

A DECADE OF AUSTRALIAN ANTI-TERROR LAWS

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[This article takes stock of the making of anti-terror laws in Australia since 11 September 2001. First, it catalogues and describes Australia's record of enacting anti-terror laws since that time. Second, with the benefit of perspective that a decade brings, it draws conclusions and identifies lessons about this body of law for the Australian legal system and the ongoing task of protecting the community from terrorism.]

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I INTRODUCTION

Australia has experienced a turbulent 10 years of enacting new laws to combat the threat of terrorism. Such laws have been introduced, often in great haste, in stunning scope and number. At the federal level alone, over 50 new statutes running to many hundreds of pages have been passed by the federal Parliament. This legislation has been of unprecedented reach, including laws providing for: restrictions on freedom of speech through new sedition offences and broader censorship rules; detention and questioning for up to a week by the Australian Security Intelligence Organisation ('ASIO') of Australian citizens not suspected of any crime; the banning of organisations by executive decision; control orders that can enable house arrest for up to a year; detention without charge or trial for up to 14 days; and warrantless searches of private property by police officers. As these examples demonstrate, powers and sanctions once thought to lie outside the rules of a liberal democracy except during wartime have now become part of the Australian legal system.¹ This demonstrates the new legal reality after the events of 11 September 2001 (often referred to as 'September 11' or '9/11').

Australia's anti-terror laws were enacted as a response to September 11 and subsequent terrorist attacks. As such, the laws were often cast as a temporary, emergency reaction to these attacks and the possibility that such indiscriminate violence might be repeated at home. However, it is now clear that Australia's anti-terror laws can no longer be cast as a transient, short-term legal response. This reflects the assessment of the Australian government and its agencies that terrorism remains a persistent threat to the community. The National Terrorism Public Alert System has since 2003 set its threat level at 'medium', indicating an assessment that a terrorist attack 'could' occur.² In 2010, the Australian govern-

¹ The same can of course be said with respect to a range of other democratic nations. See generally Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012); Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011). See also Canada's *Anti-Terrorism Act*, SC 2001, c 41; India's now repealed *Prevention of Terrorism Act 2002* (India); New Zealand's *Terrorism Suppression Act 2002* (NZ); the United Kingdom's *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24; and the United States' *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, 8 USC § 1189 (2006).

² Australian Government, *Australian National Security* (2012) <<http://www.nationalsecurity.gov.au>>. See generally, on the making and use of such assessments, Edward Santow and George Williams,

ment reiterated that '[t]he threat of terrorism to Australia is real and enduring. It has become a persistent and permanent feature of Australia's security environment.'³

There are many prior examples of the federal Parliament enacting national security legislation that conferred broad powers on government agencies and had a significant impact upon individual liberty.⁴ Such laws were typically found on the statute books during World Wars I and II.⁵ However, those conflicts were of more definite duration, and wartime legal measures ceased to operate after the conflict ended. By contrast, Australia's new anti-terror laws have taken on a character of permanence. Indeed, what has been called the 'war on terror' has run now for a longer period than either of those worldwide conflicts, and continues unabated with no likely end in sight. Moreover, while a few anti-terror laws are the subject of 'sunset clauses' that could see them lapse after a specified period of time unless re-enacted, most have effect for an indefinite duration. All this points to the fact that the body of Australian anti-terror laws may be altered in the coming years, but will not likely be repealed.

That Australia's anti-terror laws will seemingly be retained for the longer term has important implications. It means that such laws cannot be cast as a short-term aberration within the Australian legal system. Instead, they must be assessed on the basis that they can alter the way in which the legal system itself is understood. Such laws create new precedents, understandings, expectations and political conventions when it comes to the proper limits of government power and the role of the state in protecting human rights. Hence, despite their often exceptional nature, anti-terror measures are increasingly seen as normal rather than exceptional. This is due both to the passage of time and the fact that anti-terror strategies are now being copied in other areas of the law.⁶

Hard questions arise about the interaction of anti-terror laws and the Australian legal system. If Australia's anti-terror laws are to continue indefinitely, what

'Terrorism Threat Assessments: Problems of Constitutional Law and Government Accountability' (2012) 23 *Public Law Review* 33.

³ Australian Government, *Counter-Terrorism White Paper: Securing Australia — Protecting Our Community* (2010) ii.

⁴ See H P Lee, P J Hanks and V Morabito, *In the Name of National Security: The Legal Dimensions* (LBC Information Services, 1995); Michael Head, *Calling Out the Troops — The Australian Military and Civil Unrest: The Legal and Constitutional Issues* (Federation Press, 2009); Michael Head, *Crimes against the State: From Treason to Terrorism* (Ashgate, 2011).

⁵ See, eg, the *War Precautions Act 1914* (Cth) and the *National Security Act 1939* (Cth), and the various regulations made under those Acts.

⁶ See, eg, the use of control order powers in the *Serious and Organised Crime (Control) Act 2008* (SA), which was declared partly invalid by the High Court in *South Australia v Totani* (2010) 242 CLR 1. See also the *Crimes (Criminal Organisations Control) Act 2009* (NSW), declared wholly invalid by the High Court in *Wainohu v New South Wales* (2011) 243 CLR 181. See generally Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-Emption in Counter-Terrorism and Other Laws' in Andrew Lynch, Nicola McGarrity and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 131; Gabrielle Appleby and John Williams, 'The Anti-Terror Creep: Law and Order, the States and the High Court of Australia' in Andrew Lynch, Nicola McGarrity and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 150.

form should they take to best protect the community?⁷ Which laws cannot be reconciled with sound public law principles and so ought to be repealed or recast lest they do long-term damage to our system of democracy? More generally, how can anti-terror laws be accommodated over the course of decades without corroding the foundation of liberty and political freedom upon which Australian democracy rests? These questions illustrate that the problem of how to safeguard the community from terrorism is not only a matter of national security. It is also a well-recognised problem of public law central to the effective operation of democratic systems of government. As the then Prime Minister of Australia, Kevin Rudd, said in the first national security statement to the federal Parliament on 4 December 2008:

Our national security interests must also be pursued in an accountable way which meets the government's responsibility to protect Australia, its people and its interests while preserving our civil liberties and the rule of law. This balance represents a continuing challenge for all modern democracies seeking to prepare for the complex national security challenges of the future. It is a balance that must remain a conscious part of the national security policy process. We must not silently allow any incremental erosion of our fundamental freedoms.⁸

A decade on, it is time to take stock. In this article, I do not attempt to address all of the long-term, often fundamental, questions posed by anti-terror laws for the Australian legal system. Nor do I seek to address the enduring political debates that surround these laws. Instead, my aim is to contribute to these debates by pursuing a narrower, twofold purpose. First, in Part II, I catalogue and describe the extent of Australia's enactment of anti-terror laws since 11 September 2001. The absence of such an account in the literature itself hampers the capacity to engage in deeper, better informed analysis.⁹ Second, in Part III, I seek, with the benefit of perspective that a decade brings, to draw conclusions and identify lessons about this body of lawmaking for the Australian legal system and the ongoing task of protecting the community from terrorism.

II AUSTRALIA'S ANTI-TERROR LAWS

Australia has a short history of enacting laws specifically aimed at the prevention¹⁰ of terrorism.¹¹ In fact, before September 11, only the Northern Territory

⁷ For example, some laws have already been identified as being over-inclusive (because they encompass action not regarded as terrorism) or legally incoherent (such that they may compromise a successful prosecution). See, eg, Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 117 (discussing offences relating to providing training to or receiving training from a terrorist organisation) (*'Sheller Committee Report'*).

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12551–2 (Kevin Rudd).

⁹ See, as to the period to 2005, Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001–2005' (2007) 10 *Flinders Journal of Law Reform* 81.

¹⁰ I use the term 'prevention' here and elsewhere in this article as a term commonly used in this context. However, I note the sound arguments that the more accurate term might be 'pre-emption': Jude McCulloch and Sharon Pickering, 'Counter-Terrorism: The Law and Policing of

had such a law,¹² and in all other Australian jurisdictions politically motivated violence was dealt with under the traditional criminal law. This changed with the events of September 11. Those attacks provided a catalyst for the enactment of new laws, as mandated by *Resolution 1373* of the United Nations Security Council.¹³ Adopted on 28 September 2001, *Resolution 1373* called upon states to ensure that ‘terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts’.¹⁴

Australia’s response to September 11 was similar to that of many other countries. It emphasised the need to deviate from the ordinary criminal law — which focuses on punishment of individuals after the fact — by preventing terrorist acts from occurring in the first place. The result was an extraordinary bout of lawmaking that continues to challenge long-held assumptions as to the proper limits of the law (criminal law in particular) and accepted understandings of the respective roles of the executive, the legislature and the judiciary. The extent and nature of the anti-terror laws enacted by Australia over the last decade is mapped below.

A Number of Federal Anti-Terror Laws

Statements have often been made about the number of anti-terror statutes enacted by Australia. The number is significant because it indicates the amount of legislative activity in this area and reflects the level of attention given by lawmakers and government agencies to the topic.¹⁵ No calculation of the number of laws enacted by Australia over the past decade has yet been published.¹⁶ Given this, the task is undertaken below, first by developing criteria for determining which enactments should be included and second by calculating the number of such statutes. No attempt is made to include the wide range of

Pre-Emption’ in Andrew Lynch, Nicola McGarrity and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 13, 17.

¹¹ Prior to September 11, Australia did have laws criminalising specific acts that could amount to terrorism: see, eg, *Crimes (Aviation) Act 1991* (Cth) pt 2 in relation to the hijacking of aircraft and related offences. For a history of terrorism laws in Australia, see Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2004).

¹² *Criminal Code Act 1983* (NT) pt III div 2. The provisions were modelled on the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) c 56.

¹³ SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) (*‘Resolution 1373’*).

¹⁴ *Ibid* para 2(e).

¹⁵ Calculating only the number of statutes necessarily understates the level of legislative activity because it does not take account of Bills considered, but not enacted, by Parliament. For example, the Anti-Terrorism Laws Reform Bill 2009 (Cth) was introduced into the Senate by the Greens and was the subject of a significant parliamentary inquiry: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Anti-Terrorism Laws Reform Bill 2009* (2009). The Bill was not enacted.

¹⁶ However, such a calculation has been undertaken in regard to federal anti-terror laws passed in the five years between 11 September 2001 and 11 September 2006: see Dominique Dalla-Pozza, *The Australian Approach to Enacting Counter-Terrorism Laws* (PhD Thesis, The University of New South Wales, 2010). Dalla-Pozza counts 42 pieces of federal anti-terror legislation enacted in those five years: at 122.

secondary legislation in the area, such as regulations implementing Security Council resolutions or those proscribing al-Qaeda and other terrorist organisations.¹⁷

1 *Defining an Anti-Terror Law*

Calculating the number of anti-terror statutes enacted by the federal Parliament involves deciding what to classify as such a law.¹⁸ The statutes tallied below are laws enacted since 11 September 2001 which:

- 1 were drafted in response to, or in anticipation of, terrorist acts;
- 2 address the problems associated with using law to respond to or anticipate terrorist acts;
- 3 substantively alter the operation of legislation included under categories 1 or 2; or
- 4 were necessary to enable the enactment of legislation included under categories 1 or 2.

These criteria have been developed to sensibly constrain the number of Acts that can be described as an 'anti-terror law'. They only encompass enactments that can meaningfully be given this label either because they are explicitly directed at the problems posed by terrorism or because they necessarily or substantively affect legislation that is so directed. Determining whether a statute fits within these criteria has been achieved by examining the text and potential operation of the law, as well as extrinsic and contextual material such as the second reading speech and explanatory memorandum.

An example of a law that fits under category 1 is the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which introduced a range of new terrorism offences into the *Criminal Code Act 1995* (Cth) sch ('Criminal Code') in response to 9/11. A less obvious example is the *Maritime Transport Security Act 2003* (Cth). The Explanatory Memorandum to the corresponding Bill cites the devastating effect of the 9/11 attacks and Bali bombings in explaining that the International Maritime Organization developed a new preventive security regime under the 1974 *International Convention for the Safety of Life at Sea*¹⁹ to address the problem of terrorism at ports, terminals and on ships. The Explana-

¹⁷ See, eg, *Charter of the United Nations (Sanctions — Afghanistan) Regulations 2001* (Cth) (implementing Australia's obligations under Security Council *Resolution 1333* with respect to sanctions imposed on the Taliban); *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth) and *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) (implementing Australia's obligations under *Resolution 1373* with respect to the freezing of terrorist assets); *Criminal Code Amendment Regulations 2002 (No 2)* (Cth) (proscribing al-Qaeda); *Criminal Code Amendment Regulations 2002 (No 3)* (Cth) (proscribing Jemaah Islamiyah).

¹⁸ See generally on this question the extensive analysis by Dalla-Pozza, above n 16, 99–122. Dalla-Pozza classified counter-terrorism laws in a similar way to the criteria set out above by excluding Acts related to 'security' more generally, although she took a narrower approach in focusing on those laws with a predominant purpose to *combat* terrorism.

¹⁹ Opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

tory Memorandum further states that the legislation was designed to implement this maritime security regime in Australia.²⁰

An example within category 2 is the *National Security Information (Criminal Proceedings) Act 2004* (Cth). That Act did not of itself aim to respond to or prevent acts of terrorism. Instead, it was designed to deal with the problem of using sensitive national security information as evidence in criminal trials for terrorism offences. Another example is the *Independent National Security Legislation Monitor Act 2010* (Cth), which created the office of an independent reviewer of anti-terrorism legislation. Again, that Act is designed to address some of the problems involved in using law to respond to the threat of terrorism, rather than to respond to the threat of terrorism itself.

An example within category 3 is the *National Security Information Legislation Amendment Act 2005* (Cth). That Act was directed at civil proceedings, rather than criminal proceedings for terrorism offences, but it made important changes to the overall form and operation of the *National Security Information (Criminal Proceedings) Act 2004* (Cth). It is not possible to discuss the operation of the national security information rules relating to terrorism trials without taking into account this 2005 Act, which consolidated the 2004 legislation as the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

There are only four pieces of legislation in category 4.²¹ The main purpose of this legislation was not to introduce substantive anti-terrorism measures. Instead, each of these Acts was introduced alongside a principal Act. They each made a number of amendments which were necessary to enable the enactment of their principal Act. For example, the *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* (Cth) made a number of amendments so that the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) did not duplicate existing measures found in the *Financial Transaction Reports Act 1988* (Cth). Among other things, in s 114 it repealed the secrecy and access provisions in pt IV of the *Financial Transaction Reports Act* so that new secrecy and access provisions in pt 11 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* could take effect.

The calculation of the total number of anti-terror statutes necessarily includes amending legislation. Indeed, some of the most significant anti-terror measures have been introduced by way of amendments to existing Acts. The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth), which amended the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') to introduce the questioning and detention warrant scheme, is a prime example of this. In order to take this amending legislation into account, the same four criteria have been applied. Amending legislation has not been included where that legislation would not of itself satisfy one of the

²⁰ Explanatory Memorandum, Maritime Transport Security Bill 2003 (Cth) 5.

²¹ *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* (Cth); *Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004* (Cth); *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* (Cth).

four criteria. For example, several Acts have amended the *Aviation Transport Security Act 2004* (Cth) in recent years — from the *Aviation Transport Security Amendment Act 2006* (Cth) to the *Aviation Transport Security Amendment (2009 Measures No 1) Act 2010* (Cth). Most of these have not been included because the Explanatory Memoranda and Ministers' second reading speeches do not refer to the problem of terrorism as a reason for enacting the legislation. By contrast, the *Aviation Transport Security Amendment (Additional Screening Measures) Act 2007* (Cth) has been included under category 1. When introducing that legislation, the Parliamentary Secretary to the Minister for Transport and Regional Services referred to a foiled terrorist plot on 9 August 2006 in the United Kingdom. The foiled plot was said to reveal weaknesses in the ability of aviation security screening checkpoints to detect liquid explosives. Those weaknesses were addressed in Australia by amending the *Aviation Transport Security Act 2004* (Cth) to allow regulations to be written in relation to aerosols, liquids and gels.²²

The purpose of this methodology is to exclude amending legislation of a minor or technical nature that would otherwise inflate and distort the figures. The count does not therefore include the large number of general amendments to a range of federal aviation, telecommunications, organised crime, maritime security and migration legislation. Also excluded is legislation that relates to problems of security or the operation of security organisations more generally.²³ The *Intelligence Services Legislation Amendment Act 2011* (Cth), for example, will likely have an effect on how security organisations cooperate when responding to acts of terrorism, but the problem of terrorism did not feature in either the Bill's Explanatory Memorandum or the Minister's second reading speech.²⁴ Instead, the legislation was designed to affect the collection of foreign intelligence generally, and to enable the Defence Imagery and Geospatial Organisation to cooperate more closely with the Australian Defence Force.²⁵ While important to the operation of Australia's domestic security organisations, this kind of legislation could have been enacted regardless of the post-9/11 terrorist threat. By

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 14 February 2007, 5 (De-Anne Kelly). See *Aviation Transport Security Act 2004* (Cth) s 44.

²³ Examples of legislation enacted between September 2001 and September 2011 which have been excluded under these two categories include: *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* (Cth); *Aviation Transport Security Amendment Act 2006* (Cth); *Customs Legislation Amendment (Border Compliance and Other Measures) Act 2007* (Cth); *Non-Proliferation Legislation Amendment Act 2007* (Cth); *Telecommunications (Interception and Access) Amendment Act 2007* (Cth); *Customs Amendment (Strengthening Border Controls) Act 2008* (Cth); *Transport Security Amendment (2008 Measures No 1) Act 2008* (Cth); *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth); *Aviation Transport Security Amendment (2009 Measures No 1) Act 2010* (Cth); *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth); *Anti-People Smuggling and Other Measures Act 2010* (Cth); *Aviation Crimes and Policing Legislation Amendment Act 2011* (Cth); *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Act 2011* (Cth).

²⁴ See Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2011, 2861–2 (Robert McClelland); Explanatory Memorandum, Intelligence Services Legislation Amendment Bill 2011 (Cth).

²⁵ Explanatory Memorandum, Intelligence Services Legislation Amendment Bill 2011 (Cth) 1–2.

contrast, the similar *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth) has been included because its corresponding Bill's Explanatory Memorandum explicitly refers to the failed 'underpants bomber' attack on North West Airlines Flight 253 as part of the rationale for enacting the legislation.²⁶

2 How Many Anti-Terror Laws?

Applying the criteria above, it is possible to say that, in the decade from 11 September 2001 to 11 September 2011, the Commonwealth Parliament enacted 54 pieces of anti-terror legislation.²⁷ From 11 September 2001 to the fall of the

²⁶ Explanatory Memorandum, *Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010* (Cth) 1.

²⁷ The 54 Acts are:

1. *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* (Cth);
2. *Security Legislation Amendment (Terrorism) Act 2002* (Cth);
3. *Suppression of the Financing of Terrorism Act 2002* (Cth);
4. *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth);
5. *Border Security Legislation Amendment Act 2002* (Cth);
6. *Telecommunications Interception Legislation Amendment Act 2002* (Cth);
7. *Proceeds of Crime Act 2002* (Cth);
8. *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* (Cth);
9. *Crimes Amendment Act 2002* (Cth);
10. *Criminal Code Amendment (Terrorist Organisations) Act 2002* (Cth);
11. *Criminal Code Amendment (Offences against Australians) Act 2002* (Cth);
12. *Charter of the United Nations Amendment Act 2002* (Cth);
13. *Australian Protective Service Amendment Act 2002* (Cth);
14. *Australian Crime Commission Establishment Act 2002* (Cth);
15. *Australian Protective Service Amendment Act 2003* (Cth);
16. *Criminal Code Amendment (Terrorism) Act 2003* (Cth);
17. *Criminal Code Amendment (Hizballah) Act 2003* (Cth);
18. *Terrorism Insurance Act 2003* (Cth);
19. *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* (Cth);
20. *Maritime Transport Security Act 2003* (Cth);
21. *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth);
22. *ASIO Legislation Amendment Act 2003* (Cth);
23. *Australian Federal Police and Other Legislation Amendment Act 2004* (Cth);
24. *Australian Security Intelligence Organisation Amendment Act 2004* (Cth);
25. *Aviation Transport Security Act 2004* (Cth);
26. *Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004* (Cth);
27. *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth);
28. *Telecommunications (Interception) Amendment Act 2004* (Cth);
29. *Surveillance Devices Act 2004* (Cth);
30. *Anti-Terrorism Act 2004* (Cth);
31. *Anti-Terrorism Act (No 2) 2004* (Cth);
32. *Anti-Terrorism Act (No 3) 2004* (Cth);
33. *National Security Information (Criminal Proceedings) Act 2004* (Cth);
34. *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* (Cth);
35. *National Security Information (Criminal Proceedings) Amendment (Application) Act 2005* (Cth);

Howard Liberal-National Coalition government at the federal election held on 24 November 2007, the federal Parliament enacted 48 of these laws, an average of 7.7 pieces of legislation each year.²⁸ On average, a new anti-terror statute was passed every 6.7 weeks during the post-9/11 life of the Howard government. In the main, these laws attracted bipartisan agreement and were enacted with the support of the Labor opposition.

The pace at which anti-terror laws have been passed by the federal Parliament has since slowed. During the time of the Rudd and Gillard governments from 24 November 2007 to 11 September 2011, only 6 anti-terror laws were passed. This is an average of 1.6 pieces of legislation per year, or a new anti-terror law every 32.8 weeks. These new laws have not brought about any significant winding back of the anti-terror regimes enacted under the Howard government. Indeed, those regimes remain almost completely intact. Instead, Acts passed since 2007 often clarified or remedied existing laws or provided further powers to government agencies.

The number of anti-terror laws passed by the federal Parliament since September 11 is striking, and represents a more significant level of legislative output even than that of nations facing a greater threat from terrorism. In a comparative analysis of the anti-terror laws passed in a range of democratic nations over the last decade, Kent Roach has described Australia's response as being one of 'hyper-legislation', with Australia 'caught up in the 9/11 effect'.²⁹ He found:

36. *National Security Information Legislation Amendment Act 2005* (Cth);
37. *Maritime Transport Security Amendment Act 2005* (Cth);
38. *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005* (Cth);
39. *Anti-Terrorism Act 2005* (Cth);
40. *Anti-Terrorism Act (No 2) 2005* (Cth);
41. *ASIO Legislation Amendment Act 2006* (Cth);
42. *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth);
43. *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* (Cth);
44. *Telecommunications (Interception) Amendment Act 2006* (Cth);
45. *Law and Justice Legislation Amendment (Marking of Plastic Explosives) Act 2007* (Cth);
46. *Aviation Transport Security Amendment (Additional Screening Measures) Act 2007* (Cth);
47. *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2007* (Cth);
48. *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth);
49. *Customs Amendment (Enhanced Border Controls and Other Measures) Act 2009* (Cth);
50. *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth);
51. *Independent National Security Legislation Monitor Act 2010* (Cth);
52. *National Security Legislation Amendment Act 2010* (Cth);
53. *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth); and
54. *Defence Legislation Amendment (Security of Defence Premises) Act 2011* (Cth).

²⁸ The Howard government was in power between 11 September 2001 and 24 November 2007 for a total of 323 weeks, which is equal to 6.21 years. 48 pieces of legislation enacted in 6.21 years gives an average of 7.7 new laws per year. The Rudd/Gillard governments were in power between 24 November 2007 and 11 September 2011 for 197 weeks, or 3.79 years. This gives an average of 1.6 pieces of legislation per year.

²⁹ Roach, *The 9/11 Effect*, above n 1, 309.

Australia has exceeded the United Kingdom, the United States, and Canada in the sheer number of new antiterrorism laws that it has enacted since 9/11 ... this degree of legislative activism is striking compared even to the United Kingdom's active agenda and much greater than the pace of legislation in the United States or Canada. Australia's hyper-legislation strained the ability of the parliamentary opposition and civil society to keep up, let alone provide effective opposition to, the relentless legislative output.³⁰

B Scope of Federal Anti-Terror Laws

Anti-terror legislation enacted by the federal Parliament deals with a wide variety of matters. I do not here describe in detail the enactment or operation of this legislation, as this has been the subject of a number of other works.³¹ Below is a summary of the most important aspects of these laws.

1 The Definition of a 'Terrorist Act'

Section 100.1 of the *Criminal Code* defines a 'terrorist act' as conduct engaged in or threats made for the purpose of advancing a 'political, religious or ideological cause'.³² The conduct or threat must be designed to coerce a government, influence a government by intimidation, or intimidate a section of the public.³³ The conduct or threat must also cause any of a number of harms, ranging from death and serious bodily harm to endangering a person's life, seriously interfering with electronic systems, or creating a 'serious risk to the health or safety of ... a section of the public'.³⁴ The definition excludes advocacy, protest, dissent or industrial action so long as there is no intention to cause things such as serious physical harm, death or a serious risk to the health or safety of the public.³⁵

2 Offence of Committing a 'Terrorist Act' and Preparatory Offences

Section 101.1 of the *Criminal Code* creates the offence of committing a 'terrorist act'. Other provisions of div 101 create a wide range of offences for conduct preparatory to a terrorist act. These offences include: providing or receiving training connected with terrorist acts;³⁶ possessing 'things' connected

³⁰ Ibid 310.

³¹ See, eg, Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006); George Williams, 'Anti-Terror Legislation in Australia and New Zealand' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 1058; Hocking, above n 11; Roach, *The 9/11 Effect*, above n 1, 309–60.

³² *Criminal Code* s 100.1(1) (definition of 'terrorist act', para (b)). See Ben Golder and George Williams, 'What Is "Terrorism"? Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270; Keiran Hardy and George Williams, 'What Is "Terrorism"? Assessing Domestic Legal Definitions' (2012) 17 *UCLA Journal of International Law and Foreign Affairs* (forthcoming).

³³ *Criminal Code* s 100.1(1) (definition of 'terrorist act', para (c)).

³⁴ Ibid s 100.1(2).

³⁵ Ibid s 100.1(3).

³⁶ Ibid s 101.2.

with terrorist acts;³⁷ collecting or making documents likely to facilitate terrorist acts;³⁸ and doing any 'other acts' in preparation for, or planning, terrorist acts.³⁹

3 Proscription Regime

Division 102 of the *Criminal Code*⁴⁰ gives the Attorney-General a power to make a written declaration that an organisation is a 'terrorist organisation'.⁴¹ Once a declaration is made, a range of offences apply to individuals who are linked to that organisation, including: directing the activities of a terrorist organisation;⁴² intentionally being a member of a terrorist organisation;⁴³ recruiting for a terrorist organisation;⁴⁴ receiving funds from or giving funds to a terrorist organisation;⁴⁵ providing 'support' to a terrorist organisation;⁴⁶ and associating with a terrorist organisation.⁴⁷

4 Financing Offences and Regulation

(a) Offences

Division 103 of the *Criminal Code* imposes a maximum penalty of life imprisonment where a person provides or collects funds and is reckless as to whether

³⁷ Ibid s 101.4.

³⁸ Ibid s 101.5.

³⁹ Ibid s 101.6. See Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* since September 11, 2001' (2007) 16 *Griffith Law Review* 27. For different views on the preventive logic of Australia's anti-terror laws, see Philip Ruddock, 'Law as a Preventative Weapon against Terrorism' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 3; Andrew Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 59.

⁴⁰ See also the separate listing and proscription processes set out in the *Charter of the United Nations Act 1945* (Cth) pt 4.

⁴¹ In order to make such a declaration, the Attorney-General must be satisfied that the organisation 'is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' or 'advocates the doing of a terrorist act': *Criminal Code* ss 102.1(2)(a)–(b). Where an organisation has not been proscribed as a 'terrorist organisation' by the Attorney-General, a court may reach the same determination in the course of a prosecution of an individual for a relevant terrorism offence by finding that the organisation matches the description of a 'terrorist organisation' set out in s 102.1(a). For discussion, see Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1; Andrew Lynch, Nicola McGarrity and George Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament' (2009) 13 *Legal History* 25; Nicola McGarrity, 'Review of the Proscription of Terrorist Organisations: What Role for Procedural Fairness?' (2008) 16 *Australian Journal of Administrative Law* 45; Oscar Roos, Benjamin Hayward and John Morss, 'Beyond the Separation of Powers: Judicial Review and the Regulatory Proscription of Terrorist Organisations' (2010) 35 *University of Western Australia Law Review* 81; Russell Hogg, 'Executive Proscription of Terrorist Organisations in Australia: Exploring the Shifting Border between Crime and Politics' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 297.

⁴² *Criminal Code* s 102.2.

⁴³ Ibid s 102.3.

⁴⁴ Ibid s 102.4.

⁴⁵ Ibid s 102.6.

⁴⁶ Ibid s 102.7.

⁴⁷ Ibid s 102.8.

those funds will be used to facilitate or engage in a terrorist act.⁴⁸ Sections 20 and 21 of the *Charter of the United Nations Act 1945* (Cth) make it a criminal offence to deal with the assets of or to give assets to a terrorist organisation proscribed under that Act.⁴⁹

(b) *Suspicious Transactions*

Section 16(1A) of the *Financial Transaction Reports Act 1988* (Cth) requires businesses to report suspected terrorism-related transactions to the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre.⁵⁰

5 *Speech Offences and Regulation*

(a) *Urging Violence*

Part 5.1 of the *Criminal Code* contains a range of ‘urging violence’ offences. Section 80.2 makes it an offence punishable by seven years’ imprisonment to urge the overthrow of the *Constitution* or government by force or violence, or to urge interference in parliamentary elections. It is also an offence to urge violence against a group or an individual on the basis of their race, religion or political opinion.⁵¹

(b) *Classification*

Section 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) requires that publications, films or computer games that ‘advocate’ the doing of a terrorist act must be classified as ‘Refused Classification’.⁵²

(c) *Advocating Terrorism*

One of the grounds upon which an organisation may be proscribed by the Attorney-General as a ‘terrorist organisation’ is that it ‘advocates’ the doing of a terrorist act.⁵³ Criminal offences under div 102 of the *Criminal Code* will then apply to individuals linked to that organisation.

⁴⁸ Ibid ss 103.1(1) (general offence), 103.2(1) (where the funds are collected for or on behalf of a specific person).

⁴⁹ These provisions were inserted by the *Suppression of the Financing of Terrorism Act 2002* (Cth) sch 3.

⁵⁰ See also *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

⁵¹ *Criminal Code* ss 80.2A–80.2B. These offences were first introduced as ‘sedition’ offences by the *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 item 12. They were amended to their current form by the *National Security Legislation Amendment Act 2010* (Cth) pt 2. This was in large part due to criticism of the sedition offences by the Australian Law Reform Commission: see Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006). See also Simon Bronitt and James Stellios, ‘Sedition, Security and Human Rights: “Unbalanced” Law Reform in the “War on Terror”’ (2006) 30 *Melbourne University Law Review* 923, 949; Katharine Gelber, ‘When Are Restrictions on Speech Justified in the War on Terror?’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 138.

⁵² See David Hume and George Williams, ‘Australian Censorship Policy and the Advocacy of Terrorism’ (2009) 31 *Sydney Law Review* 381; David Hume and George Williams, ‘Advocating Terrorist Acts and Australian Censorship Law’ (2009) 20 *Public Law Review* 37.

⁵³ *Criminal Code* s 102.1(2)(b). An organisation ‘advocates’ the doing of a terrorist act if it directly or indirectly ‘counsels or urges the doing of a terrorist act’ or ‘provides instruction on the doing of a terrorist act’, or directly ‘praises the doing of a terrorist act in circumstances where there is a

6 Coercive Powers of Police and Security Organisations

(a) Investigation Period

A longer investigation period applies to terrorism offences (24 hours) compared to non-terrorism offences (12 hours).⁵⁴ In the case of a terrorism offence, the investigating authorities may also apply to a magistrate for up to seven days of 'dead time' if they need to suspend or delay questioning the suspect (for example, while making overseas inquiries in a different time zone).⁵⁵

(b) Questioning and Detention Warrants

Part III div III of the *ASIO Act* allows the Director-General of ASIO to apply to the Attorney-General for questioning and detention warrants. A person may be questioned in eight hour blocks up to a maximum of 24 hours where this would 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'.⁵⁶ In addition, a person may be detained for up to a week for questioning where there are reasonable grounds to believe that he or she will alert another person involved in a terrorism offence, not appear before ASIO for questioning, or destroy a record or thing that may be requested under the warrant.⁵⁷ It is an offence punishable by five years' imprisonment to refuse to answer ASIO's questions, or to give false or misleading information.⁵⁸ These warrants may be issued against non-suspects, including family members, journalists, children between the ages of 16 and 18⁵⁹ and innocent bystanders. Although these powers were originally set to expire after three years in operation, they were renewed in 2006 for a further 10 years. They are now set to expire in July 2016.⁶⁰

substantial risk that such praise might have the effect of leading a person ... to engage in a terrorist act': s 102.1(1A).

⁵⁴ Compare *Crimes Act 1914* (Cth) ss 23DB–23DF (terrorism offences) with ss 23C–23DA (non-terrorism offences). When a person is arrested on suspicion of a terrorism offence, the standard four hour questioning period may be extended for a further 20 hours: s 23DF(7). In the case of non-terrorism offences, that four hour period may only be extended by a further eight hours: s 23DA(7). These changes were first introduced by the *Anti-Terrorism Act 2004* (Cth) items 3–12, as the existing 12 hour investigation period was seen to be inadequate in the context of terrorism offences. The powers were originally built into the existing pt IC structure of the *Crimes Act 1914* (Cth). The *National Security Legislation Amendment Act 2010* (Cth) sch 3 clarified the operation of the provisions by creating separate sections for non-terrorism (sub-div A) and terrorism (sub-div B) offences in div 2 of pt IC.

⁵⁵ *Crimes Act 1914* (Cth) s 23DB(11). Until *National Security Legislation Amendment Act 2010* (Cth) sch 3 item 16 introduced the current s 23DB(11) into the *Crimes Act 1914* (Cth), there was no cap on the amount of 'dead time' that could be authorised. This meant that suspects could potentially be detained indefinitely while the authorities investigated their involvement with terrorism. The problems with this became apparent in the Haneef affair: see the discussion below in Part II(D).

⁵⁶ *ASIO Act* ss 34D–34G, 34R–34S.

⁵⁷ *Ibid* s 34F(4)(d). The seven day limit on detention is found in ss 34G(4)(c), 34S.

⁵⁸ *Ibid* s 34L.

⁵⁹ See the 'special rules for young people' in *ibid* s 34ZE.

⁶⁰ These questioning and detention powers were introduced by *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) sch 1 item 24 and renewed by *ASIO Legislation Amendment Act 2006* (Cth) sch 1 pt 1. The sunset clause is now found in s 34ZZ of the *ASIO Act*. In its original form, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) attracted considerable public opposition. It

(c) *Warrantless Searches*

Section 3UEA of the *Crimes Act 1914* (Cth) gives police officers a power to enter premises without a warrant in order to prevent a thing from being used in connection with a terrorism offence, or where there is a serious and imminent threat to a person's life, health or safety.⁶¹ While on the premises, police officers have the power to seize any other 'thing' if they suspect on reasonable grounds that doing so is necessary to protect someone's health or safety, or because the circumstances are 'serious or urgent'.⁶²

7 *Control Orders and Preventative Detention Orders*

(a) *Control Orders*

Division 104 of the *Criminal Code* creates a 'control order' regime, in which individuals not suspected of any criminal offence may be subject to a wide range of restrictions (potentially amounting to house arrest) if those restrictions are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.⁶³

(b) *Preventative Detention Orders*

Division 105 of the *Criminal Code* creates a 'preventative detention order' regime in which individuals may be taken into custody and detained for a maximum period of 48 hours where this is reasonably necessary to prevent an 'imminent' terrorist act from occurring or to preserve evidence relating to a recent terrorist act.⁶⁴ An extended period of detention is then possible under state law up to a maximum of 14 days.⁶⁵

8 *Surveillance Measures*

Section 5D of the *Telecommunications (Interception and Access) Act 1979* (Cth) includes divs 72, 101, 102 and 103 of the *Criminal Code* within the definition of a 'serious offence'. This means that telecommunications warrants

would have allowed children who were not suspected of engaging in terrorist activity to be stripsearched and detained indefinitely in two day rolling periods: see Lynch and Williams, *What Price Security?*, above n 31, 32–40; Hocking, above n 11, 212–30; George Williams, 'Australian Values and the War against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191, 195–9.

⁶¹ See *National Security Legislation Amendment Act 2010* (Cth) sch 4, inserting *Crimes Act 1914* (Cth) s 3UEA.

⁶² *Crimes Act 1914* (Cth) s 3UEA(5).

⁶³ *Criminal Code* s 104.4(1)(d).

⁶⁴ *Ibid* s 105.4. For different views on the preventative detention order regime, see Geoff McDonald, 'Control Orders and Preventative Detention: Why Alarm Is Misguided' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 106; Margaret White, 'A Judicial Perspective — The Making of Preventative Detention Orders' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 116; James Renwick, 'The Constitutional Validity of Preventative Detention' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 127. See also Claire Macken, 'The Counter-Terrorism Purposes of an Australian Preventive Detention Order' in Andrew Lynch, Nicola McGarrity and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 30.

⁶⁵ See, eg, *Terrorism (Police Powers) Act 2002* (NSW) s 26K(2).

may be issued to assist with the investigation of terrorism offences.⁶⁶ Warrants may also be issued in relation to non-suspects who are 'likely to communicate' with the person under investigation (known as 'B-Party' communication).⁶⁷ Communications may be intercepted through intrusive methods such as optical surveillance and tracking devices.⁶⁸

9 Evidence Procedures

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) gives the Attorney-General a power to issue non-disclosure certificates when sensitive national security information is likely to be disclosed in the courtroom. That information may then be led against a defendant in summary or redacted form.⁶⁹ Decisions as to whether the evidence will be admitted are decided in a closed hearing from which the defendant and even his or her legal representative may be excluded.⁷⁰ When deciding whether and in what form to admit the evidence, the judge or magistrate must give 'greatest weight' to the interests of national security.⁷¹

10 Border and Transport Security

In addition to updating security protocols for airports, aircraft, ports and ships,⁷² anti-terror legislation has also vested customs and transport security officers with a number of specific powers. Customs officers now have the power to make an arrest without a warrant where a person resists or obstructs their functions, or makes a threat to cause serious harm.⁷³ Airport security guards have the power to physically restrain a person suspected of committing an offence, and screening officers have a general power to frisk search a person in order to carry out a proper search.⁷⁴ Judicial officers have also been granted a power to issue warrants for the seizure of goods in transit where the Minister for Home

⁶⁶ Division 72 of the *Criminal Code* contains a number of bombing offences as introduced by the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth). Section 72.3 of the *Criminal Code* imposes a maximum penalty of life imprisonment where a person intentionally delivers, places, discharges or detonates an explosive or lethal device where they are reckless as to the fact that the device is an explosive or lethal device.

⁶⁷ *Telecommunications (Interception and Access) Act 1979* (Cth) s 46(1)(d)(ii). This power was added by the *Telecommunications (Interception) Amendment Act 2006* (Cth) sch 2. See David Hume and George Williams, 'Who's Listening? Intercepting the Telephone Calls, Emails and SMS's of Innocent People' (2006) 31 *Alternative Law Journal* 211.

⁶⁸ See the definition of 'surveillance device' in *Surveillance Devices Act 2004* (Cth) s 6 and the warrant procedure in pt 2 div 2.

⁶⁹ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31.

⁷⁰ *Ibid* s 29(3).

⁷¹ *Ibid* ss 31(7)(a), (8), 38L(7)(a), (8).

⁷² See generally *Aviation Transport Security Act 2004* (Cth); *Maritime Security Transport Act 2003* (Cth); *Maritime Security Transport Amendment Act 2005* (Cth).

⁷³ See *Customs Act 1901* (Cth) s 210 (power triggered by offences in the *Criminal Code* ss 147.1–147.2, 149.1). This provision was introduced by *Border Security Legislation Amendment Act 2002* (Cth) sch 11.

⁷⁴ See *Aviation Transport Security Act 2004* (Cth) ss 95C–96. Section 95C was introduced by *Aviation Transport Security Amendment (Additional Screening Measures) Act 2007* (Cth) sch 1 item 5.

Affairs has reasonable grounds for suspecting that the goods are connected with a terrorist act.⁷⁵

C State and Territory Anti-Terror Laws

Anti-terror legislation enacted in Australia since September 11 has primarily been a federal phenomenon. The states possess considerable legislative responsibility in the field of criminal law. Nevertheless, they decided against enacting their own comprehensive anti-terror law regimes, and instead referred their legislative power to the Commonwealth so as to enable the making of national laws. These referrals, brought about by each of the states under s 51(xxxvii) of the *Constitution*,⁷⁶ enabled the federal Parliament to enact comprehensive national anti-terror statutes via the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) (which re-enacted the Commonwealth terrorism offences to ensure that they were supported by the referrals power). No referral of power has been necessary from the territories because the Commonwealth possesses plenary legislative power within those jurisdictions under s 122 of the *Constitution*.⁷⁷

Having referred significant legislative power over terrorism to the Commonwealth, the states and territories have enacted a much smaller number of anti-terror laws. State and territory anti-terror laws have been enacted for five main purposes:

- 1 to refer state legislative power to the Commonwealth to provide expanded legislative capacity to enact national anti-terror laws;⁷⁸
- 2 to give state and territory police special powers to prevent imminent terrorist acts and to investigate recent terrorist acts (including search, seizure, surveillance and covert search warrant powers);⁷⁹
- 3 to extend the maximum period of detention under a federal preventative detention order from two days to 14 days;⁸⁰

⁷⁵ *Customs Act 1901* (Cth) s 203DA, as inserted by *Border Security Amendment Act 2002* (Cth) sch 4 item 20 and later amended by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 1 item 23.

⁷⁶ See, eg, *Terrorism (Commonwealth Powers) Act 2003* (Vic), as considered by the High Court in *Thomas v Mowbray* (2007) 233 CLR 307. See also Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32 *Sydney Law Review* 363.

⁷⁷ See, eg, *R v Bernasconi* (1915) 19 CLR 629, 635 (Griffith CJ).

⁷⁸ See *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act 2002* (WA).

⁷⁹ See *Terrorism (Police Powers) Act 2002* (NSW) pt 2; *Terrorism (Emergency Powers) Act 2003* (NT); *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW) (which also, at sch 4, inserted the offence of being a member of a terrorist organisation into pt 6B of the *Crimes Act 1900* (NSW)); *Police and Other Legislation Amendment Act 2005* (Qld); *Terrorism (Police Powers) Act 2005* (SA); *Terrorism (Community Protection) Act 2003* (Vic) pt 2; *Terrorism (Extraordinary Powers) Act 2005* (WA).

⁸⁰ *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 21(3)(b); *Terrorism (Police Powers) Act 2002* (NSW) s 26K(2); *Terrorism (Emergency Powers) Act 2003* (NT) s 21K; *Terrorism (Preventative Detention) Act 2005* (Qld) s 12(2); *Terrorism (Preventative Detention) Act 2005* (SA) s 10(5)(b); *Terrorism (Preventative Detention) Act 2005* (Tas) s 9(2); *Terrorism*

- 4 to extend the expiry date on existing anti-terrorism powers which were subject to a sunset clause;⁸¹ and
- 5 to require certain transport operators to implement counter-terrorism protocols.⁸²

D Anti-Terror Laws in the Courts

Thirty-seven men have been charged under Australia's anti-terror laws, with 25 convicted and often sentenced to very lengthy periods of imprisonment.⁸³ None of these charges have been in respect of terrorist attacks that have actually occurred. Instead, they have related to offences connected with preparation for a terrorist attack. This illustrates how Australia's anti-terror laws are predominantly directed in text and practice to the prevention of terrorist attacks, and also how Australian authorities have been effective in heading off potential attacks.⁸⁴

Australia's *Criminal Code* creates 'inchoate' offences that apply to all other Commonwealth crimes. Inchoate offences for attempt (s 11.1), incitement (s 11.4) and conspiracy (s 11.5) punish a person where the substantive offence that was intended is not completed. The terrorism offences found in div 101 of

(*Community Protection (Amendment) Act 2006* (Vic) s 5, inserting *Terrorism (Community Protection) Act 2003* (Vic) s 211(2)(b); *Terrorism (Preventative Detention) Act 2005* (WA) s 15(4). State laws on this topic were believed necessary as it was thought that providing for detention without charge for up to 14 days was beyond federal legislative capacity due to the separation of judicial power brought about by ch III of the *Constitution*: 'Anti-Terror Laws: "Unconstitutional Summit"', *The Sydney Morning Herald* (online), 25 October 2005 <<http://www.smh.com.au/news/national/antiterror-laws-unconstitutional-summit/2005/10/25/1130006093367.html>>; 'Bracks Reconsiders Terror Laws', *The Age* (online), 25 October 2005 <<http://www.theage.com.au/news/national/bracks-reconsiders-terror-laws/2005/10/25/1130006095354.html>>.

⁸¹ See, eg, the renewal of New South Wales's covert search warrant scheme, which was introduced as pt 3 of the *Terrorism (Police Powers) Act 2002* (NSW) by *Terrorism Legislation Amendments (Warrants) Act 2005* (NSW) sch 1. Those powers were renewed via *APEC Meeting (Police Powers) Act 2007* (NSW) sch 3 item 3.5, *Courts and Crimes Legislation Amendment Act 2008* (NSW) sch 6, and the *Crimes Amendment (Terrorism) Act 2010* (NSW). The *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* (NSW) expanded covert search warrants to all crimes with a penalty of seven years' imprisonment that involve offences such as violence causing grievous bodily harm, the supply and manufacture of drugs and child pornography: see *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 46C, div 2. See also the *Terrorism (Community Protection) (Amendment) Act 2006* (Vic). Along with introducing Victoria's preventative detention order scheme, that Act (at s 11) extended the special powers in the *Terrorism (Community Protection) Act 2003* (Vic) for a further 10 years until 2016.

⁸² See *Transport Security (Counter-Terrorism) Act 2008* (Qld) and the recent *Terrorism (Surface Transport Security) Act 2011* (SA).

⁸³ See Robert McClelland, 'The 9/11 Decade' (Speech delivered at the United States Studies Centre, The University of Sydney, 7 June 2011) <<http://ussc.edu.au/events-special/page-2011-national-summit/keynote-address-robert-mcclelland>>. In that speech, McClelland counts 38 individuals as 'prosecuted' under Australian law. The 38th person in that count is David Hicks, who was subject to a control order under the *Anti-Terrorism Act (No 2) 2005* (Cth). Control orders are a civil law restriction, and so Hicks has not been charged with any criminal offence under Commonwealth law. For a detailed explanation of the trials of 37 men charged with federal terrorism offences, see Nicola McGarrity, "'Testing' Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia" (2010) 34 *Criminal Law Journal* 92. In addition to the 25 men convicted of terrorism offences, a retrial is pending for Bilal Khazaal, whose conviction on terrorism charges was overturned by the New South Wales Court of Criminal Appeal in June 2011: *Khazaal v The Queen* [2011] NSWCCA 129 (9 June 2011).

⁸⁴ See MacDonald and Williams, above n 39.

the *Criminal Code* go further by criminalising acts made in preparation for a terrorist act. As described above, it is an offence if a person intentionally ‘provides or receives training’,⁸⁵ ‘possesses a thing’,⁸⁶ or ‘collects or makes a document’⁸⁷ that is ‘connected with preparation for, the engagement of a person in, or assistance in a terrorist act’.⁸⁸ These offences are committed if the person either knows or is reckless as to the fact that they relate to a terrorist act. The maximum penalty for each varies between 10 and 25 years’ imprisonment, with higher penalties applying where actual knowledge can be proved. Section 101.6 creates a broader, catch-all offence of intentionally doing ‘any act in preparation for, or planning, a terrorist act.’ A person found guilty is liable to life in jail.

Since the enactment of the *Anti-Terrorism Act 2005* (Cth), these offences are committed even if:

- a terrorist act does not occur; or
- the training/thing/document/act is not connected to a specific terrorist act.⁸⁹

These anti-terror offences thus go further than prior inchoate offences in that they criminalise the formative stages of an act. They render individuals liable to serious penalties even before there is what would ordinarily be regarded as clear criminal intent.⁹⁰

This has been acknowledged in the trials of the men charged with terrorist offences. For example, in sentencing five Sydney men for terrorism offences in February 2010, Whealy J stated:

The broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. ... The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community.⁹¹

The five men in that case were charged with a combination of preparatory and inchoate offences, namely, conspiracy to do an act connected with preparation for a terrorist act. There was evidence that the offenders had purchased large amounts of ammunition, chemicals and laboratory equipment. Each was also in possession of extremist propaganda and military instructional material. In sentencing the offenders, Whealy J noted that they had not reached a firm conclusion as to the nature of the attack they intended to carry out, and did not necessarily intend to kill innocent civilians. Nonetheless, he held that their actions fell only just short of the most serious case because their ‘collective disdain for the Australian Government and their intolerant animosity towards

⁸⁵ *Criminal Code* s 101.2.

⁸⁶ *Ibid* s 101.4.

⁸⁷ *Ibid* s 101.5.

⁸⁸ *Ibid* ss 101.2, 101.4, 101.5.

⁸⁹ See *ibid* ss 101.2(3), 101.4(3), 101.5(3), 101.6(2).

⁹⁰ See Bernadette McSherry, ‘Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 *University of New South Wales Law Journal* 354, 366–7.

⁹¹ *R v Elomar* (2010) 264 ALR 759, 779 [79].

members of the community' made it 'inevitable' that they would be willing to take human life.⁹² It is this kind of predictive approach, exemplified in the doubly pre-emptive offence of 'conspiracy to do an act in preparation for a terrorist act', which gives Australian anti-terror laws an extraordinary reach.

The most contentious invocation of anti-terror laws by Australian authorities did not actually involve the case being tried in court. Mohamed Haneef, an Indian doctor working in Australia, was arrested in July 2007 and detained for 12 days before being charged with intentionally providing resources to a terrorist organisation.⁹³ The Australian Federal Police were able to detain Haneef under the dead time provisions for questioning terrorist suspects in pt IC of the *Crimes Act 1914* (Cth).⁹⁴ These provisions, originally inserted by the *Anti-Terrorism Act 2004* (Cth), allow investigating authorities to apply to a magistrate to suspend or delay questioning time during the investigation of a terrorism offence. This has the effect of extending the maximum investigation period before a suspect must be brought before a magistrate. The purpose of these provisions is to balance a suspect's right to liberty with the needs of law enforcers to conduct a thorough pre-charge interview. For example, investigating authorities may need additional time to make overseas inquiries in a different time zone, or to translate foreign materials.⁹⁵ In Haneef's case, applications for dead time were made on the basis that the Australian Federal Police needed additional time to collect, collate and analyse information from the United Kingdom.⁹⁶

Haneef was suspected of involvement in the attempted terrorist attack on Glasgow Airport. He had given his mobile phone SIM card to his second cousin in England, who was a suspect in the attack. Haneef was finally granted bail in the Federal Magistrates Court, but the Minister for Immigration then decided to cancel his visa on character grounds. The charge was later dropped against Haneef and his visa cancellation was quashed by the Federal Court.⁹⁷ Haneef was later paid an undisclosed amount of compensation by the Australian government.⁹⁸

⁹² Ibid 774 [60], 777 [69].

⁹³ Haneef was charged under *Criminal Code* s 102.7(2). See generally Michael Head, 'The Haneef Inquiry: Some Unanswered Questions' (2009) 2 *Journal of the Australasian Law Teachers Association* 99; Mark Rix, 'The Show Must Go On: The Drama of Dr Mohamed Haneef and the Theatre of Counter-Terrorism' in Andrew Lynch, Nicola McGarrity and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 199; Fergal Davis, 'Extra-Constitutionalism, Dr Mohamed Haneef and Controlling Executive Power in Times of Emergency' in Andrew Lynch, Nicola McGarrity and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 219.

⁹⁴ During the Haneef affair, these were found in *Crimes Act 1914* (Cth) ss 23CA–23CB. Since the *National Security Legislation Amendment Act 2010* (Cth), they are found in *Crimes Act 1914* (Cth) ss 23DB–23DF.

⁹⁵ See *Crimes Act 1914* (Cth) s 23DC(4)(e).

⁹⁶ See M J Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) vol 1, 57–64 [3.2.6]–[3.2.10] ('Clarke Inquiry Report').

⁹⁷ *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

⁹⁸ See 'Haneef Compensation "About \$1m"', *The Sydney Morning Herald* (online), 22 December 2010 <<http://www.smh.com.au/national/haneef-compensation-about-1m-20101222-194vj.html>>.

An inquiry into the Haneef case by John Clarke⁹⁹ was not designed to determine whether Haneef was guilty or innocent. However, Clarke remarked that he ‘could find no evidence that [Haneef] was associated with or had foreknowledge of the terrorist events’.¹⁰⁰ He concluded that the advice to charge Haneef, given to the Australian Federal Police by an officer of the Commonwealth Director of Public Prosecutions, was ‘completely deficient’.¹⁰¹ The report otherwise found that it was ‘at least arguable’ that reasonable grounds existed for Haneef’s initial arrest,¹⁰² although it was unnecessary to detain Haneef for more than seven days for the purposes of the investigation.¹⁰³ Among other recommendations, the report suggested that the dead time provisions in the *Crimes Act 1914* (Cth) be reviewed and that the government consider appointing an independent reviewer of Australia’s counter-terrorism laws.¹⁰⁴ These recommendations have since been implemented. Schedule 3 of the *National Security Legislation Amendment Act 2010* (Cth) amended pt IC of the *Crimes Act 1914* (Cth) to clarify the operation of the dead time provisions, and to set a seven day limit on the amount of time which can be disregarded during the investigation of terrorism offences.¹⁰⁵ As discussed below, the *Independent National Security Legislation Monitor Act 2010* (Cth) created the office of an independent reviewer of Australia’s anti-terror legislation.

Australian anti-terror laws have been the subject of constitutional attack. In *R v Lodhi*,¹⁰⁶ the defendant sought to challenge the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) on the ground that it permitted a person accused of committing terrorist offences to be sentenced through a process incompatible with the exercise of judicial power. Whealy J in the Supreme Court of New South Wales held that the legislation was not inconsistent with the exercise of judicial power primarily because it set down a procedure for determining the pre-trial disclosure of evidence rather than one for excluding evidence during the trial itself.¹⁰⁷ On appeal in the New South Wales Court of Criminal Appeal, Whealy J’s decision was upheld, with Spigelman CJ stating that the Act ‘tilted the balance’¹⁰⁸ in favour of national security without rendering the legislation invalid.¹⁰⁹

In *Thomas v Mowbray*¹¹⁰ the High Court rejected a challenge to the control order regime in div 104 of the *Criminal Code*. It was argued that the legislation did not fall within one of the enumerated heads of federal legislative power in

⁹⁹ *Clarke Inquiry Report*, above n 96.

¹⁰⁰ *Ibid* vii.

¹⁰¹ *Ibid* x.

¹⁰² *Ibid* 53.

¹⁰³ *Ibid* 70.

¹⁰⁴ *Ibid* xii (recommendations 3–4).

¹⁰⁵ See especially *Crimes Act 1914* (Cth) s 23DB(11).

¹⁰⁶ (2006) 163 A Crim R 448.

¹⁰⁷ *Ibid* 464–5 [82]–[85].

¹⁰⁸ *Lodhi v The Queen* (2007) 179 A Crim R 470, 487 [67].

¹⁰⁹ *Ibid* 487–8 [66]–[67].

¹¹⁰ (2007) 233 CLR 307.

s 51 of the *Constitution* and that it also breached the separation of judicial power brought about by ch III of that instrument. The majority judges rejected these arguments.¹¹¹ This reflects how, in the absence of a national scheme of human rights protection, such as a national human rights Act, the possibilities for legal challenge to any of Australia's anti-terror laws are very slight. Unless a law breaches one of the structural implications arising from the *Constitution*, such as the separation of judicial power or the implied freedom of political communication, it is unlikely that it will fall foul of constitutional review.¹¹²

E Review of Anti-Terror Laws

Many of Australia's anti-terror laws were examined by parliamentary committees prior to their enactment, sometimes on more than one occasion.¹¹³ Laws have also been examined post-enactment by the following reviews:

- review of sedition laws by the Australian Law Reform Commission (July 2006);¹¹⁴
- review by the Security Legislation Review Committee ('Sheller Committee') (June 2006);¹¹⁵

¹¹¹ For analysis as to the question of whether the control order regime fell within legislative power, see Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement?' (2008) 19 *Public Law Review* 20; Geoffrey Lindell, 'The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*' (2008) 10 *Constitutional Law and Policy Review* 42; Hernan Pintos-Lopez and George Williams, "'Enemies Foreign and Domestic": *Thomas v Mowbray* and the New Scope of the Defence Power' (2008) 27 *University of Tasmania Law Review* 83. For a range of critiques of the High Court's decision as to ch III and the control order regime more generally, see Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105; Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072; Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17; Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209.

¹¹² See also *Ul-Haque v The Queen* [2006] NSWCCA 241 (9 August 2006), holding that terrorist organisation offences are validly enacted under the Commonwealth's power over 'external affairs' in s 51(xxix) of the *Constitution*.

¹¹³ See, eg, Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006).

¹¹⁴ Australian Law Reform Commission, above n 51.

¹¹⁵ *Sheller Committee Report*, above n 7.

- review of security and counter terrorism legislation by the Parliamentary Joint Committee on Intelligence and Security (December 2006);¹¹⁶
- inquiry into the proscription of ‘terrorist organisations’ under the *Criminal Code* by the Parliamentary Joint Committee on Intelligence and Security (September 2007);¹¹⁷ and
- inquiry by John Clarke into the case of Dr Mohamed Haneef (November 2008).¹¹⁸

These inquiries represent major assessments of key parts of Australia’s anti-terror laws. Each recommended significant changes to aspects of those laws. However, in contrast to the speed with which many of the anti-terror laws were enacted, Australian governments have been slow to respond to the findings of the reviews. Where they have done so, they have tended to be selective in their willingness to adopt the recommendations, often by agreeing with changes that would further strengthen the reach of the laws and rejecting reforms that would introduce new safeguards.¹¹⁹ In any event, it was not until the *National Security Legislation Amendment Act 2010* (Cth) that any of the findings of these reviews were finally implemented. However, that legislation not only responded to these reports, but also continued the expansion of the anti-terror regime. Most contentious, it introduced the warrantless search powers in s 3UEA of the *Crimes Act 1914* (Cth).

While Australia has undertaken some important examinations of its anti-terror laws, the overall picture is one of piecemeal review. No holistic assessment has been undertaken of the broad range of Australia’s anti-terror laws. Questions have not been asked about the sustainability of those laws, nor about their effectiveness or appropriateness over the short and longer term. Australia has thus been left with an array of interconnected laws enacted over the course of a decade whose capacity to protect the community while also respecting democratic values has never as a whole been assessed.

A further problem is that some important aspects of the anti-terror laws have not been subject to any form of post-enactment review. There has not, for example, been any comprehensive examination of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), despite its pervasive impact upon trials under anti-terror legislation.¹²⁰ There has also not been any review of many of the most important additions to Australia’s anti-terror laws brought about in the wake of the 2005 London bombings, including provisions for the control order and preventative detention order regimes. These changes

¹¹⁶ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) (‘*PJCIS Review*’).

¹¹⁷ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Proscription of ‘Terrorist Organisations’ under the Australian Criminal Code* (2007).

¹¹⁸ *Clarke Inquiry Report*, above n 96.

¹¹⁹ See, eg, Attorney-General’s Department (Cth), *National Security Legislation: Discussion Paper on Proposed Amendments* (2009). See also Andrew Lynch, ‘The Impact of Post-Enactment Review on Anti-Terrorism Laws: Four Jurisdictions Compared’ (2012) 18 *Journal of Legislative Studies* 63.

¹²⁰ But see Attorney-General’s Department (Cth), *National Security Legislation*, above n 119, ch 4.

were subject to an express commitment that they would be reviewed by an independent committee after five years of operation, and also to a 10 year sunset clause.¹²¹ The Council of Australian Governments ('COAG') stated in February 2006 that '[t]he committee should commence the review in December 2010 ... [and] should provide a written report to COAG within six months of commencing the review.'¹²² The committee has not been established. This failure is especially problematic given that the United Kingdom's control order regime, upon which Australia's is based, is now itself the subject of extensive debate and likely amendment.¹²³

One of the recommendations of the Sheller Committee in 2006 was for an independent office to monitor Australia's anti-terror legislation on an ongoing basis.¹²⁴ Such an office exists in the United Kingdom in the form of the Independent Reviewer of Terrorism Laws.¹²⁵ The Australian position was finally created by the *Independent National Security Legislation Monitor Act 2010* (Cth).¹²⁶ The federal government took more than a year to fill the office after the passage of this legislation, and appointed as the inaugural Monitor leading Sydney barrister Bret Walker in April 2011.¹²⁷ Walker completed his first annual report, in which he provided a lengthy list of 'issues for consideration' rather than making any recommendations, in December 2011.¹²⁸

¹²¹ *Criminal Code* ss 104.32, 105.53.

¹²² COAG, *Details and Process for Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation* (2006) 2 <http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm>. See also COAG, *Council of Australian Governments' Meeting: 10 February 2006 — Communiqué* (2006) <http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm>.

¹²³ See Home Office (UK), *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004 (2011) 36–43; Lord Macdonald, *Review of Counter-Terrorism and Security Powers*, Cm 8003 (2011) 9–16; Joint Committee on Human Rights, *Renewal of Control Orders Legislation 2011*, House of Lords Paper No 106, House of Commons Paper No 838, Session 2010–11 (2011).

¹²⁴ *Sheller Committee Report*, above n 7, 201–3.

¹²⁵ Lord Carlile was appointed Independent Reviewer of the United Kingdom's anti-terrorism legislation under s 126 of the *Terrorism Act 2000* (UK) c 11, which provides that the Home Secretary shall deliver a report on the workings of the Act to both Houses of Parliament at least once every 12 months. Lord Carlile has produced a range of general reports on the *Terrorism Act 2000* (UK) c 11 and the control order regime in the *Prevention of Terrorism Act 2005* (UK) c 2, as well as a special report on the United Kingdom definition of terrorism. See, eg, Lord Carlile, *Report on the Operation in 2001 of the Terrorism Act 2000* (2002); Lord Carlile, *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation*, Cm 7052 (2007); Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006); Lord Carlile, *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2010). See also Andrew Lynch and Nicola McGarrity, *At Last, an Independent Reviewer of Terrorism Laws* (16 July 2009) Inside Story <<http://inside.org.au/at-last-an-independent-reviewer-of-terrorism-laws>>.

¹²⁶ See Andrew Lynch and Nicola McGarrity, 'A "Watch Dog" of Australia's Counter-Terrorism Laws — The Coming of the National Security Legislation Monitor' (2010) 12(1) *Flinders Law Journal* 83.

¹²⁷ Wayne Swan (Deputy Prime Minister and Treasurer), 'Appointment of the Independent National Security Legislation Monitor' (Media Release, No 036, 21 April 2011).

¹²⁸ Bret Walker, *Independent National Security Legislation Monitor — Annual Report 16 December 2011* (2012) app 3 <<http://www.dpnc.gov.au/publications/INSLM/index.cfm>>.

Australia's record of reviewing the extraordinary powers granted by its anti-terror laws is poor. Significant reviews have been undertaken, but the results of those reviews have, at best, been implemented years later. Another major promised review into the 2005 reforms has not been initiated and, although legislation was passed to create a new independent office to monitor anti-terror laws, that office was not filled for a considerable period. All this points to reluctance on the part of federal governments to assess the appropriateness and effectiveness of Australia's anti-terror laws. It can only be hoped that this picture will change with the ongoing work of Australia's first Independent National Security Legislation Monitor. Of course, even if that office proves to be a success in terms of the depth and quality of its work, that is no guarantee that its recommendations will be implemented in a timely manner, or even at all.

III LESSONS FROM A DECADE OF MAKING ANTI-TERROR LAWS

Australia's anti-terror laws pose significant challenges for the nation's legal system and institutions of government. The laws upset accepted orthodoxies, such as the notion that the executive should not ban organisations and that non-suspects should not be detained and questioned or subject to covert surveillance. They also bring about shifts in the balance of power between different institutions. For example, one of the effects of the body of Australian anti-terror law is that it grants significant new decision-making powers to the executive, such as deciding which organisations should be proscribed¹²⁹ and who should be subject to covert search warrants¹³⁰ and warrantless searches.¹³¹

Much of the legal scholarship on the anti-terror laws enacted in Australia has necessarily been immediate and reactive. The fact that so many laws of great length and significant import have been enacted in such a short space of time has meant that research and analysis has inevitably focused on understanding those laws and dealing with specific questions about their drafting and impact upon human rights.¹³² As a result, the laws have often been analysed as short-term phenomena. This reflects an assumption that Australia's anti-terror laws are a reaction to a temporary, exceptional state of affairs and, once the terrorist threat diminishes, the laws will be repealed or provisions infringing upon civil liberties will be weakened in proportion to the nature of the threat. However, a decade on, this has yet to occur, and there is no apparent likelihood that it will occur at any near point in time. It is unlikely, for example, that the federal Parliament will

¹²⁹ Compare Australia's earlier proscription regime in the *Crimes Act 1926* (Cth) pt IIA, which invested such a decision in the courts: see McGarrity, Lynch and Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament', above n 41.

¹³⁰ See, eg, *Terrorism (Police Powers) Act 2002* (NSW) pt 3.

¹³¹ See *Crimes Act 1914* (Cth) s 3UEA.

¹³² For comparative analysis, see Ramraj et al (eds), above n 1. Cf other works such as Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing, 2008); Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008).

soon see fit to repeal even something as exceptional as ASIO's non-suspect questioning and detention powers.

Ten years on, it is possible to take a broader view of Australia's anti-terror laws informed by the notion that such laws, as a matter of political reality, are here to stay. This perspective has the advantage of being informed by the benefits of hindsight.¹³³ Below, I draw out four lessons from the Australian experience with these laws.

A Australia Needed Laws Directed to the Prevention of Terrorism

The absence of national anti-terror laws in Australia prior to September 11 was not surprising. Apart from isolated incidents such as the 1978 bombing attack on the Commonwealth Heads of Government Regional Meeting at the Sydney Hilton Hotel, Australia had little direct experience of terrorism.¹³⁴ However, the rarity of such attacks was not itself a justification for the lack of law. Anti-terror laws should ideally be in place as a precursor to a possible attack, rather than enacted in haste after the event. Indeed, the worst possible time for enacting anti-terror laws can be in the aftermath of a devastating terrorist attack. The fear and grief that such an event produces is hardly conducive to rational debate about the appropriate scope of the resulting laws.

The attacks of September 11 provided the catalyst for Australia's first national anti-terror laws. Although it has been forcefully argued that such laws were not needed, primarily on the basis that terrorism could be adequately dealt with by the existing criminal law,¹³⁵ that position is not sustainable. Australia needed new anti-terror laws to deal with specific aspects of the problem. For example, the nation needed a statutory framework directed to preventing the financing of terrorist acts overseas so as to ensure that Australians do not help to bring about such attacks.

The criminal law in place in 2001 was not sufficient for the task of preventing terrorism. It failed to adequately deal with matters such as those relating to terrorist organisations, and was not adequately directed to prevention. It is not appropriate in the context of terrorism, as is often the case for other types of crime, to primarily apply the force of law once an act has been committed so as to bring the perpetrator to justice. Instead, given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack. This prevention can be seen as an act of pragmatic necessity given the need for Australian governments to take action to protect the community from terrorism. It can also be seen as a

¹³³ Other works are now appearing which are also so informed: see, eg, Roach, *The 9/11 Effect*, above n 1.

¹³⁴ For an overview, see Hocking, above n 11, 120–38.

¹³⁵ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2403, where Greens Senator Bob Brown said during debate on the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) package: 'The existing criminal law, with offences such as murder, criminal damage, conspiracy, and aiding and abetting, can and should be used to prosecute and penalise anything that can sensibly be described as terrorism.'

measure designed to respect fundamental human rights, including the right to life and to live free of fear.¹³⁶

Anti-terror laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that may give rise to a terrorist attack. It is arguable that Australia's laws give rise to lengthy jail sentences for preparatory acts too far removed from the actual commission of an act of terrorism.¹³⁷ Nonetheless, this is not an argument against the existence of anti-terror laws *per se*, but for their recalibration so as to ensure that they criminalise actions that can be more realistically described as preparation for committing a terrorist act. The argument for anti-terror laws is *not* also an argument for departing from well-accepted principles of criminal law aimed at ensuring outcomes such as the right to a fair trial.¹³⁸

An effective prevention strategy involves laws that confer powers on agencies such as the Australian Federal Police and ASIO. These organisations require legal authorisation to collect information to head off an attack and the power to target not only individuals who might engage in terrorism but also groups or cells of potential terrorists. Again, the issue here is not so much one of justification, but of proportionality. Australia's law enforcement and intelligence agencies should have sufficient powers to dismantle and prevent threats to the community, but those powers should be carefully tailored to the level of the threat. They should also be subject to strict and transparent safeguards enforced by independent agencies.

Apart from the inadequacy of its existing national laws, Australia was justified in enacting new anti-terror laws after September 11 in fulfilment of its obligations as a member of the international community. For example, *Resolution 1373*, adopted on 28 September 2001, determined that states shall '[t]ake the necessary steps to prevent the commission of terrorist acts'¹³⁹ by ensuring that 'terrorist acts are established as serious criminal offences in domestic laws and regulations'.¹⁴⁰ This gave rise to a clear obligation on the part of Australia to enact laws directed at this problem. While Australia had laws in place that could have been used to *prosecute* individuals for acts of terrorism, it did not have sufficient laws in place directed at the *prevention* of terrorism.

Finally, Australia's anti-terror laws can be seen as having an important moral dimension. In an era punctuated by terrorist attacks starting with those in New

¹³⁶ See Chief Justice James Spigelman, 'The Forgotten Freedom: Freedom from Fear' (2010) 59 *International and Comparative Law Quarterly* 543.

¹³⁷ For example, five defendants in the Elomar trial received sentences between 23 and 28 years' imprisonment for a 'conspiracy to commit acts in preparation for a terrorist act'. The defendants had not yet reached a firm conclusion as to the nature of the attack they intended to carry out, and they did not necessarily even intend to kill innocent civilians: see *R v Elomar* (2010) 264 ALR 759, 774 [58], 774–5 [60], 779 [79] (Whealy J), and the discussion above in Part II(D). On preventive offences in anti-terror laws, see generally MacDonal and Williams, above n 39, 33–6; McSherry, above n 90, 364–7.

¹³⁸ See Justice A G Whealy, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81 *Australian Law Journal* 743.

¹³⁹ *Resolution 1373*, UN Doc S/RES/1373, para 2(b).

¹⁴⁰ *Ibid* para 2(e).

York and Washington and followed by those in Bali, Madrid, London, Mumbai, Jakarta and elsewhere, it was appropriate that Australian law outlawed such forms of political violence. Enacting a specific crime of 'terrorism' signalled that, as a society, Australia rejects the use of violence in the pursuit of a political, religious or ideological goal.¹⁴¹

Australian governments and Parliaments deserve credit for recognising that Australia required a body of law directed towards protecting the community from the threat of terrorism. These institutions were also correct in their assessment that such laws ought to be directed particularly to the prevention of such acts. In hindsight, our legal system prior to 9/11 reflected complacency about the potential for political violence in Australia and the region. On the other hand, the justification for new laws does not support legislation of every kind. Anti-terror laws must be carefully tailored to the problems posed by terrorism, and must be proportionate in the sense that they confer powers and sanctions consistent with the threat currently posed to the community.

B *Inferior Laws Result from Poor Processes of Enactment and Review*

Australia needed new anti-terror laws, but the laws actually enacted reflect major problems of process and political judgment. To a large extent, this was a result of many of the laws being enacted as a reaction to catastrophic attacks overseas, especially those of September 11 and in London in 2005. Too many of Australia's laws were passed in response to those and other events with inordinate haste and insufficient parliamentary scrutiny.¹⁴²

¹⁴¹ See *Criminal Code* s 101.1(1) (definition of 'terrorist act', para (b)). The conclusion that Australia's anti-terror laws should be directed specifically at violent acts undertaken with a view to achieving a political, religious or ideological goal was reached by both the Sheller Committee and the Parliamentary Joint Committee on Intelligence and Security. The Sheller Committee concluded that this requirement was included in order to 'stigmatise certain political acts', and that it should therefore be retained because it 'emphasises a publicly understood quality of terrorism': *Sheller Committee Report*, above n 7, 56–7. See also *PJCIS Review*, above n 116, 57 [5.25]. For opposing arguments as to whether or not the 'political, religious or ideological' motive requirement should have been included in sub-s (1)(b), see Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 28; Kent Roach, 'The Case for Defining Terrorism with Restraint and without Reference to Political or Religious Motive' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 39. See also Keiran Hardy, 'Hijacking Public Discourse: Religious Motive in the Australian Definition of a Terrorist Act' (2011) 34 *University of New South Wales Law Journal* 333.

¹⁴² See Andrew Lynch, 'Legislating with Urgency — The Enactment of the *Anti-Terrorism Act (No 1) 2005*' (2006) 30 *Melbourne University Law Review* 747; Andrew Lynch, 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 151; Greg Carne, 'Hasten Slowly: Urgency, Discretion and Review — A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13(2) *Deakin Law Review* 49; Hocking, above n 11, 193–211; Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform', above n 9; Dominique Dalla-Pozza, 'Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to the Australian Parliamentary Committees in the Creation of Counter-Terrorism Laws' (2008) 23(1) *Australasian Parliamentary Review* 39; Nicola McGarrity and George Williams, 'Counter-Terrorism Laws in a Nation without a Bill of Rights: The Australian Experience' (2010) 2 *City University of Hong Kong Law Review* 45, 58–65; John Uhr, 'Terra Infirma? Parliament's Uncertain Role in the "War on Terror"' (2004) 27 *University of New South Wales Law Journal* 339; Joo-Cheong Tham,

Australia's first set of anti-terror laws set a bad precedent. These four Bills,¹⁴³ drafted to respond to the events of September 11, dealt with many of the most important aspects of Australia's anti-terror laws, including the definition of a 'terrorist act', the criminalisation of such acts and the proscription of organisations. The Bills were introduced into the House of Representatives on 12 March 2002, and were passed by that House the next day. As Jenny Hocking has described:

Despite the complexity and the significant implications of these Bills, they were passed by the House of Representatives the following day after a rushed and heavily criticised trajectory during which the government gagged the debate which lasted barely a few hours ...¹⁴⁴

The Bills were then read for the first time in the Senate on 14 March. Fortunately, the process was then forced to slow because the government did not possess a majority in that chamber. After an inquiry by the Senate Legal and Constitutional Legislation Committee,¹⁴⁵ which needed extra time because it received 421 submissions,¹⁴⁶ the Bills were passed on 27 June 2002.

These first laws demonstrate a common theme that applied until the fall of the Howard government in late 2007. Those sponsoring the new measures sought to see them passed by Parliament as quickly and with as little scrutiny as possible. This was despite the fact that the Howard government itself recognised the benefits of robust parliamentary scrutiny and debate after this first set of Bills had been passed. After having been forced to accept significant changes in line with the recommendations of the unanimous Senate Committee report,¹⁴⁷ Prime Minister John Howard stated in response at a National Press Club Address on 11 September 2002 that 'through the great parliamentary processes that this country has I believe that we have got the balance right'.¹⁴⁸

Once it gained a majority in the Senate after the 2004 election, the Howard government proved willing to ride roughshod over parliamentary process and normal parliamentary timelines. This was demonstrated most significantly with

'Casualties of the Domestic "War on Terror": A Review of Recent Counter-Terrorism Laws' (2004) 28 *Melbourne University Law Review* 512.

¹⁴³ Security Legislation Amendment (Terrorism) Bill 2002 (No 2) (Cth); Suppression of the Financing of Terrorism Bill 2002 (Cth); Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth); Border Security Legislation Amendment Bill 2002 (Cth). The Telecommunications Interception Legislation Amendment Bill 2002 (Cth) was introduced at the same time as these other four Bills, but was not referred to as part of the same package by Attorney-General Daryl Williams: see Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1040 (Daryl Williams).

¹⁴⁴ Hocking, above n 11, 196.

¹⁴⁵ Senate Legal and Constitutional Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills*, above n 113.

¹⁴⁶ See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Interim Report on the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills* (2002).

¹⁴⁷ See Senate Legal and Constitutional Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills*, above n 113, 8–16.

¹⁴⁸ John Howard, 'Address to the National Press Club' (Speech delivered at the National Press Club, Canberra, 11 September 2002).

respect to the government's package of anti-terror laws passed in response to the July 2005 London bombings. In the lead-up to those bombings, no claims had been made by the government or its agencies that reforms were needed to Australia's anti-terror laws. After the bombings, a further package of changes became inevitable.

The *Anti-Terrorism Act (No 2) 2005* (Cth) dealt with a range of especially contentious topics such as control orders, preventative detention and sedition. Despite this, the government proceeded in a way that ensured the Bill received only minimal scrutiny. It announced an outline of the changes on 8 September 2005, but the Bill was not introduced into Parliament until 3 November 2005.¹⁴⁹ It was accompanied by a statement by Attorney-General Philip Ruddock that 'the government would like all elements of the anti-terrorism legislation package to become law before Christmas.'¹⁵⁰ This left very little time for scrutiny and deliberation by Parliament, let alone by its committees. An inquiry was conducted by the Senate Legal and Constitutional Legislation Committee, which had time only for a six day period of calling for submissions, three days of hearings and 10 more days to prepare the final report.¹⁵¹ The legislation was passed on 7 December 2005, in plenty of time for Christmas.¹⁵²

One of the consequences of the hasty enactment of the *Anti-Terrorism Act (No 2) 2005* (Cth) was immediate recognition that at least one aspect of the new law might be flawed. The package included new sedition offences with seven year jail terms. The offences had a potentially broad reach in that they applied to speech without accompanying actions, and contained inadequate defences in not expressly protecting legitimate speech such as academic and scientific analysis and comedy.¹⁵³ With such concerns in mind, the sedition aspect of the new law was referred immediately after enactment to the Australian Law Reform Commission. The inquiry thus proceeded while the law continued to provide for the possibility of lengthy jail terms. Not surprisingly, the Commission reported in July 2006 that there were extensive problems with the new offences, and recommended wholesale change.¹⁵⁴ However, the Howard government never moved to implement these recommendations. Even a change of government in

¹⁴⁹ A 'Draft-in-Confidence' version of the Bill was made public on 14 October 2005 by Australian Capital Territory Chief Minister Jon Stanhope, thereby providing an extra opportunity for public debate, but also attracting an angry response from the Howard government: see, eg, Brendan Nicholson, 'ACT Chief: I Won't Be Led by the Nose', *The Age* (Melbourne), 17 October 2005, 2.

¹⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (Philip Ruddock).

¹⁵¹ Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 1. The Committee advertised for submissions on 5 November 2005 in *The Australian* newspaper, and set a deadline of 11 November 2005 so that it could report by its deadline of 28 November 2005. Three days of hearings were held in Sydney (on Monday 14, Thursday 17 and Friday 18 November 2005).

¹⁵² See also Lynch, 'Legislating with Urgency', above n 142.

¹⁵³ See Australian Law Reform Commission, above n 51, 175–6 [8.36], 251 [12.40].

¹⁵⁴ *Ibid* 175–6 [8.36].

2007 did not quickly bring on the reforms. It took until 2010, five years after the sedition offences were enacted, for the necessary reforms to be legislated.¹⁵⁵

Other anti-terror laws enacted during the Howard era were made in similarly troubling circumstances, including through the hasty recall of the Senate in 2005 to pass legislation broadening the scope of terrorism offences by replacing the reference to 'the' terrorist act to 'a' terrorist act.¹⁵⁶ Too often, parliamentary inquiries have been given inadequate time to call for submissions, hold hearings and deliver considered reports. Even where parliamentary committees had an opportunity to report, sensible and necessary amendments recommended by them were often ignored in a rush to have legislation passed. This reflects the comment by Andrew Lynch that there has been 'an unwillingness to see the legislative *process* as something beyond merely a political obstacle course.'¹⁵⁷

An example was the *Telecommunications (Interception) Amendment Act 2006* (Cth), which granted ASIO the power to intercept the telecommunications of non-suspects where this might, for example, 'assist the Organisation in carrying out its function of obtaining intelligence relating to security'.¹⁵⁸ The Senate Legal and Constitutional Legislation Committee was given 26 days to conduct its inquiry and publish a report. This left interested people just 12 days to review and prepare a submission on a complex 90 page Bill that had taken the government six months to write. Unsurprisingly, the Committee received only 24 public submissions, many from government agencies whose powers were to be increased.¹⁵⁹ The Committee only held one public hearing.¹⁶⁰

Despite the difficulties, government and opposition senators wrote a joint report recommending significant new safeguards.¹⁶¹ Unfortunately, the Bill was brought on for debate in the Senate the day after the Committee's report was tabled, giving busy senators and their staff little time to read and digest its 65 pages. Two days later, the Senate passed the law with only minor amendments, some of which did not come from the Committee's report and may actually have created further problems. The House of Representatives passed the Bill on the same day as the Senate made these amendments. All up, the government ensured that the Bill was passed within four days of the publication of the Senate Committee report and that it failed to incorporate the recommended safeguards.

¹⁵⁵ *National Security Legislation Amendment Act 2010* (Cth). As described above in Part II(B), the sedition offences in s 80.2 of the *Criminal Code* have now been reframed and amended as 'urging violence' offences.

¹⁵⁶ *Anti-Terrorism Act (No 1) 2005* (Cth). See Lynch, 'Legislating with Urgency', above n 142.

¹⁵⁷ See Lynch, 'Legislating with Urgency', above n 142, 778 (emphasis in original).

¹⁵⁸ *Telecommunications (Interception) Amendment Act 2006* (Cth) sch 3 item 5. See Hume and Williams, 'Who's Listening?', above n 67.

¹⁵⁹ Parliament of Australia, *Senate Committees — Submissions Received by the Committee as at 24/03/2006* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2004-07/ti/submissions/sublist.htm>.

¹⁶⁰ Parliament of Australia, *Senate Committees — Inquiry into the Provisions of the Telecommunications (Interception) Amendment Bill 2006 — Public Hearings and Transcripts* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2004-07/ti/hearings/index.htm>.

¹⁶¹ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Telecommunications (Interception) Amendment Bill 2006* (2006).

Acknowledging this, and the fact that the government had not actually considered the Committee's report, Attorney-General Philip Ruddock told Parliament just before the Bill was passed:

The government will continue to consider in detail the committee report and the recommendations as part of its ongoing commitment to ensuring the regime achieves an appropriate balance. If there are further amendments that are thought to be appropriate following the consideration of the committee report, we will propose further amendments in the spring session of parliament.¹⁶²

No such amendments were ever proposed.

The change of federal government in late 2007 marked a shift in how Australia's anti-terror laws have been made. Few new laws have since been enacted,¹⁶³ and those that have been have involved a more satisfactory process. In particular, the *National Security Legislation Amendment Act 2010* (Cth) was passed only after an extended period of discussion and review.¹⁶⁴ Even before the Bill reached Parliament, the government held a public consultation through inviting submissions on draft amendments set out in a departmental discussion paper.¹⁶⁵ Attorney-General Nicola Roxon announced a further public consultation in 2012 on Australian national security legislation to be led by the Parliamentary Joint Committee on Intelligence and Security.¹⁶⁶

Overall, Australia's record of making anti-terror laws demonstrates how the federal Parliament can perform poorly when faced with strong community concern and an apparent political necessity to respond. This represents a particular set of problems exposed by Australia's anti-terror laws, as well as a more general problem. The reality of Australian lawmaking does not reflect idealised conceptions of responsible government and parliamentary scrutiny. Instead, lawmaking in Australia is based upon key decisions being made by representatives as members of political parties, not as parliamentarians. This leaves important matters, including the process of enactment and the content of anti-terror laws, subject primarily not to parliamentary decision, but to the political and policy objectives of the leadership of the governing party in Cabinet. Anti-terror laws are thus affected like other legislation by the fact that Parliament can be controlled by the executive rather than being accountable to it. This perennial problem was exacerbated in the case of anti-terror laws by the fact that the Howard government gained control of both Houses of Parliament and used that

¹⁶² Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2006, 98 (Philip Ruddock).

¹⁶³ See above Part II(A).

¹⁶⁴ Better processes do not, of course, necessarily lead to corresponding improvements in the content of legislation. The *National Security Legislation Amendment Act 2010* (Cth) in particular contained surprising and arguably unnecessary extensions of governmental power, including new provision for warrantless searches of private property by police officers: sch 4 item 4.

¹⁶⁵ See Attorney-General's Department (Cth), *National Security Legislation*, above n 119.

¹⁶⁶ Nicola Roxon, Attorney-General (Cth), 'Public Consultation for National Security Reform' (Media Release, 4 May 2012) <<http://www.attorneygeneral.gov.au/Media-releases/Pages/default.aspx>>.

opportunity to pass difficult and contentious new legislation at breakneck speed and with minimal scrutiny.¹⁶⁷ As Greg Carne has written:

A pattern emerged of rapid legislative passage, relatively few amendments, a discounting of many parliamentary and other review committee recommendations, and, contrary to earlier ministerial assurances, an unwillingness to remedy legislative deficiencies that were identified in reviews contemporary with or subsequent to the passage of the legislation.¹⁶⁸

Problems in enactment can to some extent be remedied by efficient and effective processes of review. However, as explored above in Part II(E), Australia's record of reviewing its anti-terror laws has been patchy and inconsistent. Important reviews have been conducted, but some have never occurred, including the now overdue review of the major changes brought about by the *Anti-Terrorism Act (No 2) 2005* (Cth). Other important areas of the law, such as the rules relating to the use of national security information in the courts, have never been the subject of holistic review, even where ongoing concerns have been raised about the effectiveness and appropriateness of the regime.¹⁶⁹

These problems are compounded by the fact that, where effective reviews have been conducted, the level of political commitment to implementing their recommendations has been low. Findings even of high-level, expert panels have been ignored or only implemented some years after a change of government. The common thread of Australia's anti-terror laws is thus that such laws have often been enacted in undue haste and reviewed and repaired sometimes at leisure, or often not at all.

This has two important consequences. First, it means that stringent legal sanctions and extraordinary powers may be exercised upon an inadequate legislative foundation, opening up the possibility that people may be jailed inappropriately, or not convicted where they ought to be. Agencies may also be able to exercise powers without sufficient safeguards, thereby endangering individual liberties and also potentially compromising community confidence in national security processes (something that in turn may compromise the effectiveness of those processes). The larger problems that may result from this were expressed by Dixon J in 1951 in *Australian Communist Party v Commonwealth* ('*Communist Party Case*')

¹⁶⁷ An analogous example is the passage of the Northern Territory intervention legislation by federal Parliament. That 480 page package of legislation, which introduced a range of contentious measures and suspended the operation of the *Racial Discrimination Act 1975* (Cth), was introduced into federal Parliament on 7 August 2007. It was passed by the House of Representatives on the same day, though it was subject to a longer period of Senate scrutiny.

¹⁶⁸ Carne, 'Hasten Slowly', above n 142, 50. See also Carne, 'Prevent, Detain, Control and Order?', above n 111.

¹⁶⁹ See, eg, Phillip Boulton, 'Preserving National Security in the Courtroom: A New Battleground' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 96; Patrick Emerton, 'Paving the Way for Conviction without Evidence — A Disturbing Trend in Australia's "Anti-Terrorism" Laws' (2004) 4(2) *Queensland University of Technology Law and Justice Journal* 1; Anthony Gray, 'Alert and Alarmed: The National Security Information Act (Cth) (2004)' (2005) 24 *University of Tasmania Law Review* 91; Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27 *University of New South Wales Law Journal* 373.

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.¹⁷⁰

Second, the failure of process, and in particular the failure to review the laws effectively, can contribute to the impression, which may grow over time, that the laws are suitable for adaptation to other fields. Anti-terror laws demand ongoing vigilance and attention lest their exceptional nature becomes lost. When this occurs, powers that can only be justified in that extraordinary setting may become accepted as normal and so applicable elsewhere. As Lucia Zedner has stated, anti-terror laws can end up providing ‘the underlying rationale and licence’ for the expansion of the extraordinary measures contained within them to new contexts.¹⁷¹ An example is the adaptation of the control order regime to organised crime in the form of bikie groups in a number of Australian states. In South Australia, Premier Mike Rann justified the *Serious and Organised Crime (Control) Act 2008* (SA) by saying: ‘We’re allowing similar legislation to that that applies to terrorists, because [bikie groups] are terrorists within our community.’¹⁷²

C Australia’s Lack of Human Rights Safeguards Enables Disproportionate Laws

Australia is now the only democratic nation in the world without a national human rights law such as a human rights Act or bill of rights.¹⁷³ The absence of this check and balance has had a significant impact on the making and final content of Australia’s anti-terror laws.¹⁷⁴ While human rights standards can be found in international instruments to which Australia is a party, such as the *International Covenant on Civil and Political Rights*,¹⁷⁵ they are not binding in

¹⁷⁰ (1951) 83 CLR 1, 187.

¹⁷¹ Lucia Zedner, ‘Seeking Security by Eroding Rights: The Side-Stepping of Due Process’ in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 257, 264.

¹⁷² ABC Radio National, ‘South Australia’s Plans to Obliterate Outlaw Bikie Gangs’, *The Law Report*, 6 May 2008 (Mike Rann) <<http://www.abc.net.au/radionational/programs/lawreport/south-australias-plans-to-obliterate-outlaw-bikie/3254212>>. See McGarrity and Williams, ‘When Extraordinary Measures Become Normal’, above n 6; Appleby and Williams, above n 6.

¹⁷³ George Williams, *A Charter of Rights for Australia* (UNSW Press, 2007) 16–17. Australia has engaged in a number of debates about whether to bring about a national bill of rights. In the most recent of these, the National Human Rights Consultation commissioned by the Commonwealth and chaired by Father Frank Brennan reported on 30 September 2009: National Human Rights Consultation Committee, *Report* (2009) <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads>. The report recommended the enactment of a national human rights Act. This recommendation was rejected by the Rudd government, which instead supported the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), a new set of parliamentary measures to scrutinise laws for compliance with human rights. These measures do not provide any means for judicial scrutiny of laws against human rights standards.

¹⁷⁴ McGarrity and Williams, ‘Counter-Terrorism Laws in a Nation without a Bill of Rights’, above n 142; George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (UNSW Press, 2004) 27–37.

¹⁷⁵ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Australian domestic law unless incorporated by legislation.¹⁷⁶ As a result, they have not had a significant effect on the drafting of Australia's anti-terror laws.¹⁷⁷

A difficulty in the anti-terror context in Australia over the last decade is that such laws have tended to be made as a reaction to terrorist attacks overseas which have provoked anger, fear and grief in the community. These have been magnified by the fact that a number of Australians have been killed in the attacks: 10 in the September 11 attacks; 88 in the 2002 Bali bombings; 1 in the 2005 London bombings; and 3 in the 2009 Jakarta hotel bombings. It is not surprising that at such times people look to their political leaders for a strong response, including action that may actually prove to be disproportionate to the threat due to its impact on democratic liberties. This dynamic is well known, and was well stated by Alexander Hamilton in *The Federalist* in the late 18th century:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.¹⁷⁸

In such circumstances, effective protection for human rights can have an important role to play. Legally protected human rights standards can provide a yardstick against which to assess the making of new anti-terror laws. Even then, they may prove to be only of limited benefit in the face of what can be overwhelming political and community pressure in the aftermath of a terrorist attack for 'tough laws' that 'do whatever it takes' to stop a future terrorist attack. A more significant benefit of human rights protection may therefore be that it can provide a trigger and mechanism for post-enactment analysis. This is a means by which over-breadth in anti-terror laws in other democratic nations is now being reassessed, and on occasion remedied. Such a winding back may occur as a result of judicial decisions or through a fresh assessment by a government recognising the value and importance of protecting democratic freedoms.

An example is the recent decision of the United Kingdom's Cameron government to repair some of the more problematic aspects of that nation's anti-terror laws. After the 2010 election, Home Secretary Theresa May initiated a review of the United Kingdom's 'most sensitive and controversial security and counter-terrorism powers.'¹⁷⁹ The review found in January 2011 that some 'counter-terrorism and security powers are neither proportionate nor necessary.'¹⁸⁰ It

¹⁷⁶ See, eg, *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ): 'treaties do not have the force of law unless they are given that effect by statute'.

¹⁷⁷ See generally Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297.

¹⁷⁸ Alexander Hamilton, 'The Effects of Internal War in Producing Standing Armies and Other Institutions Unfriendly to Liberty' in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Oxford University Press, first published 1787, 2008 ed) 39, 40.

¹⁷⁹ Home Office (UK), *Review of Counter-Terrorism and Security Powers*, above n 123, 3.

¹⁸⁰ *Ibid* 5 (emphasis altered).

recommended reforms including halving the maximum period that a terrorist suspect can be detained before charge and abolishing control orders in favour of a less intrusive regime.¹⁸¹ In response, the Home Secretary recognised that the threat from terrorism ‘is as serious as we have faced at any time and will not diminish in the foreseeable future.’¹⁸² Nevertheless, she committed the British government to correcting ‘the imbalance that has developed between the State’s security powers and civil liberties’.¹⁸³ Reforms from the report were passed by the British Parliament as the *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23 and *Protection of Freedoms Act 2012* (UK) c 9.

By contrast, Australia had no domestic reference point on human rights to assist in the making of its anti-terror laws, nor any comprehensive gauge against which to measure those rules once enacted. There is only occasionally a role for judges in this process, usually at the margins of the debate, such as where constitutional provisions come into play or in interpreting laws. In the latter context, the courts have developed the common law so that the infringement on rights is minimised. According to Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen*, ‘[t]he courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.’¹⁸⁴ Hence, ‘a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right’.¹⁸⁵ On the other hand, if an Act is clear in its intent, *Coco v The Queen* demonstrates that no principle of statutory interpretation prevents the Act from having the intended impact upon human rights.¹⁸⁶

The result in Australia is a body of anti-terror laws that undermines democratic freedoms to a greater extent than the laws of other comparable nations, including nations facing a more severe terrorist threat. For example, it would be unthinkable, if not constitutionally impossible, in nations such as the United States and Canada to restrict freedom of speech in the manner achieved by Australia’s 2005 sedition laws. It would also not be possible to confer a power upon a secret intelligence agency that could be used to detain and question non-suspect citizens.

A further consequence is that Australia has copied anti-terror laws from other nations, especially the United Kingdom, without also copying the corresponding safeguards. A good example is the United Kingdom’s control order regime,¹⁸⁷ which was adapted to Australia in 2005. The United Kingdom scheme is subject to the protections of the *Human Rights Act 1998* (UK) c 42. Indeed, a number of

¹⁸¹ See *ibid* 7–14, 36–43.

¹⁸² *Ibid* 3.

¹⁸³ *Ibid*.

¹⁸⁴ (1994) 179 CLR 427, 437. See also Susan Kenny, ‘Principles of Statutory Interpretation Relating to Government’ in P D Finn (ed), *Essays on Law and Government: The Citizen and the State in the Courts* (LBC Information Services, 1996) vol 2, 215, 233–7.

¹⁸⁵ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J).

¹⁸⁶ See also *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28] (McHugh J).

¹⁸⁷ *Prevention of Terrorism Act 2005* (UK) c 2.

that nation's court decisions have, on the basis of that Act, imposed significant constraints upon the use of control orders.¹⁸⁸ No such decisions or constraints are possible in Australia in the absence of the safeguards provided by a human rights Act or other like law. Moreover, the move in the United Kingdom to abolish the control order regime in favour of a less invasive mechanism has not been met with any action in Australia. It seems likely that Australia will be left with a control order regime copied without the same safeguards from a country facing a higher threat of terrorism that now regards that regime as discredited on the ground that it amounts to a disproportionate abrogation of basic human rights.

A central challenge in enacting anti-terror laws is how best to ensure the security of the nation while also respecting the liberty of its people. In democratic nations, the answer is usually grounded in legal protections for human rights. In Australia, the answer is provided almost completely by the extent to which political leaders are willing to exercise good judgment and self-restraint in the enactment of new laws. This is not a check or balance that has proved effective in Australia when it comes to the enactment of anti-terror laws.

D *Law Is Only Part of the Answer*

Anti-terror laws have a role to play in the prevention of terrorist attacks. However, enacting such laws comes with significant costs. In particular, the use of anti-terror laws can give rise to a sense of grievance in sections of the community if members and groups believe they have been unfairly ostracised or singled out. This sense of grievance can be magnified by the exceptional nature of the laws and what can be heavy-handed government use and sensationalist media reporting. It also reflects the fact that aspects of Australia's anti-terror laws have been almost exclusively applied to members of the Muslim community and their organisations. For example, despite terrorism being a phenomenon that applies across a large range of political ideologies and religions, 16 of the 17 organisations currently proscribed by the Australian government are in some way associated with Islamic goals or ideology.¹⁸⁹

¹⁸⁸ See especially *Secretary of State for the Home Department v JJ* [2006] EWHC 1623 (Admin) (28 June 2006); *Secretary of State for the Home Department v JJ* [2007] 1 QB 446; *Secretary of State for the Home Department v JJ* [2008] 1 All ER 613. For a discussion of the impact of the *Human Rights Act 1998* (UK) c 42 on the United Kingdom control order regime, see K D Ewing and Joo-Cheong Tham, 'The Continuing Futility of the *Human Rights Act*' [2008] *Public Law* 668; Joo-Cheong Tham and K D Ewing, 'Limitations of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31 *Melbourne University Law Review* 462; Joo-Cheong Tham, 'Parliamentary Deliberation and the National Security Executive: The Case of Control Orders' [2010] *Public Law* 79; Keiran Hardy, 'Bright Lines and Open Prisons: The Effect of a Statutory Human Rights Instrument on Control Order Regimes' (2011) 36 *Alternative Law Journal* 4.

¹⁸⁹ The Kurdistan Workers Party is the only non-Islamic terrorist organisation currently proscribed by the Australian government: see Attorney-General's Department (Cth), *Listing of Terrorist Organisations* (18 May 2012) Australian National Security <<http://www.ema.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>>. The 17 organisations are: Abu Sayyaf Group; Al-Qa'ida; Al-Qa'ida in the Arabian Peninsula; Al-Qa'ida in Iraq; Al-Qa'ida in the Islamic Maghreb; Al-Shabaab; Ansar al-Islam; Hamas's Izz al-Din al-Qassam Brigades; Hizballah External Security Organisation; Islamic Movement of Uzbekistan; Jaish-e-Mohammed; Jamiat ul-Ansar; Jemaah Islamiyah; Kurdistan Workers Party; Lashkar-e Jhangvi; Lashkar-e-Tayyiba; and Palestinian Islamic Jihad. See also Andrew Lynch

The disproportionality of the laws can also lead to grievance and alienation — so this is not just a problem of overbearing laws having an undue impact upon human rights. Disproportionality can strike at the effectiveness of the laws by undermining social cohesion and support for Australia's anti-terror strategies. The outcome may be that compromising human rights has a negative effect on the capacity of the laws to prevent terrorism.¹⁹⁰

This is the dynamic that terrorists rely upon. Terrorism as a political strategy requires nations to overreact in their attempts to prevent future attacks. After all, terrorist action cannot achieve its objects through military might, and instead relies upon its goals being assisted by the fear and reactions provoked within a state. Terrorism thus promotes a cycle whereby one attack feeds a reaction that contributes to bringing about a further attack. One way this can occur is by anti-terror laws causing resentment within a community so as to assist in recruitment by terrorists. Such resentment may also mean that parts of the community are less likely to cooperate with the police and intelligence agencies seeking to prevent an attack.¹⁹¹

This problem can be met, or at least minimised, by applying anti-terror laws fairly and not selectively across the community and by drafting them in a way that is consistent with accepted community and legal values and human rights standards. As then United Nations Secretary-General Kofi Annan said in an address to the International Summit on Democracy, Terrorism and Security in March 2005:

Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective — by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is more likely to find recruits.¹⁹²

Even where anti-terror laws are applied fairly and drafted appropriately, their exceptional nature means that there will always be a risk that they will produce a community counter-reaction. This in turn can contribute to radicalisation and the growth of domestic extremism. Justice Whealy of the New South Wales Supreme Court, himself experienced in overseeing terrorism trials, has made this point in stating that 'there is some danger that the imposition of stern sentences, no matter that it may be completely justified, has the capacity to inflame resentment

and Nicola McGarrity, 'Counter-Terrorism Laws: How Neutral Laws Create Fear and Anxiety in Muslim Communities' (2008) 33 *Alternative Law Journal* 225.

¹⁹⁰ See Kent Roach, 'Must We Trade Rights for Security? The Choice between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain' (2006) 27 *Cardozo Law Review* 2151.

¹⁹¹ See Aziz Z Huq, Tom R Tyler and Stephen J Schulhofer, 'Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing' (2011) 17 *Psychology, Public Policy, and Law* 419; Aziz Z Huq, Tom R Tyler and Stephen J Schulhofer, 'Mechanisms for Eliciting Cooperation in Counterterrorism Policing: Evidence from the United Kingdom' (2011) 8 *Journal of Empirical Legal Studies* 728.

¹⁹² Kofi Annan, 'A Global Strategy for Fighting Terrorism' (Speech delivered at the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, 10 March 2005) <<http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html>>.

and may encourage young Muslim men into an extremist position.¹⁹³ This risk can be especially evident in regard to the handing down of sentences of 20 or more years for people involved only at the very early stages of preparing for what may or may not eventuate as a terrorist attack.¹⁹⁴ As Justice Whealy concludes, the prevention of terrorism requires a broader range of strategies than new laws. Hence, he takes the view that ‘western countries will have to give attention to the task of developing effective and reliable counter radicalisation strategies.’¹⁹⁵ This view has been backed by others, including the Parliamentary Joint Committee on Intelligence and Security in its 2006 *Review of Security and Counter-Terrorism Legislation*.¹⁹⁶

Australia’s federal governments have come relatively late to the realisation that anti-terror laws need to be complemented by a comprehensive national framework of community-based strategies.¹⁹⁷ The federal government acknowledged the importance of such strategies in its 2010 *Counter-Terrorism White Paper*¹⁹⁸ and allocated \$9.7 million over four years to addressing the issue of domestic violent extremism in its 2010 budget.¹⁹⁹ A Countering Violent Extremism Taskforce has also been established within the federal Attorney-General’s Department, tasked with ‘developing and implementing a sophisticated and coordinated national approach to countering violent extremism.’²⁰⁰ The aim is to ‘reduce the potential for a home grown terrorist attack through building a more resilient Australia that is less vulnerable to the processes of radicalisation and through assisting individuals to disengage from violent extremist influences.’²⁰¹ This reflects an assessment that there is a significant risk of ‘homegrown’ terrorism in Australia. As the former federal Attorney-General Robert McClelland has noted:

Since 2000, there have been four major terrorist plots disrupted in Australia. To date, 38 individuals have been prosecuted as a result of counter-terrorism

¹⁹³ Justice Anthony Whealy, ‘Terrorism and the Right to a Fair Trial: Can the Law Stop Terrorism? A Comparative Analysis’ (Paper presented at the British Institute of International and Comparative Law, April 2010) 36 <[http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/whealy0410.pdf/\\$file/whealy0410.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/whealy0410.pdf/$file/whealy0410.pdf)>.

¹⁹⁴ See *R v Elomar* (2010) 264 ALR 759. The five Sydney men received sentences ranging between 23 and 28 years, even though Whealy J found that they had not decided on a particular terrorist target, and that they had not necessarily even intended to kill innocent civilians: at 774–5 [60]. See generally McGarrity, ‘“Testing” Our Counter-Terrorism Laws’, above n 83.

¹⁹⁵ Whealy, ‘Terrorism and the Right to a Fair Trial’, above n 193, 37.

¹⁹⁶ *PJCIS Review*, above n 116. The Committee recommended ‘that the Government support/ sponsor a study into the causes of violent radicalisation in Australia to inform Australia’s counter terrorism strategy’: at 10 (recommendation 1). See also at 8–10 [2.14]–[2.19].

¹⁹⁷ Compare the Australian approach with the United Kingdom Home Office’s ‘Prevent’ strategy, which was launched in 2007 to address the problems of radicalisation at a national level. It has been reviewed in 2011 after four years of operation: Home Office (UK), *Prevent Strategy*, Cm 8092 (2011) <<http://www.homeoffice.gov.uk/publications/counter-terrorism/prevent/prevent-strategy>>.

¹⁹⁸ Australian Government, *Counter-Terrorism White Paper*, above n 3, ch 7.

¹⁹⁹ Attorney-General’s Department (Cth), *Countering Violent Extremism* <<http://www.ag.gov.au/Nationalsecurityandcounterterrorism/Counteringviolentextremism/Pages/default.aspx>>.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

operations and 23 have been convicted. Significantly, 37 of the 38 people prosecuted are Australian citizens and 21 of the 38 were born in Australia. For this reason, the Government has focussed on the risk of vulnerable individuals in Australia becoming radicalised to the point of being willing to use violence.²⁰²

These initiatives follow a mix of other strategies which have complemented the often blunt and coercive powers provided by anti-terror laws. Such measures go back to 2005, following the London bombings of that year, when COAG held a special meeting on counter-terrorism at which it resolved to combat intolerance and violence within Australian Muslim communities by establishing a National Action Plan.²⁰³ That plan was released in July 2006, with its primary goal being to 'reinforce social cohesion [and] harmony and support the national security imperative in Australia by addressing extremism, the promotion of violence and intolerance, in response to the increased threat of global religious and political terrorism.'²⁰⁴ Similar initiatives have continued under the federal Labor government's recent \$77 million social inclusion and national security agenda.²⁰⁵ As part of this, the Australian Social Inclusion Board was established in May 2008 with one of its goals being to 'eliminat[e] the threats to security and harmony that arise from excluding groups in our society'.²⁰⁶

IV CONCLUSION

Australia needed to enact anti-terror laws in the wake of the September 11 attacks. Those laws were required to protect the community by preventing terrorist attacks from occurring. Passing new anti-terror laws also enabled Australia to live up to its international obligations, and signalled that as a nation Australia rejects such forms of political violence.

In the decade since September 11, the federal Parliament has enacted 54 anti-terror laws, with many more made by the states and territories. This has given rise to a large and remarkable new body of legislation providing for powers and sanctions that were unthinkable prior to the 2001 attacks. Indeed, the rhetoric of a 'war on terror' reflects the nature and severity of the laws enacted in response to the threat. While these laws were often cast as a transient response to an exceptional set of events, it is now clear that the greater body of this law will remain on the Australian statute book for the foreseeable future.

This poses a long-term challenge for the Australian legal system and Australian democracy. While new anti-terror laws were needed, the laws actually enacted diverge in too many respects from the laws that Australia should have achieved. This means that the nation has anti-terror laws which are not as

²⁰² McClelland, above n 83. Note, as discussed at above n 83, that the number of people 'charged' with terrorism offences in Australia is 37.

²⁰³ See COAG, *Communiqué: Special Meeting on Counter-Terrorism* (2005) 3.

²⁰⁴ Ministerial Council on Immigration and Multicultural Affairs, *A National Action Plan to Build on Social Cohesion, Harmony and Security* (2006) 6.

²⁰⁵ Attorney-General's Department (Cth), *Countering Violent Extremism*, above n 199.

²⁰⁶ Australian Social Inclusion Board, *Social Inclusion in Australia: How Australia Is Faring* (2010) 1.

effective as they should be in protecting the community from harm, because, for example, their selective application and disproportionate impact may actually contribute to the growth of domestic extremism. A related cost is that the overbreadth of the laws may, over the longer term, erode the very democratic freedoms, including the rights to freedom of speech and liberty, that they are designed to protect. The laws bring this about not only through their direct impact, but also by creating new political and legal norms. These norms broaden the extent to which it is acceptable for Australian law to sanction extraordinary powers or outcomes, such as detention without charge or the silencing of speech.

Problems with the laws often stem from the inadequate parliamentary processes by which they were made. It is not surprising that a rushed legislative timetable has given rise to major issues when it comes to constructing an entire new body of law, especially one involving the delicate interaction of national security and personal freedom. There is no doubt that the quality of Australia's anti-terror laws has been adversely affected by the often poor and expedited processes used to bring about their enactment.

These flaws are compounded by the reluctance of Australian governments to remedy known defects in the laws after their enactment, as often identified by independent and other reviews. Fortunately, many of these defects have since been taken up in 2010 legislation.²⁰⁷ However, even that legislation came into force years later than it should have, and fails to engage with some of the more intractable problems. It can only be hoped that the appointment of an independent monitor to oversee Australia's anti-terror laws will contribute to a stronger political willingness to review and revise these laws in a timely manner.

Australia's new anti-terror laws expose structural problems with Australia's system of law. That system is dependent upon an effective parliamentary process and a culture of respect among political leaders when it comes to democratic values, rule of law principles and human rights. Anti-terror laws reveal how many of the bedrock principles of Australian democracy are actually only assumptions and conventions within the political system rather than hard legal rules that demand compliance. The laws reveal the capacity of politicians and parliaments to readily contravene these values, and in doing so to create new and problematic precedents for the making of other laws. This can happen because of weaknesses in political leadership and the fragile status of important values within Australian democracy.

²⁰⁷ *National Security Legislation Amendment Act 2010* (Cth).