



Research Paper
No. 13 2001–02

**Terrorism and the Law in Australia: Supporting
Material**

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Terrorism and The Law in Australia: Supporting Materials

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Introduction

This project arose in response to the proposals put forward in the aftermath of the events of 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 on terrorism.

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.

The project has been produced and presented in two parts. This second part, *Supporting Materials*, comprises a series of documents on specific issues related to legislative and administrative arrangements. The first part, *Legislation, Commentary and Constraints*, draws on those documents to provide more substantial commentary and analysis.

The purpose of this paper is to provide resource materials in the context of prospective parliamentary debate over anti-terrorist legislation. In light of the fairly extensive discussion in the related paper, *Legislation, Commentary and Constraints*, this paper does not seek to connect or analyse the linkages between the various legislative and administrative arrangements it covers. The paper comprises a number of documents compiled by the Information and Research Service dealing with relatively discrete issues:

- Document 1 canvasses the various definitions of terrorism that have been developed and points to the possible core elements of a definition for the present context. It also contains a brief commentary on the legal and political difficulties associated with these definitions.
- Document 2 provides an historical survey of anti-terrorist law in the United Kingdom.
- Document 3 provides an historical survey of anti-terrorist law in the United States.
- Document 4 lists the various anti-terrorism conventions and surveys the key declarations under the auspices of the United Nations General Assembly and Security Council.
- Document 5 provides a potted history of relevant Australian inquiries and reviews.
- Document 6 contains a brief guide to intelligence agencies in Australia.
- Document 7 contains a brief guide to law enforcement agencies of the Commonwealth.
- Document 8 describes briefly the counter-terrorist response role of the defence forces.
- Document 9 describes briefly the counter-terrorist arrangements in Australia.
- Document 10 describes some relevant offences at the Commonwealth level.
- Document 11 examines issues related to the power to enact extraterritorial laws.
- Document 12 examines issues related to the exercise of jurisdiction with other countries.
- Document 13 gives a brief overview of legal issues surrounding money laundering.

Document 1 What is Terrorism?

International

The word 'terrorism' is said to derive 'from the era of the French Revolution' describing 'state-directed policy of inflicting terror ... to obtain political and social control'. Its more modern usage is almost the reverse describing offences by individuals or individual organisations against states in order to obtain discrete political objectives.¹

The League of Nations defined terrorism as 'criminal acts directed against a state ... intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'.² The current United Nations definition would seem to be: 'criminal acts [that are] intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'.³

In the United States, it is defined variously as 'the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives' (Federal Bureau of Investigations), 'the calculated use of violence or the threat of violence to inculcate fear, intended to coerce or intimidate governments or societies as to the pursuit of goals that are generally political, religious or ideological' (Department of Defence) and 'premeditated, politically-motivated violence perpetrated against noncombatant targets by subnational or clandestine agents, usually intended to influence an audience' (State Department).⁴

In the United States Code 'international terrorism' is defined in more detail to include:

activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State [which] appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination, or kidnapping [and which] occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries.⁵

Similarly, 'domestic terrorism' was recently defined to include:

activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State [and] appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of government by mass destruction, [etc.] [and which] occur primarily within the territorial jurisdiction of the United States.⁶

There are also more specific definitions related to collective offences such as 'federal terrorism crimes' and 'acts of terrorism transcending national boundaries'.

In the United Kingdom 'terrorism' was defined as 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear'⁷ and as '[t]he use of serious violence against persons or property, or threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives'.⁸

In the Terrorism Act 2000 (UK) 'terrorism' is defined as:

the use or threat of [serious violence, property damage, threats to life, risk to health or safety or disruption of electronic systems] where [it] is designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause.⁹

Australia

The Australian Defence Force defines terrorism as '[t]he use or threatened use of violence for political ends, or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear'. A 1979 protective security review defined it as 'acts of small groups of persons who use criminal violence to obtain publicity for their political views, or to achieve or to break down resistance to their political aims, by the intimidation of governments or of people'.¹⁰ A 1993 counter-terrorist review defined it as 'acts or threats of violence of national concern, calculated to evoke extreme fear for the purpose of achieving a political objective in Australia or in a foreign country'.¹¹

The only statutory definition of terrorism in any Australian jurisdiction is found in the Northern Territory where it is defined as '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 includes such acts done 'for the purpose of putting the public or a section of the public in fear' or 'for the purpose of preventing or dissuading the public or a section of the public from carrying out, either generally or at a particular place, an activity it is entitled to carry out'.¹²

Comments

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.¹³

Thus, across the various definitions listed above, there appear to be four 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.

Terrorism is Multi-Faceted

Another aspect of the problem is the fact that 'terrorists acts' are difficult to categorise at law. While the elements of criminality, seriousness, motivation and intention may be identifiable, a terrorist act does not fall neatly into legislative categories such as those that 'govern governmental conduct and powers during a national emergency crisis' (war powers) 'apply to criminal conduct and government action' (rules of personal liberty) or 'establish procedures for dealing with a cataclysmic event' (disaster management):

Rather, it would fall into all three. A terrorist attack is similar to other types of aggression, but it is not obviously characterized as the kind of event justifying the use of the military and other expansive governmental powers affiliated with international crisis, a civil war or a foreign invasion of troops. An act of terrorism is like any other heinous crime, but its impact may be too overwhelming to be contained by the traditional rules of personal liberty. Terrorism is similar to other crises, such as an earthquake or hurricane, but it has security and criminal implications not usually seen in a natural disaster.¹⁴

The fact is that 'terrorism' is difficult to conceptualise or operationalise:

It may be that the "rules of war" are too hard and permit more governmental powers than are desired in a democratic state. It may be that the "rules of personal liberty" are too soft and unduly tie the hands of government actors trying to divert a crisis with no historical antecedent. It may be that the "rules for disasters" are too vague and assume a level of communication and preparation not possible in a biological terrorism situation.¹⁵

Terrorism is Subjective

One cause of the debate over definition may be the fact that 'terrorism' is subjective. No single definition seems to meet the expectations, perceptions and aspirations of all parties:

'what the multiple pages of definitions of terrorism demonstrate is that, although it is fairly easy to get agreement on the elements that constitute terrorism at the core, as one moves outwards from the core, defining an act or incident as being 'terrorism' becomes much more difficult. This problem is exacerbated by the facility of the press and the community to attach the label ... to violence across a wide and disparate spectrum.¹⁶

The truth may be that 'terrorism' is a label which is 'both political and perjorative'. The proliferation of definitions 'constitutes evidence that the labelling process is a highly politicised one'. Moreover 'state identification of "terrorist" groups or individuals, and the legal qualifications attributed to their activities, depends in the final analysis on a high level of political control over the labelling process'.¹⁷ 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'.¹⁸ So while the United Nations has sought to pursue a coherent and consensus definition of 'terrorism':

Bridging the gap between the views of the developed and developing countries on the one hand, and finding an acceptable compromise, between legitimate acts of war carried out during liberation struggle, and terrorist acts directed against civilians, non-combatants and non-military targets on the other, continue to be difficult.¹⁹

Indeed, one commentator identified what may be (prior to September 11) a 'narrowing consensus in the international community as to what constitutes terrorism' evidenced by the fact that while there are over 170 parties to the first key convention on terrorism, as at 10 September 2001 there were only 5 signatories to the latest convention.²⁰

To acknowledge the political nature of the labelling process is not to deny that a consensus may exist as to the core elements of 'terrorism'. It is to acknowledge that there may be disputes as to the penumbra that may change over context and time. Moreover, the differences in definition may reflect differences in precision, emphasis or perspective. On the other hand, they may reflect differences in the underlying phenomena.

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?

Terrorism as Crime Terrorism as Warfare

The definition debate contains a tension between military and criminal characterisation.

In general terms, 'terrorism' is an act of violence intended to influence the government or intimidate or coerce the public. In classical terms, 'war' is 'an act of violence intended to compel our opponent to fulfil our will'.²¹ These phenomena appear to be the same thing or, at least, points on the same continuum with political violence and armed conflict at the edges and 'irregular', 'non-conventional' or 'asymmetric' warfare in the middle.

A number of factors may help to distinguish war from terrorism. These might include actor (state v non-state), motivation (public v private), scale (global v local), cost (enduring v immediate) or target (functional v symbolic). Few factors are sufficient and a combination may be necessary. For example, large scale or ongoing violence sponsored by a state actor may be viewed as terrorism. However state sponsored violence that has a functional target and an enduring impact may be distinguishable as an act of war.

Arguably, the key factor is the extent of a strategic objective. In the classical view, 'war' is a duel or a wrestle in which 'each [party] endeavours to throw his adversary, and thus render him *incapable of further resistance*'.²² Similarly, a 'strategic mission' is one which is 'directed against one or more of a selected series of targets' with a view to the 'progressive *destruction and disintegration of the enemy's war making capacity*'.²³ In general terms, 'terrorism' is an asymmetric wrestle in which one party seeks to antagonise 'his' adversary not so as to undermine 'his' capacity to resist but to prompt fear or change.²⁴

This is particularly significant in the post September 11 context where politicians and the media speaks of 'armed attack' and a 'war on terrorism'. On the one hand it is possible to view the attacks as a form of 'asymmetric' warfare. Thus, the attacks are considered by some commentators to represent a form of armed conflict in which one participant simply avoids the conventional military strengths of the other and focuses on its civilian weaknesses. On the other hand, it is still valid to view the attacks as criminal acts, distinguishable perhaps by their seriousness, motivation or intention. Thus, they conform to the adage that 'terrorists want a lot of people watching and not a lot of people dead'.²⁵ Like previous terrorist acts, they focused on political rather than strategic targets.

Moreover, it is also significant in terms of dictating the form of response to terrorism.

Historically, the United States has fluctuated between criminal and military responses to terrorist acts. So, for example, the United States took a predominantly military approach prior to the Iran-Contra affair in 1986, followed by a predominantly criminal justice approach prior to the United States Embassy bombings in Nairobi and Dar es Salaam in 1998. Arguably, the responses to the recent attacks revert to the military approach. During the criminal characterisation phase, the dominant approach 'was to avoid direct discussion of the political aims of those standing trial and, instead, to handle all aspects of the prosecution along strictly criminal lines' (partly on the basis that attempts to punish the political or ideological aspect of the crimes met with little success).²⁶ In the current phase of military characterisation the dominant approach has been to emphasise political, religious and strategic aims along with the notion of state sponsorship (presumably on the basis that threat removal and collective punishment are the more pressing issues and that attempts to punish *any* aspect of the crimes will meet with limited success until *Al-Qa'ida* is dismantled and the suspects, and issues of conspiracy or complicity, are identified).

The difference in characterisation may reflect a change in emphasis or perspective, driven by the apparent practical and political need to identify the causes and respond quickly. Alternatively, it may reflect a change in the underlying phenomenon. One commentator

has suggested that a comparison of modern terrorist incidents and more traditional incidents demonstrates a shift in focus from motivations based on changing government policy to motivations based on punishment and revenge or strategic considerations.²⁷

Arguably, the bridge between these two perspectives is the notion that if terrorism is a form of warfare, terrorist acts can be treated as atrocities under the laws of armed conflict:

Some international lawyers see the laws of war as a possible solution to the dilemma of definition. They suggest that rather than trying to negotiate new treaties on terrorism that are not likely to be ratified or enforced, nations should apply the laws of war, to which almost all have agreed. Terrorists, they say, should be dealt with as soldiers who commit atrocities ... Under the laws-of-war approach, terrorism would comprise all acts committed in peacetime that, if committed during war, would constitute war crimes ... All terrorist acts are crimes, many of which would also be war crimes or 'grave breaches' of the rules of war if we accepted the terrorists' assertion that they are waging war.²⁸

It is worth noting that the United States has recently taken measures to adopt a 'laws of war' approach to the September 11 attacks. The [Use of Military Force Joint Resolution](#), signed by the President 18 on September 2001 announced that those responsible for the attacks would be tried before a military tribunal. However, it is significant that:

[A]lthough there are frequent references in the text of the Joint Resolution to "terrorist acts" and "acts of international terrorism", nowhere in the resolution, or in the presidential signing statement, is there any mention or characterization of the attacks of September 11th as acts of war. They are clearly denoted as terrorist acts.²⁹

Endnotes

1. 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. 330–332.
2. *Terrorism Convention* of 1937, Article 1(2).
3. United Nations General Assembly, 'Measures to eliminate international terrorism', [A/RES/51/210](#) (17/12/96).
4. David Whittaker (ed.), *The Terrorism Reader*, Routledge, 2001, p. 3.
5. 18 U.S.C. 2331(1).
6. 18 U.S.C. 2331(5), inserted by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, [Pub. L. 107-56](#), section 802.
7. Prevention of Terrorism (Temporary Provisions) Act 1989 (UK) (repealed), section 20.

8. Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996.
9. Terrorism Act 2000 (UK), subsection 1(1).
10. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 9.
11. Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994, p. 4.
12. *Criminal Code* (NT), section 50. Alternatively, it may serve a clear policy objective. This possibility is reflected in the fact that Northern Territory criminal laws are applied extraterritorially to the Timor Gap (*Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990*, subsection 9A(2)), the connection between terrorism and petroleum exploration having been illustrated by terms of the Timor Gap Treaty and the *Petroleum (Submerged Lands) Act 1967*.
13. Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures*, Cambridge University Press, Cambridge, 1982, p. 16.
14. Juliette Kayyem, 'U.S. Preparations for Biological Terrorism: Legal Limitations and the Need for Planning', *ESDP Discussion Paper ESDP-2001-02*, John F. Kennedy School of Government, Harvard University, August 2001, p. 2.
15. *ibid.*, p. 25.
16. Alan Thompson, 'The Smog of Terrorism: Terrorism and Internal Security – The Next 20 Years', *Paper Presented to the Australian College of Defence and Strategic Studies Conference*, December 1997.
17. Chadwick, *op. cit.*, p. 338.
18. Brian Martin, 'International Terrorism: Recent Developments and Implications for Australia', Legislative Research Service, *Current Issues Brief No. 5 1985–86*, p. 4.
19. Alex Obote-Odora, '[Defining International Terrorism](#)', *Murdoch University Electronic Journal of Law*, Vol. 6(1), March 1999.
20. Tom Sherman, '[Terrorism – A Disease in Search of a Cure](#)', Mayo Lecture delivered at James Cook University, Townsville on 9 November 2001.
21. Carl von Clausewitz, *On War*, Translated by Colonel J.J. Graham and published by N. Trübner, London, 1873.
22. *ibid.*
23. United States Department of Defense, *Dictionary of Military Terms*, Greenhill Books, London, 1990.
24. 'Targets meant to cause disruption may be more appealing to armchair terrorists than to those who are active in today's terrorist groups ... There is no drama. No lives hang in the balance. There is no bang, no blood. They do not satisfy the hostility of the terrorists': Brian Jenkins, 'The Future Course of International Terrorism', *The Futurist*, July-August 1987, reproduced at <http://www.wfs.org/jenkins.htm>.

25. *ibid.*, '[A]lthough it was important for the professional terrorist of the 1970s and 1980s that the public's perception is of massive and random destruction, by and large the choice of weapons and how they are used has created some sort of upper limit on casualties in any one incident. The argument is that this is not an accidental correlation': Alan Thompson, 'The Smog of Terrorism: Terrorism and Internal Security – The Next 20 Years', *Paper Presented to the Australian College of Defence and Strategic Studies Conference*, December 1997. While some 3 000 people may have died in the World Trade Centre twin towers, more people could have died if the attacks had targeted a more 'strategic' installation such as a nuclear reactor.
26. 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. 30. 'Strategic' is used in this context to denote military strategic considerations.
27. Thompson, *op. cit.*
28. Brian Jenkins quoted in David Whittaker (Ed.), *op. cit.*, pp. 247–248.
29. Scott Silliman, ['Preserving Our Freedoms While Defending Against Terrorism'](#), Testimony to a Hearing before the United States Senate Committee on the Judiciary, 28/11/01.

Document 2 Legislation in the United Kingdom

The principal piece of anti-terrorist legislation in the United Kingdom is the Terrorism Act 2000. A number of other Acts deal with other issues associated with terrorism, such as hoax offences, explosives, internationally protected persons, aviation safety and security, hostages and nuclear weapons.¹ The Terrorism Act 2000 is simply the last in a long line of statutes designed to address perceived terrorist emergencies.²

Prevention of Terrorism Acts

The genesis of the anti-terrorist provisions was the Prevention of Violence (Temporary Provisions) Act 1939. This Act was passed in response to an intense period of bombings by the Irish Republican Army in mid 1939. It was originally intended to last for two years, but was extended annually by parliamentary review for 15 years until 1954.

The Prevention of Terrorism (Temporary Provisions) Act 1974 was modelled on the 1939 Act and on legislation that had been introduced in Northern Ireland in 1973.³ Similarly, it was introduced in response to bombings by the Irish Republican Army. By mid November 1974 there had been at least 110 separate terrorist incidents in Britain causing 21 deaths and 180 injuries. On 21 November a single incident, involving bombs planted in two Birmingham public houses, caused a further 21 deaths and 184 injuries.⁴ By 29 November the British Parliament had passed the Prevention of Terrorism (Temporary Provisions) Act 1974. It was drafted so as to expire within 6 months, but was extended by review and later enactments until 2000.

This Act essentially focused on the situation in Northern Ireland. It proscribed the IRA and made support for it illegal. It allowed the exclusion of persons involved in terrorism from the United Kingdom. It permitted the arrest and detention of any person whom the police reasonably suspected was subject to an exclusion order, guilty of a related offence, or 'concerned in the commission, preparation or instigation of acts of terrorism'.⁵ These persons could be detained for 48 hours and the Secretary of State could extend this by a further 5 days.⁶ The Act also permitted the Secretary of State to issue orders allowing police and immigration officers to stop and search persons at ports or borders.⁷

Such detention was always reviewable by a writ of habeas corpus (a legal action which compels authorities to bring someone in custody before a court). However, despite the large number of detentions under these provisions,⁸ such writs were rare. Moreover, given the short duration of detention, such action was practically unavailable in most cases.⁹

Under the Prevention of Terrorism (Temporary Provisions) Act 1974 an organisation could be proscribed either by legislative amendment or by legislative instrument. The Secretary of State was empowered to add any organisation 'that appears to him to be concerned in terrorism ... or in promoting or encouraging it' (s. 1(3)). It was an offence to

'belong or profess to belong to a proscribed organisation', to 'solicit or invite financial or other support for a proscribed organisation or knowingly make or receive any contribution in money or otherwise to the resources of a proscribed organisation', or to 'arrange or assist in ... or address, a meeting' in support or furtherance of a proscribed organisation (paragraphs 1(1)(a)–(c)). It was even an offence to 'wear an item of dress or ... carry ... any article' so as to 'arouse reasonable apprehension that [the person] is a member or supporter' of an organisation (s. 2). The exclusion provisions permitted the Home Secretary to prohibit a person from entering Great Britain if satisfied that s/he 'is concerned in the commission, preparation or instigation of acts of terrorism' or 'is attempting or may attempt to enter ... with a view to being concerned in the commission, preparation or instigation of such acts' (s. 3(3)).¹⁰ An exemption operated over persons who had been ordinarily resident in Great Britain (s. 3(4)).¹¹ Procedures for control of entry and removal permitted the Secretary of State to issue orders providing for arrest, detention and searches of persons, property and places (s. 8).

Subsequent enactments enlarged the focus beyond Northern Ireland. The Prevention of Terrorism (Temporary Provisions) Act 1984 applied the special arrest and detention powers to international terrorism (para 12(3)(a), and the [Prevention of Terrorism \(Temporary Provisions\) Act 1989](#) applied the financial contributions provisions to a similarly wide subject matter (para 9(3)(b)). The exclusion provisions were never enlarged in this manner.

Over time these measures were extended. For example, the Prevention of Terrorism (Temporary Provisions) Act 1976 made it an offence to contribute or solicit contributions towards acts of terrorism (s. 10) or to withhold information relating to terrorism or terrorists which a person 'knows or believes might be of material assistance' (s. 11).

The Prevention of Terrorism (Temporary Provisions) Act 1989 extended these provisions to encompass contributions to and solicitations for proscribed organisations (s. 10), and the provision of assistance in the management of terrorist funds by third parties (s. 11). It permitted courts, having convicted someone of an offence, to issue forfeiture orders and restraint orders¹² in respect of property reasonably suspected of being made available for terrorist purposes or for the use or benefit of proscribed organisations (s. 13). It permitted a person to breach an obligation of confidentiality to allow the reporting of suspicious transactions (s. 12). It also introduced a codified process for 'supervision of detention and examination powers' (Sch. 3) and entrusted justices of the peace with the power to issue search warrants (s. 15). And it elaborated on port and border control provisions by clarifying that persons could be examined without reasonable suspicion and by imposing time limits on detention for that purpose (Sch. 5).

The Criminal Justice Act 1993 amended the 1989 Act with an offence of failing to disclose information which leads a person to know or suspect that another person is providing financial assistance (s. 18A).¹³ The Criminal Justice and Public Order Act 1994 introduced offences relating to the possession of offensive articles (s. 16A), and unlawful collection of terrorist intelligence (s. 16B). It also extended police powers to include the

power to stop and search any vehicles or person within a designated area (s. 13A),¹⁴ and to impose police cordons (s. 16C). The Prevention of Terrorism (Additional Powers) Act 1996 extended the stop and search powers to cover pedestrians (s. 13B). Thus, senior police officers were empowered to authorise, for periods of up to 28 days at a time, police officers within their area of responsibility to stop vehicles and pedestrians and conduct 'ordinary' searches for 'articles of a kind which could be used for a purpose connected with the commission, preparation or instigation of acts of terrorism' (para 13A(3)(b) and s. 13B(2), whether or not the police officers had reasonable grounds for suspicion regarding those articles (paras 13A(4) and 13B(3)). The Criminal Justice (Terrorism and Conspiracy) Act 1998 amended the proscribed organisations provisions to expressly permit a court to draw adverse inferences from a person's failure to mention a fact under questioning that the person subsequently relies on to deny their membership, etc. (ss. 2A–2B). It also amended the principal statute, the Criminal Justice Act 1977, to introduce an offence of conspiracy to commit terrorist or other crimes abroad (s. 1A).

As the Northern Ireland situation stabilised, the emergency powers became largely unused. From 1995 no new exclusion orders were issued, the outstanding orders were revoked in 1997 and the exclusion provisions were not incorporated into new legislation in 2000.¹⁵

Terrorism Act 2000

In 2000, following the 1996 *Inquiry into Legislation Against Terrorism*, the British Parliament passed the [Terrorism Act 2000](#). This Act essentially replicated most of the provisions in the Prevention of Terrorism (Temporary Provisions) Acts. But, unlike its predecessors, it is a permanent statute. Moreover, it introduced a new definition of terrorism and applied that definition to acts, persons and organisations whether or not they originate overseas or are connected with the affairs of Northern Ireland. It introduced a general stop and search power to complement the powers over vehicles and pedestrians. Thus, police officers are empowered to stop and search any person that they reasonably suspect to be a terrorist 'to discover whether he has in his possession anything which may constitute evidence that he is a terrorist' (s. 43). It also expanded the concept of terrorist funds to encompass other forms of 'terrorist property'¹⁶ and it introduced provisions for seizure of cash at ports and borders (ss. 24–31). At the same time, it introduced safeguards, by transferring the power to extend detention from the Secretary of State to the judiciary, and by establishing a merits review body and process relating to proscription decisions. Thus, a judicial authority could only extend detention if satisfied that the further detention of the person is reasonably necessary to obtain or preserve relevant evidence and that the relevant investigation is being conducted diligently and expeditiously.¹⁷ The Proscribed Organisations Appeal Commission could overturn a decision regarding proscription if it considered that the decision was inconsistent with principles of judicial review (s. 5(3)).¹⁸

Anti-Terrorism, Crime and Security Act 2001

Following the September 11 attacks on the United States, the British Parliament enacted the [Anti-Terrorism, Crime and Security Act 2001](#). The Act amends provisions in the Terrorism Act 2000 relating to seizure of cash, terrorist property and police powers discussed above. It also contains measures complementing those provisions dealing with freezing orders (Part 2), duties to disclose and indemnities for disclosure (Part 3), immigration and asylum (Part 4), religious hate speech and crimes (Part 5),¹⁹ weapons of mass destruction (Part 6), security of pathogens and toxins (Part 7), security of nuclear infrastructure (Part 8), aviation security (Part 9), law enforcement powers (Part 10), retention of data by postal and telecommunications service providers (Part 11), and miscellaneous issues such as offences for anthrax-type scares or hoaxes.

There are at least five key sets of amendments to provisions of the *Terrorism Act 2000*.

Part 13 makes it an offence to use a noxious substance so as to create public fear with the intention of influencing the government or intimidating the public or a section of the public (s. 111). It is also an offence to send a benign substance or to communicate false information with the intention of inducing a person to believe that a noxious substance is present that will 'endanger human life or create a serious risk to human health' (s. 112).

Part 14 introduces a general obligation to disclose information which a person 'knows or believes might be of material assistance in preventing the commission ... of an act of terrorism or in securing the apprehension, prosecution or conviction of a [terrorist]' (s. 115).²⁰

Schedule 1 replaces the seizure of cash provisions with more general provisions permitting the seizure of cash anywhere in the United Kingdom where an officer has a reasonable suspicion that it is 'terrorist cash'.²¹ Cash may be seized for a period of 28 days with extensions by magistrates or justices of the peace in intervals of up to 3 months for a total of 2 years (item 3). Extensions may be given if justified while an offence is being investigated or assessed for prosecution or where proceedings have been started but not concluded. It provides for judicial proceedings in relation to forfeiture of detained cash (item 6), and for earmarking and tracing of terrorist cash in transactions with associated persons or entities.

Schedule 2 amends the terrorist property provisions to include account monitoring orders (item 1),²² to bring forward the power to make asset freezing orders so that they can be made during criminal investigations rather than during criminal proceedings (item 2), and to impose a duty to inquire on persons in a 'regulated sector', complementing the disclosure obligations originally introduced by the *Criminal Justice Act 1993*. Thus, it would be an offence for a person in a financial institution not to disclose information that would lead a *reasonable person* to know or suspect that a person is providing financial assistance (item 5).²³

Part 2 supplements the forfeiture provisions with provision for freezing orders. These prohibit financial institutions from providing funds to persons or corporations over which the United Kingdom has a physical or personal jurisdiction.²⁴ They may be issued by the Treasury where it reasonably believes that persons have taken or are likely to take action which causes a detriment to the national economy or poses a threat to life or property, provided that one of the persons involved is a foreign resident or foreign government.²⁵ Attached to these orders may be orders containing disclosure obligations and offences.²⁶

Endnotes

1. Criminal Law Act 1977, section 51; Explosive Substances Act 1883; Internationally Protected Persons Act 1978; Civil Aviation Act 1982; Aviation Security Act 1982; Aviation and Maritime Security Act 1990; Taking of Hostages Act 1982; Nuclear Material (Offences) Act 1983.
2. Prevention of Violence (Temporary Provisions) Act 1939; Prevention of Terrorism (Temporary Provisions) Act 1974; Prevention of Terrorism (Temporary Provisions) Act 1976; Prevention of Terrorism (Temporary Provisions) Act 1984; and Prevention of Terrorism (Temporary Provisions) Act 1989.
3. Northern Ireland (Emergency Provisions) Act 1973.
4. Clive Walker, *The Prevention of Terrorism in British Law*, Manchester University Press, Manchester, 1986, p. 23.
5. Prevention of Terrorism (Temporary Provisions) Act 1974, subsection 7(1). A 'related offence' is one related to membership, etc. of a proscribed organisation or an offence related to an exclusion order.
6. *ibid.*, subsection 7(2).
7. *ibid.*, section 8.
8. Between 1974 and 1990 6932 persons were detained under the Prevention of Terrorism (Temporary Provisions) Act 1974 (UK). Of those 6000 were released without further action, most within 48 hours: David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*, Clarendon Press, Oxford, 2000, p.59.
9. 'One consequence of these short incarcerations is that habeas corpus is generally not available – not as a matter of law, but as a matter of practice – because the courts generally adjourn *ex parte* applications in order to notify the Crown. By the time this has been done the period of detention has passed and it is trite law that since the legality of the detention is to be determined at the time of the reading of the return, a person released by that time will have no case for the issuance of the writ': *ibid.*
10. The Prevention of Terrorism (Temporary Provisions) Act 1984 permitted the exclusion of any person who 'is or has been concerned in the commission, preparation or instigation of acts of terrorism ... ' subsection 4(1).

11. Prevention of Terrorism (Temporary Provisions) Act 1974, subsection 3(4). The Prevention of Terrorism (Temporary Provisions) Act 1974 and Prevention of Terrorism (Temporary Provisions) Act 1976 contained a 20 year residence exemption based on the Prevention of Violence (Temporary Provisions) Act 1939. The exemption operated in respect of 3 years' residence in Great Britain: Prevention of Terrorism (Temporary Provisions) Act 1984, subsection 4(4).
12. A restraint order prevented a third party from dealing with property liable to be forfeited: Prevention of Terrorism (Temporary Provisions) Act 1989, Schedule 4, item 3.
13. To some extent, the offence overlapped with the more general offence of failing to disclose information which a person knows or believes might be of 'material assistance' (section 18). However, it was directed specifically at third party assistance in management of funds rather than the commission, preparation or instigation of terrorist acts per se. Moreover, it was apparently introduced to address concerns at the time that the third party assistance provisions had been described in an annual review as unworkable: 'they have been wholly ineffective, ... no money has been recovered and ... no proceedings have taken place': David Trimble, MP, Criminal Justice Bill 1992, House of Commons, *Debates*, 14 April 1993, p. 900.
14. The power was given to senior police officers to authorise officers to stop and search vehicles and persons within designated areas where, in their opinion, 'it is expedient to do so in order to prevent acts of terrorism': subsection 13A(1). The authorisation could exist for a period not exceeding 28 days.
15. United Kingdom, Home Office, '[Statistics on the Operation of Prevention of Terrorism Legislation: Great Britain 1999](#)', Issue 5/00, 03 March 2000.
16. 'Terrorist property' is defined to include 'money or other property which is *likely* to be used for the purposes of terrorism', 'proceeds of the commission of acts of terrorism' and 'proceeds of acts carried out for the purposes of terrorism': Terrorism Act 2000, section 14.
17. Terrorism Act 2000, Schedule 8, clause 32.
18. *ibid.*, subsection 5(3).
19. Part 5 amended the Public Order Act 1986 (religious hatred) and the Crime and Disorder Act 1998 and Powers of Criminal Courts (Sentencing) Act 2000 (religiously aggravated crime).
20. Section 115 introduced section 38A to the Terrorism Act 2000.
21. 'Terrorist cash' is defined to include currency, etc. 'which is *intended* to be used for the purposes of terrorism', makes up 'resources of a ... proscribed organisation', or 'is or represents property obtained through terrorism': Anti-Terrorism, Crime and Security Act 2001, subsection 1(1). Property is 'obtained through terrorism' if it is obtained by or in return for terrorist acts or acts carried out for the purpose of terrorism: Schedule 1, item 11
22. Account monitoring orders are issued by magistrates and require financial institutions to provide ongoing information regarding specified accounts for a period of 90 days.
23. 'Regulated Sector' is to be defined in new Schedule 3A to the Terrorism Act 2000.

24. Broadly, a physical jurisdiction may be exercised over any person within the territory of a country (ie, persons inside the United Kingdom) and a personal jurisdiction may be exercised over any person who has a direct connection with that country (ie nationals of the United Kingdom whether inside or outside and companies incorporated in the United Kingdom).
25. Anti-Terrorism, Crime and Security Act 2001, section 4.
26. *ibid.*, Schedule 3, items 5 and 6. Item 6 permits an order making it an offence for a person not to disclose information which would lead a reasonable person to know or suspect that any of his or her business associates or customers are persons identified in a freezing order.

Document 3 Legislation in the United States

The principal statute in the United States is the USA PATRIOT Act of 2001. Like the Terrorism Act 2000 (UK) this statute is the latest of a number of statutes.

Early Anti-Terrorist Legislation

The Act to Combat International Terrorism of 1984 established a rewards system for the provision of information leading to the 'prevention, frustration or favourable resolution' of an act of terrorism or the arrest or conviction of a person for an act of terrorism.¹ The Diplomatic Security and Antiterrorism Act of 1986 bolstered these provisions and introduced fines for foreign incursion and controls on exports to state sponsors of terrorism. It made it an offence to commit murder or to cause serious injury to an American overseas if the Attorney General was of the opinion that the offence was 'intended to coerce, intimidate or retaliate against a government or civilian population'.²

The Violent Crime Control and Law Enforcement Act of 1994 made it an offence to knowingly or intentionally provide 'material support or resources' or conceal the nature, location, source, or ownership of such property for the purposes of terrorist offences.³

In the aftermath of the Oklahoma City bombing in April 1995, the Senate and the House of Representatives passed separate bills dealing with terrorism. The consequent Anti-terrorism and Effective Death Penalty Act of 1996 empowered the Secretary of State, subject to judicial review and disallowance by an Act of Congress, to designate foreign organisations which, in his opinion, engage in terrorist activity.⁴ The Secretary of Treasury could then require financial institutions to freeze any financial assets held by 'foreign terrorist organisations'.⁵ Moreover, the Act made it an offence to provide 'material support or resources' to 'foreign terrorist organisations'⁶ and it made it an offence for a financial institution not to report the existence of any funds held for the benefit of such organisations.⁷ It also made it an offence to engage in financial transactions with governments of countries designated as countries that support terrorism.⁸ And it applied money-laundering provisions, which among other things prohibit assistance in the management of terrorist funds, to proceeds of terrorist crime.⁹

The Act established extraterritorial jurisdiction over terrorist acts (killing, kidnapping, maiming, assault with a dangerous weapon, attack on property, or attack against government employees), and related conspiracies, that transcend national boundaries.¹⁰ It also dealt with victims by expanding the compensation and assistance provisions for victims of crime,¹¹ and by extending private standing to sue 'state sponsors of terrorism' for damages in respect of personal injury or death arising from terrorist acts.¹²

USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 largely follows the model for anti-terrorist laws discussed above, focusing on 'proscribed organisations', associated offences and law enforcement powers. However, it also deals with the detention of aliens who are suspected of having some involvement in terrorist activity.

The Act extends the 'material support or resources' offences so that they apply extraterritorially¹³ and makes it an offence to engage in a transaction knowing that it involves the proceeds of 'material support or resources'.¹⁴ It makes it an offence to import or export bulk cash into the United States and provides for seizure of the cash and any related property.¹⁵ It extends offences related to operation of an 'unlicensed money transmitting business' to include businesses that knowingly involve or support proceeds from criminal activity.¹⁶ It makes it an offence to harbour or conceal persons who have committed or intend to commit a specified terrorist offence.¹⁷ It includes various terrorist offences within the provisions dealing with organised crime.¹⁸

It empowers the Secretary of Treasury to take a range of special measures where he or she finds that reasonable grounds exist for concluding that a jurisdiction or a financial institution, account or transaction is of 'primary money laundering concern'.¹⁹ These include orders in the nature of account monitoring orders,²⁰ orders relating to beneficial ownership²¹ and orders relating to account establishment and customer identity.²² It imposes specific 'due diligence' requirements on financial institutions which operate certain types of foreign customer accounts.²³ It permits financial institutions to breach an obligation of confidentiality to allow the reporting of not only suspicious transactions but suspicious activity generally.²⁴ It also gives domestic courts jurisdiction over non-citizens charged with money laundering offences under United States law.²⁵

It expands surveillance procedures relating to terrorism.²⁶ It permits wire, oral and electronic communication intercept warrants where interception 'may provide or has provided evidence of' various terrorist offences such as the production, use, etc. of chemical weapons (18 U.S.C. 229), or weapons of mass destruction (18 U.S.C. 2332a), murder, serious assault or related inchoate offences (18 U.S.C. 2332), terrorist acts that transcend national boundaries (18 U.S.C. 2332b), financial transactions with state sponsors (18 U.S.C. 2332d), and providing material support or resources to terrorists (18 U.S.C. 2339A) or terrorist organisations (18 U.S.C. 2339B). It permits information sharing among law enforcement, immigration, intelligence, or national security agencies of criminal investigative information,²⁷ and foreign intelligence or counterintelligence or 'foreign intelligence information',²⁸ or information that 'relates to the ability of the United States to protect against ... actual or potential attack', 'sabotage or international terrorism', or 'clandestine intelligence activities' perpetrated by a foreign power or foreign agent.²⁹

The Act expands the scope for foreign intelligence services to target domestic citizens. It brings 'international terrorist activities' within the ambit of 'foreign intelligence'³⁰ and

permits foreign intelligence agencies to undertake domestic surveillance where the gathering of such information is only 'a *significant* purpose' of the activity.³¹ It extends the duration for which emergency surveillance and physical searches may be conducted by foreign intelligence services on non-citizens.³² It permits intelligence authorities to issue notices compelling the production of telephone toll and transaction records,³³ permits intelligence authorities to require, by subpoena, the production of *any* tangible things,³⁴ and enlarges the scope of 'pen register' and 'trap-and-trace' orders³⁵ to include a wider range of 'non-content information'³⁶ in connection with various activities to 'investigate' or 'protect against' international terrorism. Use of the foreign intelligence powers, which are essentially based on administrative discretion, arguably allows foreign intelligence agencies, in relation to international terrorism, to avoid limitations such as the requirement to show 'probable cause'³⁷ and restrictions on the range of records that may be targeted.³⁸

The Act expands the scope for surreptitious execution of search and seizure warrants. Generally, officers executing a search warrant must announce themselves to the occupier of premises and the occupier must be notified before any property is searched or seized.³⁹ However, courts have permitted unannounced entry, or 'no-knock entry', where officers reasonably suspect that it would be dangerous or futile or would inhibit the effective conduct of an investigation,⁴⁰ and delayed notification, or 'sneak and peek warrants', particularly in drug related investigations, where the warrant 'provide[s] explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry'.⁴¹

Under the Act, a court may permit notice to the occupier to be delayed, allowing law enforcement officers to 'search and seize property or material that constitutes evidence of a criminal offence' if the court finds that immediate notification may have an 'adverse result' (such as jeopardising the investigation),⁴² if the warrant prohibits seizure of property, or if the warrant permits the giving of notice 'within a reasonable period of its execution'.⁴³ While the caselaw is not settled, this period may be anywhere from 7 days⁴⁴ to 60 days.⁴⁵

The Act provides for the mandatory detention of any alien whom the Attorney-General has reasonable grounds to believe is an 'inadmissible alien' or 'is engaged in any other activity that endangers the national security of the United States'.⁴⁶ The Attorney-General must review the situation every six months, but aliens may continue to be detained if their release will threaten national security or the safety of the community or any person.⁴⁷ An 'inadmissible alien' was defined to include persons who have incited or engaged in terrorist activity⁴⁸ and members or representatives of a foreign terrorist organisation.⁴⁹ The Act extends the definition to cover persons who use a position of prominence to endorse or espouse terrorism, or belong to a group that endorses terrorism, in a way that 'undermines United States efforts to reduce or eliminate terrorist activities'. It broadens the definition of 'engaging in terrorist activity' to include incitement, preparation, information gathering, planning and soliciting funds or members for terrorist activities or organisations.⁵⁰

The Act provides decisions by the Attorney-General may only be reviewed by a writ of habeas corpus.⁵¹ Thus, there are no administrative review, although it has been said that the habeas corpus review grounds closely parallel some of the judicial review grounds.⁵²

Endnotes

1. Pub. L. 96-533, 18 U.S.C. 3701.
2. Pub. L. 99-399, section 1202, inserting 18 U.S.C. 2332.
3. [Pub. L. 103-322](#), section 120005, inserting 18 U.S.C. 2339A.
4. [Pub. L. 104-132](#), section 303, inserting 8 U.S.C. 1189.
5. 8 U.S.C. 1189(2)(C).
6. [Pub. L. 104-132](#), section 303, inserting 18 U.S.C. 2339B(a)(1).
7. [ibid.](#), inserting 18 U.S.C. 2339B(a)(2).
8. [ibid.](#), section 321, inserting 18 U.S.C. 2332d.
9. [ibid.](#), section 726, amending 18 U.S.C. 1956.
10. [ibid.](#), section 702, inserting 18 U.S.C. 2332b.
11. [ibid.](#), section 232, inserting 42 U.S.C. 10602d and 10603b.
12. [ibid.](#), section 221, inserting 28 U.S.C. 1605(7). The acts covered include 'an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources'.
13. [Pub. L. 107-56](#), section 805, amending 18 U.S.C. 2339A.
14. [ibid.](#), section 376, amending 18 U.S.C. 1956.
15. [ibid.](#), section 371, inserting 18 U.S.C. 5332.
16. [ibid.](#), section 373, amending 18 U.S.C. 1960. Originally the offence focused on whether or not the business was licensed.
17. [ibid.](#), section 803, inserting 18 U.S.C. 2339.
18. [ibid.](#), section 813, amending 18 U.S.C. 1961(1).
19. [ibid.](#), section 311, inserting 31 U.S.C. 5318A.
20. That is, orders requiring financial institutions to keep ongoing records and/or make ongoing reports relating to particular jurisdictions or financial institutions, accounts or transactions for a period of up to 120 days: 31 U.S.C. 5318A(b)(1).
21. That is, orders requiring financial institutions to obtain and retain information relating to the beneficial ownership of any account opened or maintained in the United States: 31 U.S.C. 5318A(b)(2).
22. That is, orders requiring financial institutions not to establish 'payable through accounts' or 'correspondent accounts' (31 U.S.C. 5318A(b)(5)), or 'correspondent accounts' with 'foreign shell banks' (31 U.S.C. 5318(j)) or to disclose information regarding the identity of any persons authorised to use such accounts (31 U.S.C. 5318A(b)(3) and 31 U.S.C. 5318A(b)(4)). Broadly, 'payable through accounts' and 'correspondent accounts' are accounts in the United States linked to accounts with overseas financial institutions enabling

- payments or withdrawals to be made in the United States. A 'foreign shell bank' is a foreign owned bank that does not have a physical presence in any country.
23. [Pub. L. 107-56](#), section 312, amending 31 U.S.C. 5318. Due diligence obligations are imposed on institutions which establish, maintain, administer, or manage a 'private banking account' or a 'correspondent account' in the United States for a non-United States person.
 24. [ibid.](#), section 351, amending 31 U.S.C. 5318(g)(3). The protection applies to reporting of 'any possible violation of law or regulation to a government agency'. Originally, the protection allowed reporting of 'a suspicious transaction relevant to a possible violation of law or regulation'.
 25. [ibid.](#), section 316, amending 18 U.S.C. 1956(b).
 26. [ibid.](#), section 201, amending 18 U.S.C. 2516(1).
 27. [Pub. L. 107-56](#), section 203.
 28. [ibid.](#), section 203, inserting 18 U.S.C. 2517(6).
 29. [ibid.](#), section 203, inserting 18 U.S.C. 2510(19).
 30. [ibid.](#), section 902, amending 50 U.S.C. 401a. Thus, 'foreign intelligence' means 'information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons *or international terrorist activities*'.
 31. [ibid.](#), section 218, amending 18 U.S.C. 1804 and 1823. Prior to the amendments, surveillance could only be undertaken where the gathering of foreign intelligence information was '*the purpose*' of the investigation. Thus, surveillance may be undertaken where this is only '*a significant purpose*' of an investigation, for example where an investigation targeting terrorism seeks to identify state sponsorship of the terrorist activity.
 32. [ibid.](#), section 207, amending 50 U.S.C. 1805.
 33. [ibid.](#), section 505, amending 18 U.S.C. 2709.
 34. [ibid.](#), section 215, amending 50 U.S.C. 1862. Orders must be made by a judge where the application complies with the requirements in 50 U.S.C. 1862. However, the Director of the Federal Bureau of Investigations, or his or her delegate, need not show 'probable cause'. He or she need only show that there is an 'investigation to protect against international terrorism', that the investigation is not conducted solely on the basis of activities protected by the first amendment [ie freedom of religion, speech and assembly]' and that it otherwise complies with guidelines on collection of information, etc. in 'United States Intelligence Activities', [Executive Order 12333](#), 04/12/81.
 35. Originally, 'pen registers' were mechanical or electronic devices that monitored numbers dialled from a telephone line and the date time and duration of any incoming communications. Conversely, 'trap and trace' devices captured incoming communications and identified the originating number of the device from which it was transmitted.
 36. Pen register and trap and trace orders ordinarily require telephone companies and Internet Service Providers, for example, to reveal 'non-content' information, such as numbers dialled or e-mail addresses. The amendments permit these orders to require other information, such as routing, addressing information, etc. Applications must be made before a judge or

magistrate. However, the Attorney-General need only certify that 'the information likely to be obtained is relevant to an ongoing ... international terrorism investigation' and that the investigation is not conducted solely on the basis of activities protected by the first amendment, etc: [Pub. L. 107-56](#), section 214, amending 50 U.S.C. 1842. The express extension to routing and addressing information is also made in relation to pen register and trap and trace orders under non-foreign intelligence/international terrorism investigations: [ibid.](#), section 216, amending 18 U.S.C. 3123(a).

37. The American Civil Liberties Union, '[USA Patriot Act Boosts Government Powers While Cutting Back on Traditional Checks and Balances](#)', 2001. The ACLU argued that the USA PATRIOT Act provisions which allow foreign intelligence services to conduct surveillance for protection against terrorism 'allow the government to use its intelligence gathering power to circumvent the standard that must be met for criminal wiretaps'.
38. 'Under current law, only records of common carriers, public accommodation facilities, physical storage facilities and vehicle rental facilities can be obtained without a court order': Electronic Frontier Foundation, '[EFF Analysis of the Provisions of the USA PATRIOT Act That Relate to Online Activities](#)', 31/10/2001.
39. Notice is said by some commentators to be a bedrock principle embodied in the requirement of reasonableness under the Fourth Amendment of the United States Constitution. The Fourth Amendment provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'.
40. *Richards v. Wisconsin*, 520 U.S. 385 (1997).
41. In *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), at p. 1456. *Freitas* was the first reported case involving a 'sneak and peek warrant'. It related to an investigation of a large-scale methamphetamine operation. The district court at first instance declared a warrant, which was silent as to the items to be seized or the notice requirement, inconsistent with the Federal Rules of Criminal Procedure and constitutionally invalid under the Fourth Amendment. On appeal the Ninth Circuit held that the evidence seized under the warrant could in fact be used pursuant to a "good faith exception" in *United States v. Leon*, 468 U.S. 897 (1984) and suggested that it would have been valid if it had made provision for notice 'within a reasonable, but short, time'.
42. An 'adverse result' more generally includes 'endangering the life or physical safety of an individual, flight from prosecution, evidence tampering, witness intimidation, or otherwise seriously jeopardizing an investigation or unduly delaying a trial': Department of Justice, '[Field Guidance on New Authorities \(Redacted\) Enacted in the 2001 Anti-Terrorism Legislation](#)' reproduced by the Electronic Privacy Information Center.
43. [Pub. L. 107-56](#), section 213, amending 18 U.S.C. 3103a.
44. *United States v. Villegas* (1990), 899 F.2d 1324; *United States v. Freitas* (1986), 800 F.2d 1451. In *Freitas*, the Ninth Circuit stated that 'a reasonable, but short, time ... should not exceed seven days except upon a strong showing of necessity' (at p. 1456).

45. In *Villegas*, the Second Circuit permitted a delay of around 60 days. Other authorities suggest 45 days: *Simons*, 206 F.3d 392.
46. [Pub. L. 107-56](#), section 412.
47. *ibid.*
48. 8 U.S.C. 1182(a)(3)(B).
49. 8 U.S.C. 1182.
50. [Pub. L. 107-56](#), section 411, amending 8 U.S.C. 1182(a)(3).
51. [ibid.](#), section 412.
52. *R v. Secretary of State for Home Department; Ex parte Khawaja* [1984] AC 74 at p. 111, where Scarman LJ said 'judicial review ... is available only by leave of the court. The writ of habeas corpus issues as of right. But the difference arises not in the law's substance but from the nature of the remedy appropriate to the case [the fact that the party has to show that detention is unlawful] effectually puts habeas corpus in like case with the other form of judicial review'. Thus, a decision authorising detention will be reviewed for compliance with statutory conditions which regulate the power to detain (*R v. Secretary of State for Home Department; Ex parte Khawaja* [1984] AC 74, per Scarman LJ at pp. 110-112; *R v. Governor of Brixton Prison; Ex parte Ashan* [1969] 2 AB 222, cited in *Truong v. Manager, Immigration Detention Centre, Port Hedland* (1993) 31 ALD 729, per Malcolm CJ and Seaman J, at p. 731); for compliance with procedural fairness obligations (*Re Minister for Immigration and Multicultural Affairs; Ex parte Ervin* (unreported, HCA, Brennan CJ, 11 July 1997)) and, potentially, for apprehended bias (*Re WE Adcock* (1890) 24 SALR 3, per Boucaut J). See generally David Clark and Gerrard McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific*, The Federation Press, Sydney, 2000, pp. 147–171.

Document 4 Terrorism and the United Nations

The United Nations has been proactive in pursuing a coherent and consensus definition of 'terrorism' and developing international law standards on the prevention of terrorism throughout the world. Relevant conventions in the area of terrorism include

- [*Convention Against the Taking of Hostages*](#);
- [*Convention for the Suppression of the Financing of Terrorism*](#);
- [*Convention for the Suppression of Terrorist Bombings*](#);
- [*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*](#);
- [*Convention for the Suppression of Unlawful Seizure of Aircraft*](#);
- [*Convention on the Marking of Plastic Explosives for the Purpose of Identification*](#);
- [*Convention on Offences and Certain Other Acts Committed on Board Aircraft*](#);
- [*Convention on the Physical Protection of Nuclear Material*](#);
- [*Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*](#);
- [*Protocol for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*](#);
- [*Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*](#).

The United Nations General Assembly passed a number of resolutions in response to the September 11 attacks on the United States. [Resolution 56/1](#) urgently called for international cooperation 'to prevent and eradicate acts of terrorism'.¹ This followed calls over the last three decades for states to enact legislation dealing with terrorism.² In the first decade those calls described terrorism in the context of attacks on independence, self-determination and 'other forms of alien domination' under 'colonial and racist regimes'.³ In the second decade the focus widened to include the criminality of terrorist acts,⁴ state sponsorship of or acquiescence in terrorist activities within their territory,⁵ and the nexus between terrorism and organised or transnational crime.⁶ In the third decade, interest grew in the impacts and human rights implications of terrorism.⁷

The Security Council has also passed various resolutions. [Resolution 1214](#) demanded that the Taliban 'stop providing sanctuary and training for international terrorists and their organizations'.⁸ Similarly, [Resolution 1267](#) demanded that the Taliban 'turn over Osama bin Laden without further delay' and required states to 'freeze funds and other financial resources including funds derived or generated from property owned or controlled directly

or indirectly by the Taliban'.⁹ [Resolution 1333](#) reiterated the demands in Resolution 1267 and further required states to 'prevent the direct or indirect supply, sale or transfer' to Afghanistan of 'arms and related materiel' or 'technical advice, assistance or training'.

[Resolution 1368](#) called on states to 'redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions'.¹⁰ [Resolution 1373](#) called for all states to 'prevent and suppress the financing of terrorism', to 'criminalize the wilful provision or collection of funds for such acts' and to '[f]reeze without delay funds and other financial assets or economic resources of persons [or associated entities] who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'.¹¹

Endnotes

1. United Nations. General Assembly, Resolution 56/1, 12/09/01, A/RES/56/1.
2. In December 1996 it urged states to 'adopt further measures in accordance with the relevant provisions of international law, including international standards of human rights, to prevent terrorism and to strengthen international cooperation in combating terrorism' (United Nations. General Assembly, [Resolution 51/210](#), 17/12/96, A/RES/51/210, paragraph 3). This was reiterated in 1997 (United Nations. General Assembly, [Resolution 52/165](#), 15/12/97, A/RES/52/165), in 1999 (United Nations. General Assembly, [Resolution 53/108](#), 08/12/99, A/RES/53/108; [Resolution 54/110](#), 09/12/99, A/RES/54/110). In December 2000, it urged all states to 'enact ... domestic legislation necessary to implement the provisions of those conventions and protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts, and to cooperate with and provide support and assistance to other States and relevant international and regional organizations to that end' (United Nations. General Assembly, [Resolution 55/158](#), 12/12/00, A/RES/55/158, paragraph 7).
3. United Nations. General Assembly, [Resolution 3034\(XXVII\)](#), 18/12/72, A/RES/3034(XXVII), paragraph 3; [Resolution 34/145](#), 17/12/79, A/RES/34/145, paragraph 4.
4. [Resolution 34/145](#), loc. cit.; Resolution [38/130](#), 19/12/83, paragraph 6; [Resolution 40/61](#), 09/12/85, A/RES/40/61, paragraphs 1, 7 and 8; [Resolution 42/159](#), 07/12/87, A/RES/42/159, paragraphs 1, 5 and 7.
5. [Resolution 34/145](#), loc. cit., paragraph 7; Resolution [38/130](#), loc. cit., paragraph 4
6. United Nations. General Assembly, [Resolution 44/29](#), 04/12/89, A/RES/44/29, paragraph 9; [Resolution 46/51](#), 09/12/91, A/RES/46/51, paragraph 9.

7. [Resolution 48/122](#), 20/12/93; [Resolution 49/185](#), 23/12/94, A/RES/49/185; [Resolution 50/186](#), 22/12/95, A/RES/50/186; Resolution 52/133, 12/12/97, A/RES/52/133 (*Afghanistan voted in favour and Australia abstained*); [Resolution 54/164](#), 17/12/99, A/RES/54/164.
8. United Nations. Security Council, [Resolution 1214](#) (1998), S/RES/1214 (1998).
9. [Resolution 1267](#) (1999), S/RES/1267 (1999).
10. [Resolution 1363](#) (2001), S/RES/1363 (2001).
11. [Resolution 1373](#) (2001), S/RES/1373 (2001).

Document 5 History of Australian Reviews

To understand present counter-terrorism arrangements, it is useful to consider the history of administrative and quasi-judicial reviews over the last 25 years which have examined Australia's counter-terrorist and protective security laws and agencies.

Mark Report

Following the bombing of Sydney's Hilton Hotel in March 1978, former London Metropolitan Police Commissioner, Sir Robert Mark, was appointed to examine policing resources, protective security and counter-terrorism. While Mark commented that the existing anti-terrorist planning documentation appeared to be 'well conceived and defined', he noted a few issues of concern. First, there was no clear relationship between the law enforcement bodies and the defence forces, despite his opinion that 'the availability of military aid is a vital component of counter terrorist plans and the arrangements for invoking it should be laid down now, not when a crisis arises'. Mark recommended that the Commonwealth Police and Defence Force enter into discussions 'about the availability and the deployment to specially trained troops, both for attack and deterrence'. Second, there was no specialist team within the (then) Commonwealth Police. Mark recommended that an Australian Federal Police service establish an anti-terrorist squad with response and forensic capabilities 'as an emergency measure'.¹

Among other things, Mark recommended the amalgamation of the Commonwealth and Australian Capital Territory police forces. This was given statutory force in the *Australian Federal Police Act 1979*. Conversely, he recommended the separation of protective service and law enforcement functions on the basis that '[f]ormal security duties are a wasteful use of police manpower, a disincentive to the better type of policeman, [and] a cause of excessive overtime and premature wastage'.² In 1984 the protective service functions were removed from the AFP to the Australian Protective Service, under the *Australian Federal Police Amendment Act 1984*, and a separate Australian Protective Service (APS) was established ultimately under the *Australia Protective Service Act 1987*.

Hope Royal Commission

In the same period, the Commonwealth appointed Justice Robert Hope to conduct a review of protective security powers and arrangements. The terms of reference required Justice Hope to review coordination arrangements between law enforcement, intelligence and other civilian authorities at the Commonwealth, State and Territory level. In particular they required him to review the relationship between the Australian Defence Force (ADF) and civilian authorities.³ The *Protective Security Review Report* was tabled in May 1979.

Hope concluded that domestic intelligence gathering and law enforcement bodies were given adequate powers under existing legislation, subject to 'one possible qualification' relating to 'random powers to stop and interrogate people, to stop and search vehicles, and to search private property ... without reference to any suspicion of danger'. He concluded that such powers were not necessary for the Commonwealth, States or Territories.⁴

Holdich Inquiry

In December 1986, following an 'upsurge of terrorism in Europe and the Middle East during 1984 and 1985',⁵ the Special Minister of State appointed Roger Holdich, Deputy Secretary of the Department of The Prime Minister and Cabinet, to 'review Australia's counter-terrorism capabilities and the administrative and financial arrangements that underpinned them'.⁶ The resulting report, *Counter Terrorism Capabilities in Australia*, was not made public. However, subsequent reports indicate that the review 'emphasised that the single most important preventive measure against terrorism is the capability to produce timely and accurate intelligence'. It reported 'general satisfaction with co-operation between [intelligence and law enforcement] agencies in Australia' but 'pointed to the need for some improvement in the information flow to Commonwealth Ministers during a terrorist incident'. It 'emphasised the importance of the security-checking mechanisms' and recommended that migration control procedures be maintained. It 'canvassed the options of a special airport branch of the AFP but favoured rather the transfer of the counter-terrorism protective function to the States'.⁷ It 'highlighted the need to prepare for a greater range of terrorist incidents ... and the need for enhanced VIP protection' in the aftermath of assassinations and bombings in the early 1980s. It also recommended there be another review 'in about four years'.⁸ The further (external) review was postponed after various internal reviews but was eventually undertaken in 1993 following the events leading to the Codd Review in 1992.

Gibbs Committee

In 1987, the Attorney-General established a committee to review federal criminal law. The committee, chaired by the former Chief Justice of Australia, Sir Harry Gibbs, issued a number of reports dealing with a range of issues including computer crime,⁹ detention before charge,¹⁰ principles of criminal responsibility, secondary offences, attempts and conspiracy,¹¹ property offences against the government, bribery and corruption,¹² and forgery.¹³ The final report of the Gibbs Committee was produced in December 1991.¹⁴

The Gibbs Committee recommended the consolidation of offences relating to federal property or money, the repeal of provisions relating to unlawful or proscribed associations and the amendment of provisions dealing with treason and sabotage. It concluded that the unlawful associations provisions should be repealed because, among other things, 'the activities at which these provisions are aimed can best be dealt with by existing laws

creating such offences as murder, assault, abduction, damage to property and conspiracy'.¹⁵ It recommended that the offence of treason should be reformed, that the offences of treachery¹⁶ and sedition¹⁷ should be abolished and that there should be a separate offence of killing or injuring the Sovereign or the Sovereign's consort or heir.

Under the Gibbs Committee's draft Crimes Amendment Bill 1991, existing law which criminalises a person's intent to do a treasonable act (eg levying of war against the Commonwealth) manifested by an 'overt act' would have been repealed.

However, in other ways, it would have widened the offence of treason, for example by defining as treason an act that assisted or encouraged a foreign country or foreign force to make an armed invasion or attack on the Commonwealth. At present the offence is only of instigating a foreigner to make an 'armed invasion' of the Commonwealth. Its proposed treason offence would have applied to acts done by Australian citizens irrespective of where they occurred and to acts carried out in Australia by non-citizens.

Codd Review

Following attacks by demonstrators on the Iranian Embassy in April 1992, the Government appointed Michael Codd, former head of the Department of The Prime Minister and Cabinet, to conduct a limited review of the plans and arrangements relating to counter-terrorism. The review focused particularly on the protection of diplomatic and consular representatives. He noted that the bombing and subsequent review pointed to 'serious weaknesses in Australia's plans and arrangements at the Commonwealth level in the period prior to ... an incident'.¹⁸ The key weaknesses in the prevention area were 'in structures and in lines of responsibility or command' as well as 'in the flow of intelligence and information, and in training'.¹⁹ He identified possible problems arising out of the fact that the Australian Protective Service (APS) had been placed on a user-pays commercial footing. Financial considerations could affect a client organisation's 'judgement about first response to a threat or possible threat'. They could also 'lead to a reduced resource base for the APS to the point where inadequate training may be provided and inadequate resources available to deal with an unpredictable surge in requirements arising from an incident or potential incident'.²⁰ Codd identified 'some operational inefficiencies' arising from the division of responsibilities between the AFP and APS. He recommended that the AFP Commissioner be able to delegate 'police-type' functions,²¹ on a case by case basis, to APS officers.

Honan and Thompson Review

In 1993 the Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence (SAC-PAV) commissioned Frank Honan and Alan Thompson to review the SAC-PAV Terms of Reference and Program, including its own

effectiveness and the effectiveness of its activities and its relationship with other counter terrorism, intelligence and law enforcement activities.²² A public version of the report was tabled in June 1994. In general, it concluded that 'the effectiveness of the SAC-PAV arrangements is high', underpinned in part by 'an extremely high level of goodwill and cooperation between the Commonwealth and the States', 'soundness and flexibility in the response capabilities' and 'initiative and creativity within the Committee'. Concerns were expressed in relation to the coordinated oversight of counter-terrorist strategy and policy and the direct involvement of various Commonwealth Ministers 'having regard to the governmental policy aspects of the counter terrorism arrangements'.²³

Model Criminal Code Officers Committee

In general, the question of crimes against government and the constitution were not part of the terms of reference of the Model Criminal Code Officers Committee (MCCOC). However, the Committee did consider the issue of sabotage.²⁴

The sabotage offences recommended by MCCOC are based, to some extent, on the Convention on the Suppression of Terrorist Bombing. In its report, MCCOC commented:

[T]he substance of the Convention suggests the existence of a significant gap in Australian ... law. In most jurisdictions, property damage offences are directed at relatively minor forms of criminality they are ill-adapted for use against terrorists. Though existing state and federal legislation would impose some form of criminal liability for any instance of terrorist attack on public facilities, many of these offences are not punishable with penalties of appropriate severity.

MCCOC suggested two offences, one of sabotage and the other of threatened sabotage. Sabotage would be committed if a person damaged a public facility by committing a property offence or by causing an unauthorised computer function, intending to bring about major disruption to government functions, major disruption to public services or major economic loss. The maximum penalties would be 25 years imprisonment for sabotage and 15 years imprisonment for threatening sabotage.²⁵

On the broader applicability of the Convention, MCCOC made the following comment:

The directly applicable requirements of the Convention ... would only have a marginal effect on domestic law. It is limited in its application to terrorism which crosses international borders or involves foreign nationals and limited to acts of terrorism which involve the use of an explosive or other lethal device.

Australia has not yet become a party to the Convention but the Government announced in September 2001 that 'drafting instructions are with the Office of Parliamentary Counsel to enable legislation with a view to Australia becoming a party to the Convention'.²⁶

Endnotes

1. Mark observed that the 'possible assistance' of the Australian Defence Forces was 'dismissed in one sentence', Robert Mark, *Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and Related Matters*, AGPS, Canberra, 1978, pp. 23–24.
2. *ibid.*, p. 10.
3. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, Appendix 7, p. 271.
4. *ibid.*, pp. 49-50.
5. The Hon. Mick Young, '[Counter Terrorism in Australia](#)', Ministerial Statement, House of Representatives, *Debates*, 17 October 1986, p. 2295.
6. Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994, p. 1. SAC – PAV is the acronym for the Standing Advisory Committee on Commonwealth/State Cooperation on Protection Against Violence.
7. Mick Young, *loc. cit.*
8. Honan and Thompson, *loc. cit.*, p. 1.
9. Attorney-General's Department, Review of Commonwealth Criminal Law, *Interim Report: Computer Crime*, November 1988, AGPS, Canberra [*First Interim Report*].
10. Attorney-General's Department, Review of Commonwealth Criminal Law, *Interim Report: Detention Before Charge*, March 1989, AGPS, Canberra [*Second Interim Report*].
11. Attorney-General's Department, Review of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibility and Other Matters*, July 1990, AGPS, Canberra [*Third Interim Report*].
12. Attorney-General's Department, Review of Commonwealth Criminal Law, *Fourth Interim Report: Offences Relating to the Administration of Justice, Offences Against the Government Involving Property or Money, Bribery and Corruption and Search Warrants*, November 1990, AGPS, Canberra [*Fourth Interim Report*].
13. Attorney-General's Department, Review of Commonwealth Criminal Law, *Fifth Interim Report: Arrest and Matters Ancillary Thereto, Sentencing and Penalties, Forgery, Offences Relating to the Security and Defence of the Commonwealth and Part VII of the Crimes Act 1914*, June 1991, AGPS, Canberra [*Fifth Interim Report*].
14. Attorney-General's Department, Review of Commonwealth Criminal Law, *Final Report*, December 1991, AGPS, Canberra.
15. *Fifth Interim Report*, June 1991, p. 314.
16. The Gibbs Report recommended that the offence of treason be amended to incorporate some of the features of what is now treachery. It also took the view that other aspects of the offence of treachery were redundant, either because they were dealt with in other statutes [the *Crimes (Foreign Incursions and Recruitment) Act 1978*] or had little practical utility.

Gibbs recommended that there be a separate offence of killing or injuring the Sovereign or the Sovereign's consort or heir (presently part of the offence of treason). Finally, Gibbs recommended that it should be an offence for an Australian citizen or resident 'to help a State or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities, the existence of which is established by proclamation ... However, the right to express dissent from the Government's decision to so commit the Defence Force should be preserved'. *Fifth Interim Report*, loc. cit., p. 298.

17. The Gibbs Committee recommended that provisions in the Crimes Act dealing with sedition be repealed and replaced with an offence of inciting the overthrow of the Constitution or Government, violently interfering with Parliamentary elections or using violence against racial, ethnic or national groups in the community. *Fifth Interim Report*, loc. cit., p. 307.
18. 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. 4.
19. *ibid.*
20. *ibid.*, p. 7.
21. *ibid.*, p. 11.
22. Honan and Thompson, *op. cit.*, Annexe 2.
23. *ibid.*, p. ii.
24. Model Criminal Code Officers Committee, *Report, Chapter 4, Damage and Computer Offences and Amendment to Chapter 2: Jurisdiction*, January 2001
25. While MCCOC's suggestions seem to have been made in the context of State and Territory laws, Commonwealth sabotage offences could also, arguably be reformed as well.
26. The Hon. Daryl Williams, MP, 'Australia's national security', *Media Release*, 18 September 2001.

Document 6 Intelligence Agencies

ONA

The *Office of National Assessments Act 1977* does little more than define and delimit the roles and responsibilities of ONA. One of the functions of ONA is to 'assemble and correlate information relating to international matters that are of political, strategic or economic significance to Australia' (para 5(1)(a)). ONA may provide reports and assessments to 'appropriate Ministers and other appropriate persons' (para 5(1)(b) and, on request, may prepare and provide these to 'a Minister or prescribed Commonwealth officer' (s. 5(2)). The Minister may not issue directions regarding 'the content of, or any conclusions to be reached in, any report or assessment' (s. 5(4)). The Director-General of ONA is 'entitled to full access to all information relating to international matters that are of political, strategic or economic significance to Australia, being information in the possession of any Commonwealth agency' (s. 9).

ASIO

The *Australian Security Intelligence Organisation Act 1979* defines the roles, functions and powers of ASIO. One of the functions of ASIO is to 'obtain, correlate and evaluate intelligence relevant to security' (para 17(1)(a)). Another is to supply security assessments to Commonwealth agencies. Security assessments contain advice about whether a 'prescribed administrative action' should be taken regarding an individual on security grounds, such as denying them entry to Australia or access to sensitive information. ASIO may communicate intelligence to appropriate persons or authorities (para 17(1)(b)) and provide advice to Ministers, authorities and other prescribed persons (para 17(1)(c)). Specifically, it may communicate intelligence to State authorities in response to a proposed 'prescribed administrative action' in that State that would affect security for the purposes of the Commonwealth (s. 40).¹ The Minister may not override the opinion of the Director-General 'concerning the nature of the advice that should be given' (s. 8(4)). Nor may s/he override the Director-General's opinion concerning the appropriateness of targeting a particular person without a written direction containing reasons, which is copied to the Inspector-General and the Prime Minister (s. 8(5)). The Act does not give ASIO any guarantee of access to information held by other agencies, but other legislation permits relevant authorities to disclose to ASIO certain restricted information, such as that relating to taxation² or financial transactions.³

The ASIO Act requires the Director-General to take all reasonable steps to ensure that nothing is done beyond what is 'necessary for the purposes of the discharge of its functions' and that the organisation is 'kept free from any influences or considerations not relevant to its functions' and that nothing is done that might support a suggestion that the

organisation is 'concerned to further or protect the interests of any particular section of the community' or is concerned 'with any matters other than the discharge of its functions'. Even in the absence of a statutory requirement for '*proper performance*', such a limitation could probably be implied into the role and function of the Director-General.⁴

ASIS and DSD

The *Intelligence Services Act 2001* defines the roles, functions and powers of the Australian Secret Intelligence Service and the Defence Signals Directorate. A key function of ASIS is to 'obtain intelligence about the capabilities, intentions or activities of people or organisations outside Australia' and, by logical extension, to 'communicate such intelligence' and to 'liaise with intelligence or security services or other authorities of other countries'. Another is to 'conduct counter-intelligence activities' (s. 6). Similarly, DSD is to obtain intelligence information in the form of '[guided or unguided] electromagnetic energy [or] electrical, magnetic or acoustic energy' and to 'communicate such intelligence'. It may also assist Commonwealth and State authorities in relation to the 'security and integrity of information [in electronic form]', and in relation to cryptography and communications technologies (s. 7). These agencies may only perform functions in the interests 'national security', 'foreign relations' or 'national economic well-being' to the extent they are affected by 'the capabilities, intentions or activities of people or organisations outside Australia' (s. 11(1)). Nor may they 'undertake any activity' that is not 'necessary for the proper performance of [their] functions' or 'authorised under or required by another Act' (s. 12).

IGIS

On 17 May 1983 the Hawke Government reappointed Justice Hope to conduct a second Royal Commission into intelligence service agencies. The inquiry was to examine progress in implementing the previous recommendations; 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.

Following the Second Hope Royal Commission, the Hawke Government created the office of the Inspector-General of Intelligence and Security (IGIS). Hope had recommended that the IGIS primarily monitor ASIO's (and ASIS's) 'compliance with the law, the propriety of its actions and the appropriateness and effectiveness of its internal procedures',⁵ and, secondarily, look into complaints. The IGIS was intended to 'protect the rights of Australian citizens and residents against possible errors or excesses by the intelligence and security agencies and to guard against breaches of Australian law'. It was *not* meant to 'check on the general effectiveness and appropriateness of the agencies' operations'.⁶

The *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) gives the IGIS power to inquire into the compliance of ASIO, ASIS and DSD with the law, ministerial directions or guidelines, or human rights and the propriety of particular activities undertaken by them. But, the IGIS may not do so without ministerial approval except to the extent that Australians are affected or Australian laws may be violated (s. 8(4)).

Endnotes

1. This is subject to a restriction that, in effect, intelligence is only to be communicated to a State authority in response to, and not in anticipation of, proposed administrative action. Thus, intelligence is not to be communicated if it is likely or intended to be used by the authority in considering the administrative action: subsection 40(2).
2. The Tax Commissioner may 'despite any taxation secrecy provision ... disclose tax information to an authorised ASIO officer if [s/he] is satisfied that the information is relevant to the performance of ASIO's [statutory] functions': *Taxation Administration Act 1953*, section 3EA.
3. A similar discretion is afforded to the Director of AUSTRAC: *Financial Transaction Reports 1988*, section 27AA.
4. In *Church of Scientology v. Woodward* Mason J commented: 'I should have thought that this would have been the responsibility of the Director-General even if the statute had been silent upon that point': 154 CLR 25 at p. 58.
5. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 93.
6. *ibid.*, p. 95.

Document 7 Law Enforcement Agencies

AFP

The *Australian Federal Police Act 1979* describes the powers and functions of the AFP.

AFP functions include the provision of 'police services' for the Australian Capital Territory and in relation to Commonwealth laws, property and places. 'Police services' are services involved in crime prevention, protection of persons against injury or death and protection of property from damage (s. 4(1)). In 1999-2001 the special areas of focus were:

countering and otherwise investigating illicit drug trafficking, organised crime, serious fraud against the Commonwealth, money laundering and the interception of assets involved in or derived from these activities ... continuing to develop a capacity to deal with new forms of criminal activity requiring special attention to be directed at the investigation of economic crime, in all its forms, transnational crime and crime involving information technology and communications (including electronic commerce).¹

NCA

The *National Crime Authority Act 1984* describes the powers and functions of the NCA. Along with earlier legislation,² it was passed in response to a number of Royal Commissions in the 1970s and 1980s that drew attention to the existence, nature and magnitude of organised crime in Australia.³ In particular it was a response to the perceived need for 'a new law enforcement agency at the national level, equipped with coercive powers, skills and resources to deal the fight against organised crime.'⁴

In 1998-99 the most commonly investigated offences included drug importation, cultivation, manufacture and trafficking, money laundering, theft, fraud, tax evasion, bribery, extortion and violence.⁵ In 2000-2001 the main priorities for investigation were:

South-East Asian organised crime, principally the importation and trafficking of heroin, fraud against the Commonwealth and money laundering associated with organised criminal activities and the investigation of established criminal networks involved in the importation and trafficking of illicit drugs and the corruption of officials.⁶

On 21 December 2001 the Government 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.⁷ According to media reports, the review was a pretext for the NCA to be scrapped and either replaced by a new agency (the 'Australian Crime Commission') or merged with the AFP.⁸ Moreover, some suggested that the review was part of a 'sustained six-month campaign' by the Prime Minister to 'demolish the agency', based in part on its support for public heroin trials.⁹

The review was completed in early 2002 and, while the report is confidential, it apparently recommended that the AFP take over many of the NCA's duties.¹⁰ On 10 March 2002 the Minister for Justice and Customs 'ruled out' a merger between the NCA and AFP. He stated that the Government 'does not believe that such a merger is in the best interest of law enforcement', but left some scope to reconsider noting that '[a]ny decision on the future of the NCA is of course a matter to be decided by the Commonwealth, State and Territory leaders at the upcoming Leaders Summit' [suggested by the Prime Minister].¹¹

APS

The *Australian Protective Service Act 1987* describes the roles and functions of the APS.

The functions of the APS include protection of property in which the Commonwealth or a foreign power or organisation has an interest, protection of Commonwealth office holders and internationally protected persons and the provision of detention services under the *Migration Act 1958*.¹² In common parlance, its role is generally to provide a 'highly visible deterrent' and 'an immediate response to a potential or actual incident'.¹³

More generally, the APS may provide 'such protective and custodial services for or on behalf of the Commonwealth as the Minister ... directs' (s. 6(1)). In performing these functions APS officers have powers of arrest without warrant (s. 13) and search (s. 16), and may use reasonable force ranging up to the use of lethal force where reasonably necessary to 'protect life or prevent serious injury to the officer or any other person' (s. 14).

On 14 February 2002, the Government announced that, from 1 July 2002, the APS would be merged to become a division of the AFP. This would 'ensure greater coordination between the AFP's close personal protection function and the APS's guarding function' strengthening the ability of each to 'fulfil their counter-terrorism responsibilities'.¹⁴

AUSTRAC

The Australian Transaction Reports and Analysis Centre was established by *Financial Transaction Reports Act 1988*. The Act requires cash dealers including banks to report instructions for the transfer of funds into or out of Australia electronically on behalf of their customers. AUSTRAC is principally charged with preventing money-laundering it but it also provides an intelligence role to Commonwealth, State and Territory law enforcement and revenue agencies by providing financial transaction reports information.

The Act provides that the Attorney-General is entitled to access information for the purpose of dealing with a request made by a foreign country for international assistance in a criminal matter. The Government has committed AUSTRAC to supporting the work of Financial Crimes Enforcement Network (finCEN), an agency of the US Treasury.

ABCI

The Australian Bureau of Criminal Intelligence is not a creation of statute. It was established by an inter-governmental agreement on 6 February 1981. Its function is to 'provide a cooperative national criminal intelligence service for law enforcement agencies in Australia' in part by 'combining effective intelligence skills and utilisation of leading-edge information technology'.¹⁵ It relies on Commonwealth and State and Territory police to collect information while it facilitates the exchange of that information and intelligence.

OSCA

The Office of Strategic Crime Assessments was established in 1995 to provide the Commonwealth with 'strategic assessments of significant crime trends and criminal threats to Australia likely to emerge within 5 years' and to 'facilitate coordination of intelligence assessment activities within the Commonwealth law enforcement system'. In relation to assessments, its focus is on whole of government 'policy-relevant strategic analysis'.¹⁶

Weapons Specific Agencies

In addition to these general law enforcement agencies, other agencies responsible for monitoring and controlling aviation safety and the development, production, storage, use, etc. of particular chemicals and toxins have certain relevant investigatory powers. So, for example, the *Chemical Weapons (Prohibition) Act 1994* provides for inspections, warrants and search and seizure in relation to chemical weapons and weapons related chemicals.

Endnotes

1. Australian Federal Police, [Annual Report 2000-2001](#), p. 12.
2. *National Crimes Commission Act 1982*.
3. For example, the 1973 NSW Royal Commission into Organised Crime in Clubs (headed by Justice Moffitt); the 1977 NSW Royal Commission into Drug Trafficking (headed by Justice Woodward); the 1977 Australian Royal Commission of Inquiry into Drugs (established by the Commonwealth, Victorian, Tasmanian, Western Australian & Queensland Governments and headed by Justice Williams); the 1980 Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (established by the Commonwealth and Victorian Governments and headed by Mr Frank Costigan QC); the 1981 Royal Commission of Inquiry into Drug Trafficking (established by the Commonwealth, NSW, Victorian & Queensland Governments and headed by Justice Stewart).
4. *Report of the Review of Commonwealth Law Enforcement Arrangements*, AGPS, Canberra, 1994, p. 329.
5. National Crime Authority, *1998-99 Annual Report*, AGPS, Canberra, 1999, p. 3.
6. *Agency Budget Statements 2000-2001*, p. 298.
7. The Hon. Daryl Williams, MP; Senator The Hon. Chris Ellison, '[Review of National Crime Authority](#)', *Media Release*, 21 December 2001.
8. Patrick Walters, 'PM's bid to break law agency', *The Weekend Australian*, 9 March 2002.
9. Patrick Walters, 'PM's bid to break law agency', *The Weekend Australian*, 9 March 2002; Bob Bottom, 'A blatant effort to sabotage the NCA', *The Canberra Times*, 27 February 2002; Mark Mallabone, 'Terrorism "pretext" for NCA scrap bid', *The West Australian*, 13 February 2002.
10. John Silvester, 'Howard's crime and terrorism plan', *The Age*, 12 March 2002.
11. Senator The Hon. Chris Ellison, 'NCA/AFP Merger Ruled Out', *Media Release*, 10 March 2002.
12. *Australian Protective Service Act 1987*, section 6.
13. 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. 6.
14. Senator The Hon. Chris Ellison, '[Australian Protective Services to become a division of the Australian Federal Police](#)', *Media Release*, 14 February 2002, Peter Clack, 'AFP to control Protective Services', *The Canberra Times*, 15 February 2002.
15. Quote appears in <http://au.missingkids.com/1/html/ABCigen1.html>.
16. Attorney-General's Department, [OSCA's Mission](#), 28 February 2001.

Document 8 Role of the Defence Force

As indicated in the *Legislation, Commentary and Constraints* paper at section 1.5.3, the Australian Defence Force may provide either Defence Assistance to the Civil Community (DACC)¹ or Defence Aid to the Civil Power (DACP).²

DACC

In theory, there are few significant legal issues associated with DACC. One author, in a seminal text on emergency powers, states, perhaps too confidently, that '[n]o significant legal problems are posed when the Defence Force is used for relief operations'.³ On the other hand, it has been pointed out that there is no specific provision in the Constitution or any Commonwealth law that may be called into operation in crisis management.⁴ The truth may be that legal authority could be derived from various sources.⁵ The issue has simply never been fully raised or resolved probably because attention has been focused on DACP. Thus, the key issue is that DACC, unlike DACP, relates to 'support to civil authorities in the performance of non-emergency law enforcement related tasks where there is *no likelihood* that Defence personnel will be required to use force'.⁶ Once it is accepted that DACP may involve the use of force (see below) 'then it seems rather farcical that the Constitution authorises use of the defence forces in civil situations where force is likely, but not in civil situations where force is not contemplated'.⁷

DACP

It seems clear that the Commonwealth may use military personnel to protect itself. But it is unclear how far the Commonwealth may use military personnel to protect its 'interests'. Sir Victor Windeyer, a former High Court judge, suggested that '[t]he ultimate constitutional authority [for the intervention during the 'Siege of Bowral' in 1978⁸] was the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth'.⁹ He argued that the power 'arises fundamentally, I think, because the Constitution created a sovereign body politic with the attributes that are inherent in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation'.¹⁰

So, it is widely accepted that the Commonwealth can use the ADF to enforce its laws and to protect its interests and property and thereby suppress domestic violence in a State. It is acknowledged that 'it is not within the province of the Commonwealth to protect a State against domestic violence [in the absence of a request]',¹¹ but it has been said that where domestic violence 'is of such a character as to interfere with the operations of the Federal government, or with the rights and privileges of Federal citizenship, the Federal government may clearly, without a summons from the State, interfere to restore order'.¹²

Recent amendments to the *Defence Act 1903* reflect the argument in favour of this power. The Governor-General may call out the ADF where the Prime Minister, the Defence Minister and the Attorney-General are satisfied that 'domestic violence' is occurring or is likely to occur and a State or Territory is not, or is unlikely to be, able to protect Commonwealth interests (s. 51A). The Governor-General may also call out Permanent Forces, and such Emergency and Reserve Forces as may be necessary, for the protection of a State against domestic violence, provided they are not 'called out or utilized in connexion with an industrial dispute' (s. 51B). The order must specify the powers to be held by the ADF.

One commentator has suggested, 'the functions of the Commonwealth Government are so many and its agencies and instrumentalities so far reaching, that internal disorder on any large scale could hardly leave them unaffected'.¹³ More recently another commentator has suggested that 'any social controversy can nowadays be injected with 'national security' implications' and that, as a result, the Commonwealth can circumvent any requirement in section 119 to intervene in State affairs 'whenever the Commonwealth chooses'.¹⁴

More pressing perhaps is the issue of domestic violence motivated or directed at issues or people of international concern. Such violence would undoubtedly affect the Commonwealth in its position as Australia's representative in the international community. As indicated, one of the stated purposes of the call out in 1978 was the protection of the 'national and international interests' of the Commonwealth. The common view at the time was that the call out was *not* made under s 119 of the Constitution but was 'initiated by the Commonwealth to protect Commonwealth interests'.¹⁵ The Attorney-General's opinion was that the Commonwealth had intervened 'not to protect the State but to protect itself'.¹⁶

Effect of a Call Out

At common law, ADF personnel who are called out do not acquire any special powers or responsibilities and remain subject to the law and jurisdiction of the state. A call out 'is not like a declaration of martial law' in which the military acquires complete control. On the contrary, 'the civil power remains paramount throughout and the civil law supreme'.¹⁷ In other words, '[m]embers of the Defence Force are called out to be in readiness to uphold the law. They remain subject to it, and liable to its penalties, except insofar as in some circumstances any one of them may be exculpated by his orders'.¹⁸ Similarly, a call out, without more, does not impose active duties to be immediately performed. It is simply 'a warning order to those parts of the ADF to which it was communicated to be ready for duty for the purpose specified'.¹⁹ In order to be used, there must be a 'requisition of civil authority', that is a written authorisation from the Minister, Chief of Police, etc.

Once called out, military personnel stand in the same position as ordinary citizens. Thus, while they are able to detain offenders using reasonable force, they have no power to question, stop and search persons nor do they have powers of arrest. Moreover, they are

subject to investigation in the ordinary court system.²⁰ At the same time, personnel may be obliged, in accordance with orders, to place themselves in danger and *may* be able to claim a defence based on a reasonable belief that those orders were lawful.²¹

Under the *Defence Act 1903*, ADF personnel may use 'such force against persons and things as is reasonable and necessary in the circumstances' but may not 'do anything that is likely to cause the death of, or grievous bodily harm to, the person' unless it is reasonably necessary 'to protect the life of, or to prevent serious injury to, another person' (para 51T(2)(a)). Nor may they subject a person 'to greater indignity than is reasonable and necessary' (para 51T(2)(b)).

As far as practicable, ADF personnel must cooperate with State/Territory police and, while command ultimately remains with the ADF, ADF personnel must not be utilised for specific tasks unless responding to a written request from the police force (s. 51F). The ADF 'is there to assist civilian authorities such as the police force, and not [to] replace them'.²² Also, ADF cannot be used to stop or restrict any protest, dissent, assembly or industrial action unless there is a likelihood of death, serious injury or serious property damage (s. 51G(a)).

Endnotes

1. 'This 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].
2. 'This is the provision of Defence Force aid to civil law authorities in the performance of law enforcement tasks': *ibid.*
3. H. P. Lee, *Emergency Powers*, Law Book Company, Sydney, 1984, p. 208.
4. 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]. Ward states the argument in these terms: 'the fact that the executive power is in fact linked with the maintenance and execution of Commonwealth laws (and the Constitution) as is the defence power, and that there is no relevant Commonwealth law [or provision of the Constitution] to execute or maintain in the case of natural disasters or ceremonial occasions'.
5. It is clear that the Commonwealth has exclusive control over the Defence Forces by virtue of various sections of the Constitution. If that is considered insufficient, because it does not confer a positive power on the Commonwealth to use the Defence Forces for DACC, other sources of power may exist. The Commonwealth would seem to be able to rely on an

executive prerogative which gives it direct control over the 'disposition and use' of the Defence Forces. The Commonwealth may even be able to rely on the fact of its status as a 'juristic person' which *may* empower it to conduct the same activities as individuals are able to conduct in the domain of the States. Failing these bare sources of executive power, it would seem to be able to rely on the implied nationhood power in the sense that the activities in DACC are peculiarly adapted to the government of a nation.

6. Defence Instructions (General), OPS 05-1, p. 5.
7. Elizabeth Ward, *op. cit.*
8. On 13 February 1978 a bomb exploded at the Commonwealth Heads of Government Regional Meeting in the Sydney Hilton Hotel. As a result, the meeting was removed to Bowral under tight security arrangements involving the Commonwealth and State police and the Defence Forces.
9. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, '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', Appendix 9, p. 280.
10. *ibid.*, p. 279.
11. *R v. Sharkey* (1949) 79 CLR 121, per Dixon J at p. 151.
12. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 964. This passage was cited with approval in *R v. Sharkey* (1949) 79 CLR 121, per Dixon J at p. 151. See also the *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1, per Dixon J at p. 188.
13. Harrison Moore, *Constitution of the Commonwealth of Australia*, 2nd Edition, Law Book Company, Melbourne, 1910, pp. 338-339.
14. Professor Tony Blackshield, 'The Siege of Bowral – The legal issues', *Pacific Defence Reporter*, March 1978, p. 7.
15. *Protective Security Review*, *op. cit.*, Appendix 8, p. 274, 'Letter of 24 May 1978 from the Attorney-General [The Hon. Peter Durack] to Sir Victor Windeyer seeking advice concerning the position of members of the Defence Force when called out in aid of the civil power'. This opinion was shared by a former High Court Judge: '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', *ibid.*, Appendix 9, p. 277.
16. *Ibid.*, p. 274.
17. As the ADF's own guidelines explain 'notwithstanding a callout of the troops, Commonwealth and State and Territory Governments and law enforcement agencies retain control over responses to terrorist incidents': *Australian Defence Force Publication, Operations Series, Civil–Military Cooperation*, ADFP 44, First Edition, Defence Publishing Service, Canberra, 1998, at para 4.13.
18. *Protective Security Review*, *op. cit.*, p. 294.
19. *ibid.*, p. 283.

20. Charge to the Bristol Grand Jury on a Special Commission (1832) 172 ER per Tindal LJ at p. 967; Reference by the Attorney-General for Northern Ireland (1976) 3 WLR 235, per Diplock LJ at p. 245.
21. See generally *Protective Security Review*, Appendix 20, op. cit.
22. Defence Amendment (Aid to Civilian Authorities) Bill 2000, *Explanatory Memorandum*, p. 6.

Document 9 Crisis Management Issues and Structure

Introduction

Command and control of a terrorist threat or incident is a critical function that demands a unified framework for the preparation and execution of plans and orders. Emergency response organisations at all levels of government may manage command and control activities differently depending on the organisation's history, the complexity of the crisis, and their capabilities and resources. Management of Federal, State and local government response actions should reflect an inherent flexibility in order to effectively address the entire spectrum of capabilities and resources across Australia. The challenge for emergency response agencies is to integrate the different types of management systems and approaches utilised by all levels of government into a comprehensive and unified response to meet the unique needs and requirements of each incident.

There is a large body of literature dealing with crisis management. While there may be significant intersections between this literature and literature on terrorism preparedness, most if not all of the discussion does not focus on legal issues. However, for completeness, the following *brief* overview is given of the key institutional arrangements in Australia.

The National Security Committee

The [National Security Committee](#) is a cabinet sub-committee, which meets on an irregular and ad-hoc basis. The Committee consists of the Prime Minister (Chairperson), the Deputy Prime Minister, the Treasurer, the Minister for Foreign Affairs, the Minister for Defence and the Attorney-General. Other Ministers are seconded to the Committee when specific issues relevant to their portfolios are being addressed.

The National Security Committee is at the head of the decision making tree on national security. It meets when necessary to consider strategic developments and major issues of medium to long term relevance to Australia's national security interests.

SAC-PAV

In 1978, following the Hilton bombing, the then Prime Minister, Malcolm Fraser, announced the establishment of a committee which would include both Commonwealth and State agencies, whose principal aim would be to achieve a set of national arrangements and agreements to respond to threats or acts of politically motivated violence. The Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence (SAC-PAV) held its first meeting in February 1979.

The Director of the Protective Security Coordination Centre (PSCC) of the Commonwealth Attorney-General's Department serves as Executive Deputy Chairman to SAC-PAV.

[SAC-PAV](#) is comprised of representatives from both the Commonwealth and the States. Representatives from the Commonwealth include the Departments of the Attorney-General, the Prime Minister and Cabinet, Transport and Regional Services, Australian Federal Police, Australian Defence Force, Australian Security Intelligence Organisation and the Australian Protective Service. The Department of Finance and Administration attends in the capacity of an adviser. State/Territory representatives include officials from Premier's and Chief Minister's Departments and the Police Services. The Department of Foreign Affairs and Trade, the New Zealand Department of the Prime Minister and Cabinet and the New Zealand Police have observer status.

SAC-PAV is based upon national cooperation and it has established nation-wide capabilities in such areas as crisis management, command and control, intelligence, investigation, bomb response, technical support, bomb scene examination, negotiation, VIP protection, police tactical response and media cooperation.

SAC-PAV aims to ensure that Australia has a nation-wide counter terrorism capability by fostering cooperation between all relevant agencies in the Commonwealth and the State Governments.

The PSCC

The Protective Security Coordination Centre (PSCC) is a Division of the Commonwealth Attorney-General's Department. The PSCC was established in 1976 to ensure security arrangements for holders of high office are appropriately coordinated between the Commonwealth and States. In 1977, the PSCC was also given responsibility for coordinating counter terrorism planning. In addition, in 1992 the PSCC was given responsibility for coordinating and managing protection arrangements for foreign diplomatic and consular personnel and premises.

Today the [PSCC](#) performs the following functions:

- supports both the Attorney-General and the Minister for Justice and Customs by providing policy advice on protective security. It also implements Government decisions in the field of protective security
- develops and maintains national standards, and coordinates and managing the implementation of these standards
- provides executive and secretariat support for the Special Inter-Departmental Committee on Protection Against Violence (SIDC-PAV). This Committee is made up of

representatives from Commonwealth Agencies and meets every month to exchange information, consider policy issues on counter terrorism and dignitary protection, to consider the threat from politically motivated violence and to determine the level of national counter terrorism alert in Australia

- provides executive and secretariat support for the Standing Advisory Committee on Commonwealth State Cooperation for Protection Against Violence (SAC-PAV). This includes coordinating the SAC-PAV equipment procurement, training and exercise programs and maintaining the National Anti-Terrorist Plan. The Director of the PSCC is the Executive Deputy Chair of SAC-PAV
- on behalf of the SAC-PAV, coordinates training exercises and courses annually
- the PSCC maintains a dedicated crisis management facility known as the Watch Office. The Watch Office is activated in response to significant incidents or threats of politically motivated violence, or during periods of heightened alert, to monitor and coordinate the Commonwealth response. When activated, the Watch Office maintains a close liaison with all appropriate Commonwealth, State and Territory agencies involved in responding to the threat or incident
- the PSCC is responsible for developing protective security policy. The PSCC provides policy advice to the Government on protective security issues and is responsible for producing government standards and guidelines to help Commonwealth agencies to create and foster a secure environment
- the PSCC provides an advisory service to Agency Security Advisers (ASAs) and Information Technology Security Advisers (ITSAs) on issues relating to protective security policy and practices. Regular ASA/ITSA Forums are held on a quarterly basis in order to highlight issues of interest
- the PSCC also chairs and provides secretariat and research services for the Protective Security Policy Committee (PSPC), an interdepartmental committee which coordinates the development of Government security policy
- the PSCC is responsible for the provision of protective security training, including physical, computer and personnel security, for personnel in Commonwealth agencies and
- the PSCC is also responsible for the Australian Security Vetting Service (ASVS). The ASVS is a security clearance advisory service available for use by all Commonwealth agencies on a fee for service basis.

Document 10 General Commonwealth Offences

Offences Against Commonwealth Property

Under the *Public Order (Protection of Persons and Property) Act 1971* it is an offence to trespass, commit an act of violence or property damage or cause an unreasonable obstruction on Commonwealth premises (ss. 6–12). The Act provides for similar offences in relation to diplomatic and consular premises and their staff (ss. 15–20).

Computer Crime

Commonwealth law dealing with computer crime is largely a result of reviews by the Gibbs Committee in 1988¹ and the Model Criminal Code Officers Committee in 2001.² While the Commonwealth has no direct constitutional power over computer crime, it may legislate with respect to Commonwealth facilities, property or activities and with respect to 'postal, telegraphic, telephonic, and other like services'. It may therefore deal with federal computers, data and networks and other public and private computer networks.

The *Criminal Code* (Cth) deals with a range of computer crimes such as hacking, denial of service attacks, spreading computer viruses and website vandalism. It is an offence to access or modify data in a computer or impair electronic communications between computers without authorisation and with the intention to commit a 'serious offence' (s. 477.1). Access, modification or impairment must be caused 'by means of a telecommunications service' which is defined broadly to include any form of electronic communication. (A 'serious offence' is one that is subject to 5 or more years imprisonment.) It is an offence to modify data so as to impair a computer system (where it involves federal computers or data or a telecommunications services) (s. 477.2) or to impair an electronic communication (s. 477.3).

However, ASIS and DSD officers are not subject to any civil or criminal liability for 'computer related acts' if done in the proper performance of the agency's functions (s. 476.5).

Postal and Telecommunications Services

Under the *Crimes Act 1914* it is an offence to intentionally send an article by post which consists of, encloses or contains a 'totally prohibited substance or thing' (s. 85X). This includes explosives and a range of 'dangerous or deleterious substances or things' listed in

regulations, including toxic gases, substances likely to cause harm if swallowed, inhaled or exposed to skin and those containing pathogens that can cause human or animal disease.³

It is also an offence to interfere with telecommunications carriage services (s. 85ZG) or carrier facilities (s. 85ZJ) or to use equipment for unlawful purposes (s. 85ZK).

Hostages

The *Crimes (Hostages) Act 1989* essentially implements the *International Convention Against the Taking of Hostages* of 1979. It is an offence to seize or detain another person and threaten to kill, injure or continue to detain that hostage with the intention of compelling a domestic or international government institution or organisation to do or abstain from doing any act as a condition for release (ss. 7 & 8). The Act applies to offences committed in Australia, on board Australian ships or aircraft or by Australians (s. 8). Proceedings may not commence unless the Attorney-General has given his or her consent. Pending this, a person may be arrested, charged or remanded in custody or on bail (s. 10).

Internationally Protected Persons

The *Crimes (Internationally Protected Persons) Act 1976* implements the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* of 1973. It is an offence to murder, kidnap or cause bodily harm to or to intentionally destroy or damage premises or property used or occupied by an 'internationally protected person' (s. 8). 'Internationally protected persons' include heads of state, heads of government, prescribed officials or representatives of countries, international organisations, overseas missions and their family members (s. 3A). Proceedings may not commence unless the Attorney-General has given his or her consent. Pending this, a person may be arrested, charged or remanded in custody or on bail (s. 12).

Under the *Public Order (Protection of Persons and Property) Act 1971* it is an offence to assault, harass, obstruct or behave offensively, threateningly or insultingly to diplomatic staff, staff of special missions, prescribed staff of an overseas mission, or a high officer or representative of an international organisation (s. 18). It is an offence to take part in a violent assembly (s. 15), to trespass or unreasonably cause an obstruction (s. 20) or to carry, discharge, throw or deposit an offensive weapon or object (s. 19) in relation to protected premises.

Aviation Security

Legislation dealing with aviation security and aviation terrorist-related matters can be divided into two groups. The first is the *Crimes (Aviation) Act 1991*. This Act implements Australia's obligations under a number of international conventions that cover specific types of violent or dangerous acts directed against international civil aircraft, their passengers and crew and civil airports and airport installations. The second group, covering aviation safety, consists of the *Air Navigation Act 1920* and Regulations.

Under the *Crimes (Aviation) Act 1991* it is an offence to hijack an aircraft in flight (s. 13) or to commit an act of criminal violence against passengers or crew (s. 15), where a relevant jurisdictional connection is established with the aircraft, the flight or the incident.⁴ It is an offence to do any ordinarily criminal act aboard a 'division 2 aircraft' (s. 15). Moreover, it is an offence to exercise control over (s. 16), destroy (s. 17) or prejudice the safe operation (s. 19), assault the crew (s. 21), or endanger the safety of (s. 22), or place dangerous goods on (s. 23) a 'division 3 aircraft'. 'Division 2 aircraft' include Australian aircraft engaged in wholly international flights or foreign aircraft engaged in flights that begin or end in Australia. 'Division 3 aircraft' include Australian aircraft that are used international flights.

Under the *Air Navigation Act 1920* it is an offence for a passenger to board or to be permitted to board an aircraft without being screened and cleared (s. 20). It is an offence for a person to carry or to be permitted to carry a weapon through a screening point (s. 22), or on board an aircraft, otherwise than with the permission of the Secretary (s. 22D). Other offences exist to protect the security of 'sterile areas' following screening and clearance. Under the Act airports must develop approved airport security programs and safety measures (Part 3, Div. 4 & 5).

Other legislation is also relevant. For example, under the *Customs Act 1901* a customs officer may take custody of a prohibited weapon found aboard a ship or aircraft (s. 227F).

Ships and Fixed Platforms

Under the *Crimes (Ships and Fixed Platforms) Act 1992* it is an offence to seize control of a ship or fixed platform, to place a destructive device or commit an act of violence against a person on a ship or fixed platform, or to destroy navigational facilities.

Biological Weapons

The *Crimes (Biological Weapons) Act 1976* implements the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* of 1972. It is an offence to develop, produce, stockpile

or otherwise acquire or retain 'microbial or other biological agents, or toxins' other than for 'prophylactic, protective or other peaceful purposes' or weapons, equipment or means of delivery designed to use such toxins (s. 8). Any substance or article covered by this offence is automatically forfeited and may be seized and retained for 60 days (s. 9). Proceedings may not commence unless the Attorney-General has given his or her consent. Pending this, a person may be arrested, charged or remanded in custody or on bail (s. 10).

Chemical Weapons

The *Chemical Weapons (Prohibition) Act 1994* implements the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* of 1993. It is an offence to develop, produce, acquire stockpile or retain transfer or use chemical weapons (s. 12). Any such weapon covered by this offence is automatically forfeited to the Commonwealth (s. 14). 'Chemical weapons' include 'toxic chemicals and their precursors' which may accompany 'munitions or devices [that are] designed to cause death or harm through the toxic properties of those toxic chemicals' (s. 7(2)).⁵ A 'toxic chemical' is one which 'through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals' (s. 7(2)).⁶ An operator of a chemical facility requires a permit to deal with weapons related chemicals (s. 16).

Nuclear Material

Under the *Nuclear Non-Proliferation (Safeguards) Act 1987* it is an offence, without a permit or reasonable excuse, to possess nuclear material other than material that is expressly exempted by regulations or ministerial declaration (s. 23). Moreover, it is an offence to steal, fraudulently misappropriate or obtain by false pretences any nuclear material (s. 33) to demand nuclear material by force or intimidation (s. 34) or to use or threaten to use nuclear material to cause serious injury to a person or substantial damage to property (ss. 35 & 36). A court that convicts a person for an offence may order the article to be forfeited (s. 39).

Weapons of Mass Destruction

The *Weapons of Mass Destruction (Prevention of Proliferation) Act 1994* is, to some extent, an adjunct to the legislation dealing with biological weapons, chemical weapons and nuclear material, relying in part on the conventions which support those Acts. It is an offence, without authorisation, for a person to supply (s. 9) or export (s. 10) goods or provide services (s. 11) that he or she knows or reasonably suspects may be used or may assist in a 'weapons of mass destruction program'. Any goods covered by these offences

are automatically forfeited to the Commonwealth (s. 17). 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 (s. 20).

Endnotes

1. Attorney General's Department, *Review of Commonwealth Criminal Law: Interim Report on Computer Crime*, November 1988.
2. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Report on Chapter 4 - Damage and computer offences and amendment to chapter 2: jurisdiction*, January 2001.
3. Crimes Regulations 1990, reg 6E, inserted by Crimes Amendment Regulations 2001 (No. 4).
4. The connection exists where the aircraft is a Commonwealth or visiting government aircraft, where the aircraft is registered or lands in Australia or where the hijacker is an Australian citizen: *Crimes (Aviation) Act 1991*, section 13 and Convention for the Suppression of Unlawful Seizure of Aircraft of 1972, Article 4.
5. *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*; Article II(1).
6. *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*; Article II(2).

Document 11 Extraterritorial Application of Australian Laws

A distinction should be drawn between what may be called '*prescriptive*', '*enforcement*' and '*adjudicative*' powers.¹ Prescriptive powers relate to the powers to enact laws. Enforcement and adjudicative powers relate to the actions of executive to apply laws.

Prescriptive Powers

Generally, offences are presumed to be local and territorial.² Australian statutes are presumed to extend only to the territorial limits of Australia, unless a contrary intention is expressed.³ Specifically, they are presumed not to extend to cases governed by foreign law.⁴ Neither are they presumed to extend to actions of foreigners overseas.⁵ The presumption can be rebutted, but only by express intention or by necessary implication from the nature, purpose and policy of the legislation.⁶ 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.⁷

At common law, it is generally accepted that the States may enact laws having an extraterritorial effect so as to secure 'peace, order and good government' of the State.⁸ This would include a power to control overseas acts of Australians,⁹ and to control overseas acts of foreigners where they come within the physical limits of the State.¹⁰ There need only be a link between the subject matter of the offence and the State.¹¹ But, 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.¹² Indeed, it is said that extraterritorial criminal laws are supportable whenever a valid basis exists for enacting a criminal law.¹³ The authority to legislate extraterritorially can be derived from the external affairs power because it relates to matters that are 'physically external' to Australia.¹⁴ 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.¹⁵

Enforcement and Adjudicative Powers

International law recognises a jurisdiction where a valid nexus exists between the alleged criminal conduct and the state. The nexus will exist where the offence occurs within the territory or where the offender is present within the territory ('territorial jurisdiction') and where the results of the conduct are felt within the territory ('extra-territorial jurisdiction'). It may also recognise a jurisdiction based on the offender's nationality ('nationality principle'), the victim's nationality ('passive personality principle') and the need to protect the interests of the state (the 'protective principle'), but there is a degree of uncertainty.¹⁶

These principles are generally recognised in domestic jurisprudence, within the limits implied above. So, for example, the common law explicitly recognises the categories of 'territorial jurisdiction'¹⁷ and 'extra-territorial jurisdiction'.¹⁸ Except in relation to the Commonwealth, it would not ordinarily recognise the 'passive personality principle'.¹⁹ Neither would it ordinarily recognise the 'protective principle', although there have been cases in which, having recognised an extraterritorial jurisdiction over a principal offence, it has recognised a jurisdiction over inchoate offences (such as attempt and conspiracy). This has occurred on the basis that intended results or the intended victim were within the territory and it was necessary to protect 'peace, order and good government'.²⁰

In the future, the common law may recognise an extraterritorial jurisdiction over foreign acts where there is a 'real and substantial link' between the offence and the territory. This approach has been adopted in Canada in relation to overseas offences²¹ and has recently been endorsed in Australia in relation to interstate offences in *Lipohar and Winfield*.²²

Endnotes

- 1 See generally Ivan Shearer in S. Blay, R. Piotrowicz and B.M. Tsamenyi, *Public International Law: An Australian Perspective*, Oxford University Press, Melbourne, 1997, at pp. 162–164.
2. *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 pp. 155–156.
3. *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.
4. *Wanganui-Ragitihei 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.
5. *Meyer Heine Pty Ltd v. The China Navigation Co Ltd* (1966) 115 CLR 10 at p. 23.
6. This is discussed in Dennis Pearce and Robert Geddes *Statutory Interpretation in Australia* (3rd Ed), Butterworths, Sydney, 1988, pp. 97–99.
7. 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 (sections 50AA-50GA), *Crimes (Torture) Act 1988*, section 7; *Crimes (Hostages) Act 1989*, section 7.
8. *Croft v. Dunphy* [1933] AC 156.
9. *Bonser v. La Macchia* (1969) 122 CLR 177 per Windeyer J at p. 226.

10. *Broken Hill South Ltd v. Commissioner of Taxation (NSW)* (1936) 56 CLR 337 per Dixon J at p. 375.
11. *Pearce v. Florenca* (1976) 135 CLR 507 at p. 518.
12. *Polyukhovich v. Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501.
13. 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).
14. *Polyukhovich v. Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, per Mason CJ at pp. 530-531.
15. *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 p. 195.
16. See generally Ivan Shearer op. cit., at pp. 165-179; Matthew Goode, 'The Tortured Tale of Criminal Jurisdiction', *Melbourne University Law Review*, 1997, vol. 21(2), pp. 411-459 at pp. 413-414.
17. *Broken Hill South Ltd (Public Officer) v. Commissioner of Taxation (NSW)* (1937) 56 CLR 337 per Dixon J at 375; *Mynott v. Barnard* (1939) 62 CLR 68 per Latham CJ at p. 75 and Starke J at p. 89; *Helmets v. Coppins* (1961) 106 CLR 156. See also *Union Steamship Co of Australia Pty Ltd v. King* (1988) 166 CLR 1.
18. *Ward v. R* (1980) 142 CLR 308.
19. *Lipohar v. The Queen; Winfield v. The Queen* (1999) 200 CLR 485 per Kirby J at para 178. This is because individuals do not have any particular status as residents of a State or Territory in contrast to the Commonwealth of Australia which is a unique legal entity having its own criminal jurisdiction and being recognised in international law.
20. *Liangsiriprasert v. United States* [1991] 1 AC 225 at 251; *R v. Manning* [1999] QB 980 at 1000; *Lipohar* per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan at para 269. However, the approach in *Liangsiriprasert* was criticised in Goode, op. cit., p. 436 and *Lipohar* per Kirby J paras 175-176. The previous cases were *Board of Trade v. Owen* per Tucker LJ, at pp. 625-626 (conspiracy to defraud); *Department of Public Prosecutions v. Doot* [1973] AC 807, per Wilberforce LJ at pp. 817-818 and Salmon LJ at p. 832-833 (conspiracy to defraud); *DPP v. Stonehouse* [1977] 2 All ER 909 (attempt). See also comments in *R v. Hansford* (1974) 8 SASR 164, per Wells J at p. 195; *McNeilly v. The Queen* (1981) 4 Australian Criminal Reports 46; *R v. Millar* [1970] 2 QB 54; *R v. El-Hakkaoui* [1975] 2 All ER 146 discussed in Goode, op. cit., at pp. 433-436. Aside from *Liangsiriprasert* all of these cases could be viewed as examples of crimes where some element of the principal offence occurred within the territory.

21. *Libman v. The Queen* [1985] 2 SCR 178.
22. *Lipohar* per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan J at para 269.

Document 12 International Cooperation

Extradition

The *Extradition Act 1988* provides for the extradition of persons from 'extradition countries'. An 'extradition country' includes a country that is prescribed as such by regulations (following the making of an extradition treaty) (s. 11). A valid extradition application must include an arrest warrant, a statement of each extradition offence and a statement of the acts or omissions alleged.

In addition, the application would need to satisfy a court about the following matters:

- *an accused*: the person in question is 'accused' of an offence overseas¹
- *an extradition offence*: the offence is indictable or is covered by an extradition treaty²
- *dual criminality*: the conduct is an offence in the overseas jurisdiction and in Australia³
- *not a political offence*: the offence is not a political offence⁴
- *no 'extradition objection'*: there is no valid objection to extradition⁵
- *AG consents*: the Attorney General has consented for the person to be extradited
- *rule of speciality*: the person will only be prosecuted for the extradition offence.

In the extradition context it is important to distinguish between 'terrorism' or 'politically motivated crimes' and mere 'political offences'. In the nineteenth century, fugitives accused of 'political offences' were often exempt from extradition treaties – a corollary of the protection given by political asylum.⁶ As attitudes changed, the scope of the exemption was narrowed to remove offences otherwise associated with terrorism. Thus, a 'political offence', for the purposes of extradition and mutual assistance, now includes 'an offence against the law of the country that is of a political character' or '[a]n offence committed in the course of an organised prolonged campaign involving a number of people and directed to changing government policy'.⁷ It does not include an offence that falls within the scope of 'politically motivated violence'.⁸ This is significant given that 'politically motivated violence' includes acts of violence or threats of violence for the purpose of influencing domestic or foreign governments.⁹ Essentially, a 'political crime', for extradition and mutual assistance purposes, is a non-violent crime of a political nature.

Mutual Assistance

The *Mutual Assistance in Criminal Matters Act 1987* deals with arrangements between Australia and foreign countries regarding mutual assistance in criminal justice proceedings. Where there is an agreement between Australia and a foreign country, Australia may request that evidence be taken in the foreign country and/or that a consenting foreign prisoner be released from a foreign country to appear as a witness in relation to proceedings in Australia.¹⁰

Prisoner Exchange Agreements

It is worth noting cooperation arrangements in relation to prisoner exchange.

The *International Transfer of Prisoners Act 1997* seeks to provide a framework, against a proposed uniform legislative scheme, for the transfer of prisoners to and from Australia. In theory, transfer would occur only where an agreement is finalised between Australia and the transfer country and only with the consent of the stakeholders, including any relevant State or Territory Minister, the Commonwealth Attorney-General and the prisoner. The 'transfer countries' are to be listed, conditionally or unconditionally, in the regulations.

Among other things, before giving his or her consent the Attorney-General must consider the method by which the sentence of imprisonment will be enforced in Australia and any other proposed terms or conditions relating to the transfer (s. 26). The Attorney-General, with the consent of the transfer country, may impose conditions relating to the duration of the sentence, for example to ensure consistency with Australian law, and other conditions related to enforcement, such as entitlements to release on parole. Once a prisoner is transferred to Australia, no entitlements lie in relation to appeal or review (s. 45), but the usual rules apply in relation to pardon, amnesty or commutation of sentences (s. 49).

Practical Considerations

In addition to the above issues, there may be a range of practical considerations. The common law doctrines of *autrefois convict* and *autrefois acquit* require that a court must not expose a person to liability where they have been exposed to liability and punished in another jurisdiction. This doctrine has been held to apply to foreign proceedings.¹¹

Endnotes

1. A court may be unwilling to extradite a person who is merely 'under investigation' or 'strongly suspected' (*Kainhofer v. Austria* (1994) 124 ALR 665). Although in the latter case, on appeal, the High Court held that for the purposes of the Extradition Act 1988, 'terms which relate to the criminal procedure of other countries should not be interpreted so as to confined its reach to cases in which a step in the foreign procedure accords precisely with a step in the procedure of Australian courts': *Director of Public Prosecutions v. Kainhofer* (1985) 185 CLR 528 at p. 529 (Headnotes).
2. That is, where the maximum penalty is death or imprisonment for more than 12 months: s 5.
3. *Extradition Act 1988*, ss 7(d), 16(2) and 19(2)(c). This requirement is also included in extradition treaties that define 'extraditable offences'.
4. That is, an offence of a political character because of the circumstances in which it is committed or otherwise, not including specific offences such as hijacking or hostage taking (*Extradition Act 1988*, s 5).
5. In addition to the 'political offence' exception, the Act provides other grounds for objection (*Extradition Act 1988*, s 7):
 - accused is really sought for prosecution or punishment according to his or her race, religion, nationality or political opinions
 - accused may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinion
 - the overseas offence would only have constituted an offence under Australian military law rather than the general criminal law, and
 - the accused has been pardoned, acquitted or punished for the offence already.
6. 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. 331.
7. 'The offence must be directed solely to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign': *Prevato v. Governor, Metropolitan Remand Centre* (1986) 64 ALR 37, per Wilcox J, at p. 65.
8. *Extradition Act 1988*, section 5, definition of 'political offence'.
9. *Australian Security Intelligence Organisation Act 1979*, section 4, definition of 'politically motivated violence', paragraphs (a) and (b).
10. Parts II and IV.
11. For example, *Roche* (1775) 168 ER 169; *Hutchinson* (1671) 84 ER 1011, 87 ER 125; *Aughet* (1918) 13 Cr App R 101.

Document 13 Money Laundering

Some of the organisations targeted by the United States Terrorist Financing [Executive Order 13224](#) and the United Nations Security Council Resolution [1373](#) have allegedly been involved in providing money laundering and other related services:

Al Taqua is an association of offshore banks and financial management firms that have helped *Al-Qa'ida* shift money around the world. *Al Barakaat* is a group of money wiring and communication companies owned by a friend and supporter of Osama bin Laden.

Al Taqua and *Al Barakaat* raise funds for *Al-Qa'ida* they manage, invest and distribute those funds. They provide terrorist supporters with Internet service, secure telephone communications and other ways of sending messages and sharing information. They even arrange for the shipment of weapons.

They present themselves as legitimate businesses. But they skim money from every transaction, for the benefit of terrorist organizations. They enable the proceeds of crime in one country to be transferred to pay for terrorist acts in another. ¹

The focus on money laundering was reiterated at the recent [APEC](#) meeting in Shanghai, where leaders committed themselves to developing 'appropriate financial measures' to:

prevent the flow of funds to terrorists, including accelerating work on combating financial crimes through APEC Finance Ministers' working Group on Fighting Financial Crime and increasing involvement in related international standard-setting bodies. ²

The worldwide value of laundered funds has been estimated to be between US\$500 billion³ and US\$1 trillion.⁴ It is estimated that the Asia-Pacific Region is responsible for 25% of the worldwide value of laundered funds.⁵ In Australia, it is estimated that between \$A2 billion and \$A3.5 billion⁶ of criminal assets are laundered each year.

Money laundering involves *placement*, *layering* and *integration*. Placement represents the initial entry of cash sums into the financial system to dispose of bulk cash sums and to prepare for the subsequent stages. Layering involves a series of transactions which are ultimately designed to obscure the link between the criminal and the crime. Integration involves the assimilation of the funds into the legitimate economy.

The key concern is *placement*. Basic methods rely on domestic financial institutions, *bureaux de change*, casinos, cash smuggling and the purchase and sale of luxury items and gold. Increasingly, money laundering operations are being assisted by professionals (e.g. accountants, lawyers, notaries, real estate agents), transnational alliances (e.g. wholesalers and retailers of consumer goods) and technology (especially information technology). Consequently, they are able to avoid regulatory regimes (e.g. by structuring transactions to avoid reporting thresholds) develop sophisticated business structures (e.g. offshore

registered businesses), take advantage of conducive regulatory arrangements (e.g. offshore financial centres⁷), use sophisticated technologies (e.g. 'smartcards', electronic cash, on line banking, wire transfers, Internet gambling, encryption of financial records) and conduct international transfers of goods and services in the absence of currency (e.g. the Black Market Peso Exchange⁸ and the Hawala/Hundi System⁹).

Predominantly, the driving force behind international money laundering is drug trafficking.¹⁰ But, there are a number of underlying features that have given impetus to the industry particularly in the Asia-Pacific Region. These features include fast growth in financial sectors, diversification of financial products, growth of offshore financial centres,¹¹ electronic commerce and Internet gambling. Often, these developments have been coupled with weak regulatory systems, lax enforcement, and corruption.

As indicated, there is growing international attention on money laundering. There are various international bodies dealing with money laundering. In addition to the organisations dealing with transnational crime¹² are the Basle Committee on Banking Supervision, Financial Action Task Force on Money Laundering (FATF),¹³ the Inter-American Drug Abuse Control Commission (CICAD),¹⁴ the Asia/Pacific Group on Money Laundering, and the International Money Laundering Information Network.¹⁵

The key standards for dealing with money laundering are contained in a set of 40 Recommendations produced by the Financial Action Taskforce on Money Laundering (FATF). Other standards have been developed by the Basle Committee, CICAD and the United Nations Drug Control Programme (UNDCP).

Other legislation may be needed to identify beneficial owners of legal entities registered in Australia¹⁶ and to regulate offshore financial centres under Australian jurisdiction.¹⁷

Endnotes

1. Transcript of remarks by President Bush at <http://www.whitehouse.gov/news/releases/2001/11/20011107-4.html>.
2. '[APEC Leaders Statement on Counter-terrorism](#)', Shanghai, October 21 2001.
3. *International Narcotics Control Strategy Report 1997*, Released by the Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State Washington, DC, March 1998.
4. Address by Michel Camdessus, Managing Director of the International Monetary Fund, to the Financial Action Taskforce on Money Laundering (FATF), Plenary meeting, Paris, February 10, 1998.
5. Allan Castle and Bruce Broomhall, 'The International Money Laundering Regime and the Asia Pacific: Pairing Multilateral Cooperation with Domestic Institutional Reform', The International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver, Canada, p. 14.

6. John Walker Consulting Services, *Estimates of the Extent of Money Laundering in and through Australia* AUSTRAC, September 1995, p. 39, at <http://www.austrac.gov.au/publications/moneylaundestimates/toc.html>.
7. An 'offshore financial centre' is 'a jurisdiction where an intentional effort has been made to attract foreign business by deliberate government policies such as the enactment of tax and other fiscal incentives, "business friendly" regulatory/supervisory regimes and secrecy enforced by law': *International Narcotics Control Strategy Report 1998*, Released by the Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State Washington, DC, February 1999 at http://www.state.gov/www/global/narcotics_law/1998_narc_report/index.html.
8. In this process, drug related US currency is deposited into financial institutions in South America. These institutions then place the funds into the US bank accounts in small amounts which are below the reporting threshold of the Bank Secrecy Act. They issue monetary instruments to the trafficker to be used for the purchase of foreign goods.
9. In this process, drug related currency is deposited into a financial institution in one country for credit in goods or services in another. It is a system based on trust ('hawala') in which drug traffickers and the beneficiaries essentially trust the relationship between the 'hawaladars' and the suppliers of goods and services.
10. See for example Financial Action Task Force on Money Laundering, *1996-97 Report on Money Laundering Typologies*, February 1997, p. 3, at <http://www.oecd.org/fatf/pdf/97typ-en.pdf>, and Financial Action Task Force on Money Laundering, *1998-99 Report on Money Laundering Typologies*, 10 February 1999, p. 11, at <http://www.oecd.org/fatf/pdf/99typ-en.pdf>.
11. Recently there has been a proliferation of OFCs in the Cook Islands, the Marshall Islands, Nauru, Niue, Samoa, Tonga and Vanuatu, and an OFC is planned in Fiji, principally to attract foreign business to these small economies: *International Narcotics Control Strategy Report 1998*, loc. cit.
12. A number of these organisations also deal with money laundering. For example, the Office for Drug Control and Crime Prevention administers the Global Programme against Money Laundering: http://www.odccp.org/gpml_index.html.
13. See <http://www.oecd.org/fatf/>.
14. See http://www.cicad.oas.org/en/legal_development/legal-regulations-money.htm.
15. See <http://www.imolin.org/>.
16. Financial Action Task Force on Money Laundering, *1998-99 Report on Money Laundering Typologies*, 10 February 1999, p. 7, at <http://www.oecd.org/fatf/pdf/99typ-en.pdf>.
17. *International Narcotics Control Strategy Report 1997*, Released by the Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State Washington, DC, March 1998 at http://www.state.gov/www/global/narcotics_law/1997_narc_report/index.html.

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