2, p. 58.
110. Conor Gearty and John Kimbell, *Terrorism and the Rule of Law: a report on the laws relating to political violence in Great Britain and Northern Ireland*, King's College London School of Law, Civil Liberties Research Unit, London, 1995, p. 14.
111. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 9.
112. *ibid.*, p. 60.
113. Donohue, *op. cit.*, p. 42.
114. 'Precisely because the need for action against the . . . scourge is manifest, the need for vigilance against . . . excess is great. History teaches that grave threats to liberty often come in times of urgency, when . . . rights seem too extravagant to endure . . . [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it [T]he first, and worst, casualty . . . will be the precious liberties of our citizens.': *Skinner v. Railway Labor Executives' Association* (1989) 489 U.S. 602 per Marshall J., dissenting at pp. 635-36.
115. 'When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will,

however frightened and prejudiced it may be, of Parliament': Leslie Scarman, *English Law – The New Dimension*, The Hamlyn Lectures, 26th Series, Law Book Company, Melbourne, 1974, at p. 15; 'It must be a cardinal principle of a liberal democracy in dealing with problems of terrorism, however serious these may be, never to be tempted into using methods which are incompatible with the liberal values of humanity, liberty and justice. It is a dangerous illusion to believe one can 'protect' liberal democracy by suspending liberal rights and forms of government': Lord Lloyd of Berwick, *op. cit.*, Vol. 2, p. 59.

116. 'Given the chance to vote on the proposal to change the Constitution, the people of Australia, fifty years ago, refused. When the issues were explained, they rejected the enlargement of federal power. History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States. Keeping proportion. Adhering to the ways of democracies. Upholding constitutionalism and the rule of law. Defending, even under assault, the legal rights of suspects. These are the way to maintain the love and confidence of the people over the long haul. We should never forget these lessons. ... Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the *Communist Party case* of 1951': Justice Michael Kirby, '[Australian law, after September 11, 2001](#)', Speech to the Law Council of Australia, 32nd Australian Legal Convention, Canberra, 11 October 2001. The Law Council also commented it 'recognises the Government needs to protect Australia's security interests, but in doing so, it must remain mindful of the rights of individual Australians to fair treatment by police and security agencies': Law Council of Australia, 'Hicks Reaction a Warning on Counter-Terrorism Laws', *Media Release*, 14 December 2001.
117. For example, in the United States, the Government has said that it will 'act in a strong manner against terrorists without surrendering basic freedoms or endangering democratic principles': Public Report of the Vice President's Task Force on Combating Terrorism, Washington, D.C., 1986.
118. The Hon. John Howard, MP, Transcript of Press Conference, Sydney, 2 October 2001.
119. In the wake of the demand for ever more stringent counterterrorist measures, not just one but many areas of the government respond to each event. And so the legislature legislates, the White House negotiates international agreements and the military introduces new counterterrorist strike teams. The result is an unwieldy and ever-expansive compilation of counterterrorist measures that confuses efforts to evaluate America's total terrorist response.': Donohue, *op. cit.*, p. 41.
120. J. Murphy, 'The Need for International Co-operation in Combating Terrorism', *Terrorism: An International Journal*, Vol. 13, p. 381.
121. Grant Wardlaw, 'The Nature and Purpose of Terrorism and Politically Motivated Violence', in Alan Thompson (Ed.), *Terrorism and the 2000 Olympics*, Australian Defence Studies Centre, Canberra, 1996, p. 14.
122. Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures*, Cambridge University Press, Cambridge, 1982, p. 16.

123. Brian Martin, 'International Terrorism: Recent Developments and Implications for Australia', Legislative Research Service, *Current Issues Brief No. 5 1985–86*, p. 4.
124. Honan and Thompson, op. cit., p. 4.
125. Alan Thompson, 'Management of Australia's Counter-Terrorism Program', Australian Defence Studies Centre, *Working Paper No. 28*, Canberra, September 1994.
126. [Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373 \(2001\) of 28 September 2001.](#)
127. *ibid.*
128. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.
129. *Protective Security Review*, op. cit., p. 42.
130. Chadwick, op. cit., pp. 329–350, p. 336.
131. Doug Meagher, *Organised Crime*, AGPS, Canberra, 1983, p. 22.
132. Lord Lloyd of Berwick, op. cit., Vol. 1, p. 28.
133. *ibid.*, p. xi.
134. Clive Walker, *The Prevention of Terrorism in British Law*, Manchester University Press, Manchester, 1986, p. 22.
135. Lord Lloyd of Berwick, op. cit., Vol. 1, p. 23.
136. Resolution 1373, para 2(e).
137. The Hon. Daryl Williams, MP, '[Airport Security Claims Not Justified](#)', *Media Release*, 16 December 2001.
138. Michael Levi, '[Tighter rules to cut off supply of terror funds](#)', *Australian Financial Review*, 03 November 2001.
139. United Nations Office for Drug Control and Crime Prevention, Global Programme Against Money Laundering, [Financial Havens, Banking Secrecy and Money Laundering](#), December 1998.
140. Organisation for Economic Cooperation and Development, [Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices](#), April 1998.
141. United Nations. Security Council. Resolution 1373 (2001), S/RES/1373 (2001), paragraph 1(c).
142. The magnitude of the problem of identifying beneficiaries of trusts for taxation purposes was highlighted by the Australian National Audit Office (ANAO) in its report, *Managing Tax File Numbers*, April 1999. It states that 45 percent of the 430,572 trust tax returns for 1997 did not include the tax file numbers (TFNs) of the beneficiaries of trust distributions. Further, TFNs were not provided for 370,764 beneficiaries of trusts in 1997.

143. The Hon. John Howard, MP, 'Australian Financial Controls on Terrorists and their Sponsors', 28 September 2001. *Media Release*.
144. *MacLeod v. Attorney-General (NSW)* [1891] AC 455 per Halsbury LC, at p. 458-459; *Thompson v. The Queen* (1989) 169 CLR 1 per Deane J at p. 33; *R v. Keyn* (1876) 2 Ex D 63, at pp. 68, 117, 152, 160-161, 239; *Huntingdon v. Attrill* [1893] AC 150 per Watson LJ at p. 155–156.
145. *Jumbunna Coal Mine NL v. Victorian Coal Miners' Association* (1907) 6 CLR 309 at p. 363 and *Morgan v. White* (1912) 15 CLR 1 at pp. 3–9.
146. *Wanganui-Ragotikei Electric Power Board v. Australian Mutual Provident Society* (1934) 50 CLR 581 at 601. See also *Air India v. Wiggins* [1980] 2 All ER 593 per Scarman LJ at p. 597.
147. *Meyer Heine Pty Ltd v. The China Navigation Co Ltd* (1966) 115 CLR 10 at p. 23.
148. This is discussed in Dennis Pearce and Robert Geddes *Statutory Interpretation in Australia* (3rd Ed), Butterworths, Sydney, pp. 97–99.
149. A similar jurisdiction has been asserted in Australia, but only in relation to war crimes, hostages and torture: *War Crimes Amendment Act 1988*, *Crimes Act 1914*, Part IIIA (ss 50AA-50GA), *Crimes (Torture) Act 1988*, s 7; *Crimes (Hostages) Act 1989*, s 7.
150. *Polyukhovich v. Commonwealth (War Crimes Act case)* (1991) 172 CLR 501.
151. The basis for this proposition would probably be the fact that the extraterritorial limitations on the States do not apply to the Commonwealth. The power of the States to legislate extraterritorially depends on a demonstrated nexus between the subject matter of the law and the 'peace, welfare and good government' of the State (*Port MacDonnell Professional Fishermen's Association Inc v. South Australia* (1989) 168 CLR 340, at pp. 372-373). However, '[s]o far as the Commonwealth is concerned, it is now for the Parliament alone to judge whether a measure in respect of any topic on which it has power to legislate is in fact for the peace order and good government of the Commonwealth' (*R v. Foster; Ex p. Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256 per Windeyer J at p. 308).
152. *War Crimes Act case*, loc. cit. per Mason CJ at pp. 530-531.
153. *Polities v. The Commonwealth* (1945) 70 CLR 60; *Fishwick v. Cleland* (1960) 106 CLR 186; and *Horta v. The Commonwealth* (1994) 181 CLR 183 at 195.
154. That is, it may enforce laws in relation to any persons in Australia and it may enforce laws in relation to any Australians overseas.
155. *Treacy* [1971] AC 537 per Diplock LJ at p. 564.
156. Lanham, *Cross-Border Criminal Law* (1997) at p. 16 quoted in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction – Discussion Paper*, January 2000, p. 169 at http://law.gov.au/publications/Model_Criminal_Code/damage.pdf [1/9/00].
157. *Prevention of Terrorism (Temporary Provisions) Act 1989*, paragraph 14(1)(b).

158. Article 5(1) provides that 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an *offence*.' Lord Lloyd considered that it was 'at least doubtful' that the paragraph 14(1)(b) 'would be upheld if challenged under Article 5': Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 14.
159. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 14.
160. J J Rowe, 'The Terrorism Act 2000', *Criminal Law Review*, July 2001, pp. 527–542, at pp. 534–535.
161. (1989) 11 EHRR 117.
162. Article 5(3) provides that 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial'.
163. (1994) 17 EHRR 539.
164. Rowe, *loc. cit.*, at pp. 534–535.
165. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 29 (emphasis added) and p. 30 and Vol. 2, p. 57.
166. Walker, *op. cit.*, p. 50.
167. Lord Lloyd of Berwick, *op. cit.*, Vol. 2, p. 57.
168. Walker, *op. cit.*, p. 36.
169. *Crimes Act 1914*, section 30AA.
170. *Kioa v West* (1985) 159 CLR 550 per Mason J at 584.
171. *Mobil Oil Australia Pty Ltd v. Federal Commissioner of Taxation* (1963) 113 CLR 475 per Kitto J at p. 504; *Salemi v. Minister for Immigration and Ethnic Affairs* (1977) 14 ALR 1 at p. 19; *Kioa v. West*, *loc. cit.* per Mason J at p. 585; *Haoucher v. Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 per Deane J at p. 652.
172. *F.A.I. Insurances Ltd v Winneke* (1982-83) 151 CLR 342 per Mason J at 363.
173. *Kioa v. West*, *loc. cit.* per Brennan J at 629; See *Cooper v. Wandsworth Board of Works* (1863) 143 ER 414; *Commissioner of Police v. Tanos* (1958) 98 CLR 383 per Dixon CJ and Webb J at p395; *T. A. Miller Ltd v. Minister of Housing and Local Government* [1968] 1 WLR per Denning MR, at 995; *Twist v. Randwick Municipal Council* (1976) 136 CLR 106.
174. *F.A.I. Insurances Ltd. v. Winneke* per Mason J at 370-71; cf *State of South Australia v. O'Shea* (1987) 73 ALR 1 per Mason J at 6 and Brennan J at 20.
175. *Roderick v. AOTC* (1992) 111 ALR 83.
176. *Excell v. Harris* (1983) 51 ALR 137.
177. *Criminal Code Act 1983* (NT), section 51 (amended).

178. David Weisbrot, 'Criminal Law: NT Prepares for War', *Legal Service Bulletin*, Vol. 7(4), August 1982, p. 184.
179. 'Concerns have been expressed that this section [original section 51] has potential implications for interference with a number of civil rights, which Australia has international obligations to protect including the right to freedom of expression, the right to freedom of association and the right to peaceful assembly': Letter from the Prime Minister to the Chief Minister of the Northern Territory, 17 November 1983 reproduced in Senator Gareth Evans, '[Northern Territory Criminal Code](#)', Senate, *Debates*, 18 November 1983, Answer to Question on Notice, p. 2856.
180. 'The proscribing of organisations under the terrorism provision in the code is in the hands of the executive and is thus a political decision. In our view it is inappropriate that this be so. Such decisions should be the subject of impartial judicial consideration': Mr Bob Collins, MLA, Legislative Assembly of the Northern Territory, *Parliamentary Record*, 31 August 1983, p. 981.
181. Letter from the Chief Minister of the Northern Territory to the Prime Minister tabled by Senator Bernie Kilgariff in Adjournment, '[Northern Territory Criminal Code-Presentation of Petitions](#)', Senate, *Debates*, 15 December 1983, p. 3932.
182. Robertson, MLA, Legislative Assembly of the Northern Territory, *Parliamentary Record*, 31 August 1983, p. 981.
183. Senator Gareth Evans, '[Northern Territory Criminal Code](#)', Senate, *Debates*, 29 March 1984, Answer to Question Without Notice, p. 877.
184. The provisions on 'proscribed organisations' were replaced with the current provisions on 'unlawful organisations' by section 5 of the *Criminal Code Amendment Act 1984*.
185. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.
186. *Chic Fashions v. Jones* [1968] 1 All ER 229; *Ghani v. Jones* [1970] 1 QB 693; *Reynolds v. Commissioner of Police of the Metropolis* [1985] 2 WLR 93. In Australia see generally *Parker v. Churchill* (1985) 63 ALR 326.
187. Australian Law Reform Commission, *Criminal Investigation: An interim report*, AGPS, Canberra, 1975, Chapter 7, Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand*, Law Book Company, Sydney, 1996, Chapter 1.
188. 'General warrants' have been widely criticised on the basis that they lack certainty (ALRC, op. cit., para 191-192; Tronc et al, op. cit., pp. 58-62) and suffer from a lack of independent scrutiny: 'There is no requirement...that before the powers are exercised an independent judicial mind should consider the circumstances of the *particular case*, weighing the public interest as against that of the individual...Nor is there any effective way in which any of the powers once exercised can be the subject of *ex post facto* judicial review': ALRC, op. cit., para 192.
189. For example the Australian Customs Service; the Australian Defence Force (*Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000*); authorised employees of the Department of Immigration and Multicultural Affairs (eg *Border Protection Legislation*

Amendment Act 1999); and authorised employees of the Department of Employment, Training and Youth Affairs (*Education Services For Overseas Students Act 2000*).

190. For example, a search warrant may be issued if a Justice of the Peace 'is satisfied by information' (*Crimes Act 1914*, old s 10), 'satisfied by information upon oath' (*Crimes Act 1958* (Vic), s 465) or if it appears 'on a complaint made on oath' (*Criminal Code 1913* (WA), section 711) that there is reasonable ground for suspecting the existence of property connected with an offence, etc.
191. *Parker v. Churchill* (1985) 9 FCR 316 per Burchett J at p. 322, quoted with approval by the High Court in *George v. Rockett* (1990) 93 ALR 483.
192. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.
193. Lord Lloyd of Berwick, op. cit., Vol. 1, p. 94.
194. The Home Office Circular states that its use 'can only be justified in extreme cases where the withholding of information might lead to death, serious injury or the escape of a terrorist offender': Sally Broadbridge, ['The Anti-Terrorism, Crime and Security Bill: Parts I, II, VIII, IX & XIII Property, Security & Crime'](#), *Research Paper No. 01/99*, p. 56.
195. Lord Lloyd of Berwick, op. cit., Vol. 1, p. 94.
196. As the NCA acknowledges, these coercive powers 'set the NCA apart from traditional police services, and are essential if the community is to be protected from the impact of complex national organised crime': National Crime Authority, ['Why are hearings so important?'](#).
197. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.
198. Blackstone, quoted by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 28.
199. *Chu Keong Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 per Brennan, Deane and Dawson JJ at pp. 28-29 (emphasis added).
200. *ibid.*, at p. 33.
201. *Veen v. R* (1979) 143 CLR 458; *Veen v. R* (No 2) (1988) 164 CLR 465; *Hoare v. R* (1989) 167 CLR 348.
202. *Veen v. R* per Mason J at p. 468 per Jacobs J at pp. 482-3; *Veen v. R* (No 2) at 473; *Chester v. R* (1988) 165 CLR 611, at 618.
203. See generally *Halsbury's Laws of Australia*, 'Title 130 – Criminal Law' [130-17000].
204. *Lowe v. R* (1984) 154 CLR 606 at 612. See generally *Halsbury's Laws of Australia*, 'Title 130 – Criminal Law' [130-17025].
205. The ICCPR was adopted by the UN General Assembly in 1966 and came into operation in 1976. Australia signed it on 18 December 1972 and ratified it on 13 August 1980. Australia signed the First Optional Protocol on 25 September 1991 with effect on 1 December 1991.

206. *Alphen v. The Netherlands* (1990) Communication No. 305/1988, Human Rights Committee Report 1990, Volume II: UN Doc. A/45/40, paragraph 5.8 (emphasis added).
207. Sir Garfield Barwick, Crimes Bill 1960, Second Reading Speech, House of Representatives, *Debates*, 8 September 1960, pp. 1020–1021.
208. *Victoria v. Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at p. 487. See also at p. 488.
209. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 per Murphy J at p. 242; *Polyukovich v. Commonwealth* (1991) 172 CLR 501 per Brennan J at pp. 560-562 and Toohey J at pp. 657-658.
210. See generally, *R v. Burgess, Ex Parte Henry* (1936) 55 CLR 608 per McTiernan J at p. 687; *Commonwealth v. Tasmania* (1983) 158 CLR 1 per Deane J at pp. 258-259 and Murphy J at pp. 171-172.
211. *Victoria v. The Commonwealth* (1996) 187 CLR 416 per Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ at pp. 488-489; *The Commonwealth v. Tasmania* (1983) 158 CLR 1 per Deane J at pp. 233-234, 268; *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1 at 75 (cf *R v. Burgess; Ex parte Henry* (1936) 55 CLR 608 per Evatt and McTiernan JJ, p. 688).
212. *Victoria v. The Commonwealth* (1996) 187 CLR 416 per Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ at p. 489.
213. Resolution 1373, para 1(a) and 1(b) and para 2(e).
214. 'Current Topics: Legal and constitutional problems of protective security arrangements in Australia', *Australian Law Journal*, Vol. 52, 1978, p. 298.
215. Peter Hanks, *Constitutional Law in Australia*, Butterworths, Sydney, 1991 pp. 325–326, citing comments by Gaudron J and Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.
216. *Lamshed v. Lake* (1958) 99 CLR 132 per Kitto J at p. 153; *Spratt v. Hermes* (1965) 114 CLR 226 per Barwick CJ at p. 242; *Teori Tau v. Commonwealth* (1969) 119 CLR 564 at p. 570 (unanimous High Court); *Berwick Ltd v. Gray* (1976) 133 CLR 603 per Mason J at p. 607; *Northern Land Council v. Commonwealth* (1986) 161 CLR 1 at p. 6 (unanimous High Court).
217. Christopher Horan, '[Section 122 of the Constitution: A “disparate and non-federal power”?](#)' *Federal Law Review*, 25(1), 2000, pp. 97-126
218. *R v. Kidman* (1915) 20 CLR 425 per Isaacs J at p. 440.
219. *Burns v. Ransley* (1949) 79 CLR 101 per Latham CJ at p. 110.
220. *ibid* per Dixon J at p. 116
221. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Dixon J at p. 188.
222. The precise constitutional bases of the 'inherent right of self-protection' are discussed in Elizabeth Ward, 'Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters', *Research Paper No. 8 1997-98*, at <http://www.aph.gov.au/library/pubs/rp/1997-98/98rp08.htm> [5/7/00]

223. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Fullagar J at p. 260.
224. *ibid* at p. 261 and pp. 266-267.
225. *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338 per Mason J at p. 379.
226. *Davis v. The Commonwealth* (1988) 166 CLR 79 per Mason CJ, Deane and Gaudron JJ at p. 111. See generally Dr Max Spry, 'The Executive Power of the Commonwealth: its scope and limits', *Research Paper No. 28 1995-96*, at <http://www.aph.gov.au/library/pubs/rp/1995-96/96rp28.htm> [5/7/00].
227. Leslie Zines, *The High Court and the Constitution*, 4th ed, Butterworths 1997, at p. 303.
228. Lee, Hanks and Morabito, *In the Name of National Security: The legal dimensions*, Law Book Company, North Ryde, 1995 foreword by The Hon Sir Anthony Mason, AC, KBE, p. vii.
229. George Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999, pp. 103-104.
230. *Cheatle v The Queen* (1993) 177 CLR 541.
231. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 28.
232. George Williams, *loc. cit.*, pp. 214-225.
233. (1997) 189 CLR 520.
234. *Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106 at p. 212. See also McHugh J at p. 227.
235. George Williams, *loc. cit.*, pp. 194.
236. *The Zamora* (1916) 2 AC 77 at p. 107.
237. In *Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd.* (1922) 31 CLR 421 per Isaacs J at p. 442.
238. *A v. Hayden* (1984) 156 CLR 532 per Gibbs CJ at p. 548.
239. *Chandler v. Director of Public Prosecutions* (1964) AC 763 per Devlin LJ at p. 811 (emphasis added).
240. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Fullagar J at p. 264.
241. *ibid.*, at p. 258.
242. *Marcus Clark and Co Ltd v. Commonwealth* (1952) 87 CLR 177 per Fullagar J at p. 256.
243. *ibid.*
244. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Dixon J at p. 189.
245. *ibid.*, at p. 261.
246. *Attorney-General (NSW) v. Quin* (1990) 170 CLR 1 per Brennan J at pp. 35-36.

247. Professor Tony Blackshield, 'The Siege of Bowral – The legal issues', *Pacific Defence Reporter*, March 1978, p. 7.
248. This judicial review would be an action taken under section 39B of the *Judiciary Act* 1901 and section 75 of the Constitution rather than the *Administrative Decisions (Judicial Review) Act* 1977. This is because ASIO is exempt from AD(JR) actions: *Administrative Decisions (Judicial Review) Act* 1977, Schedule 1, paragraph (d).
249. In *Leisure and Entertainment Pty Ltd v. Willis* No. QG 204 of 1995 FED No. 1/96, Spender J commented, in relation to an opinion by the Treasurer based on national interest considerations, that an applicant must demonstrate 'that the opinion were not genuinely entertained or that the opinion was wholly unreasonable'
250. *Administrative Decisions (Judicial Review) Act* 1977, paragraphs 5(1)(e) & s.5(2)(a), 5(2)(b), and 5(2)(f).
251. *Murphyores Incorporated Pty. Ltd. v. The Commonwealth* (1976) 136 CLR 1 per Stephen J at 14.
252. Two judges said that, in the absence of bad faith or infringement of personal rights, such a question was not justiciable. They said that the issue of relevance either could not be assessed in isolation from other information that was or *could become* available to ASIO or was beyond the expertise of judges. They also said that scrutiny of ASIO operations was dealt with exclusively in the ASIO Act and, in any event, judicial proceedings would be frustrated by claims of secrecy or public interest immunity.
253. *Church of Scientology v. Woodward* (1982) 154 CLR 25 at pp. 59-61.
254. *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223 see also *Prasad v. Minister for Immigration and Ethnic Affairs* (1984-1985) 6 FCR 155 per Wilcox J at p. 169.
255. *Baker v. Campbell* (1983) 153 CLR 52, citing *D. v. N.S.P.C.C.* (1978) AC 171, at pp. 218, 230, 237-239, 242; *Smorgon v. Australia and New Zealand Banking Group Ltd.* (1976) 134 CLR 475, at pp. 487-489; *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd.* (1979) 143 CLR 499, at p. 521.
256. *Alister and Others v. The Queen* (1984) 154 CLR 404 per Wilson and Dawson JJ at p. 435.
257. *Reg. v. Lewes Justices; Ex parte Home Secretary* (1973) AC 388, at p. 407, cited by Brennan J in *Church of Scientology v. Woodward* (1983) 154 CLR 25 at p. 75.
258. *Church of Scientology v. Woodward*, *ibid.*
259. The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.
260. The Hon. John Howard, MP, Transcript of Doorstop Interview, Brisbane, 30 October 2001.
261. *Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and Related Matters*, AGPS, Canberra, 1978, p. 25.
262. Protective Security Review, *op. cit.*, pp. xvi and 43.
263. *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, p. 3.

264. Michael Codd AC, *Review of Plans and arrangements in relation to Counter-Terrorism*, AGPS, 25 May 1992, tabled 24 March 1994, Parliamentary Paper No. 151/1994, p. 15.
265. Concern expressed by 'one police force' to the 1993 SAC-PAV Review: Honan and Thompson, *op. cit.*, p. 9.
266. See generally Senator Gareth Evans, Answer to Question on Notice, '[Northern Territory Criminal Code](#)', Senate, *Debates*, 18 November 1983, p. 2856.
267. Letter from the Prime Minister to the Chief Minister of the Northern Territory, 17/11/83 tabled by Senator Gareth Evans in an Answer to Question on Notice, *loc. cit.*
268. Letter from the Chief Minister of the Northern Territory to the Prime Minister, 15/12/83, tabled by Senator Bernie Kilgariff in Adjournment, '[Northern Territory Criminal Code-Presentation of Petitions](#)', Senate, *Debates*, 15 December 1983, p. 3932.
269. The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.
270. Sir John Downer in commenting on the necessity of the clause remarked 'This, of course is to be an inelastic constitution, which can only be amended after great thought and with much trouble.' *Official Record of the Debates of the Australasian Federal Convention*, 3rd Session, Melbourne, 1898, Vol IV, p. 220.
271. Western Australia chose this course of action in relation to mutual recognition legislation.
272. During the Constitutional Convention Debates Alfred Deakin expressed the view that the referred power could not be reclaimed: 'having appealed to Caesar, it (the State) must be bound by the judgement of Caesar, and that it would not be possible for it afterwards to revoke its reference.' *Official Record of the Debates of the Australasian Federal Convention*, 3rd Session, Melbourne, 1898, Vol IV, p.217.
273. Constitutional Commission, 'Interchange of Powers between the Commonwealth and the States', *Background Paper No.5*, 1986, p. 5.
274. The Constitution Alteration (Interchange of Powers) Bill 1984 sought to clarify the basis on which States may refer legislative powers to the Commonwealth. The proposal was defeated at the referendum in 1984, securing only a 47 per cent Yes vote and failing to achieve a majority in any state.