SUBMISSION TO COAG REVIEW OF COUNTER-TERRORISM LEGISLATION COMMITTEE

18 SEPTEMBER 2012

HH JUDGE MAIDMENT – COUNTY COURT OF VICTORIA

Background

By letter dated 24 August 2012, The Hon Anthony Whealy QC, Chair of the COAG Review of counter-terrorism legislation committee, invited me to consider making a submission to the COAG Review. This submission is offered in response to that invitation.

I practised as a barrister at the Bar of England and Wales from 1971 to 1981. I practised as a barrister at the Victorian Bar from 1981 to 2011. I was appointed as senior counsel in 2001. In June 2011 I was appointed as a Judge of the County Court of Victoria.

As senior counsel I was regularly briefed by the Commonwealth Director of Public Prosecutions to advise in relation to and to lead the prosecution teams in complex cases, including several prosecutions of persons charged pursuant to Australian counter-terrorism laws.

Cases involving the application of counter-terrorism laws in which I have been engaged include the following:

R v Roche (pre-trial advice only) [NB this case necessarily involved charges pursuant to the laws available before the introduction of Part 5.3 of the Criminal Code]

R v Zaky Mallah (pre-trial hearings only)

R v Izhar Ul Haque (pre-trial hearings only)

R v Joseph Terrence "Jack" Thomas (pre-charge advice, pre-trial hearings for first trial and control orders only)

R v Faheem Khaled Lodhi (committal, pre-trial, interlocutory appeal and trial)
R v Abdul Nacer Benbrika and others (pre-charge advice, pre-trial and trial)
R v Mohammed Ali Elomar and others (the latter part of the pre-trial and trial)
R v Fattal and others (advice during the pre-trial arguments)
R v Abdul Nacer Benbrika and others (No. 2) (advice, pre-trial and interlocutory appeal)
Dr Haneef – I was briefed by the CDPP to conduct an internal investigation into the role of his Office in the decision to charge Dr Haneef. Parts of my Report were submitted by the Director to the Inquiry into that case conducted by The Hon John Clarke QC.

1. Are the Offence Provisions necessary?

The arguments in favour of and against the terrorism offence provisions in Part 5.3 of the Criminal Code have been analysed and debated by and amongst many academics since they were introduced in 2002. I adopt an argument in favour which is stated simply by Gregory Rose and Diana Nestrovoska in an article entitled "Australian counter-terrorism offences: necessity and clarity in federal criminal law reforms" [(2007) 31 Crim L J 20] as follows:

> *... the new criminal offences were necessary to update or extend prior legislation ... Shortcomings in prior legislation prohibiting acts of political violence included a lack of extraterritorial reach, inadequate proscription of preparatory and supporting activities, inability to prohibit participation in terrorist organisations, non-implementation of applicable treaties, inadequate applicable penalties and inadequate incitement laws. Not least in these prior shortcomings was the lack of a legal definition for terrorism in the context of globally networked political violence. The 2002 reforms gave terrorism a sound contemporary legal definition ...The definition provides a toolbox*

within which are placed offences with more severe penalties than correlated common violent crimes. These include terrorist acts, preliminary acts supportive of terrorist acts and participation in terrorist organisations. Although remoteness at the extremities of the range of preparatory acts is undefined, the difficulty of establishing criminal intention will correctly define the limits of remote acts.

At first blush, the range of criminal offences available under 'prior legislation' to deal with terrorist activity may appear to be comprehensive. It includes both substantive offences such as murder, making threats to kill, kidnapping, assaults causing grievous bodily harm, hostage taking, hijacking, foreign incursions, malicious damage to property, interference with communications, treason, sedition, smuggling and fraud as well as inchoate offences such as conspiracy and attempt to commit one of the substantive offences to which I have referred.

I proffer some examples of conduct which, in my opinion, would not have been caught by the criminal laws of Australia prior to the 2002 reforms but which would be caught by the anti-terrorism laws in the Criminal Code:

1) A political fanatic acting alone in Australia stockpiles all the chemical ingredients necessary to manufacture high explosives. All such ingredients, along with batteries, fairy-light globes, digital alarm clocks, metal tubes and other components for making detonators have been purchased over the counter of shops in a suburban shopping centre. All purchases are made with the sole intention of using them to make a powerful bomb. The materials purchased are of a quality and quantity that would enable the fanatic, by following simple instructions available on the internet, to make such a bomb within 24 hours of commencing the manufacturing process. The fanatic downloads such instructions. He intends, as soon as the bomb

is made, to detonate it in a crowded public place in Australia so as to kill and maim as many members of the general public as possible. The fanatic is motivated by a desire to intimidate the federal government into complying with demands for the abolition of all goods and services taxes;

2) An Australian citizen trains overseas with a terrorist organisation known regularly to engage in religiously and politically motivated mass murder in which activity the organisation has an extensive record of success. The individual does so in order to obtain the skills necessary to carry out in Australia similarly motivated acts of mass murder. Armed with the necessary skills, the individual returns to Australia with the intention of engaging in such acts and with the intention of recruiting other like minded Australian residents with similar training to join him in that endeavour;

3) An Australian resident, acting alone in Australia, makes enquiries of a chemical supplier with intent to acquire chemical ingredients necessary for the manufacture of high explosives. The enquiry is made with the intention that an improvised explosive device will be manufactured and detonated so as to cause serious damage to a State electricity supply system in Australia in circumstances likely put at risk the safety of members of the public. The prospective actions are motivated by a desire to further a political or religious cause and to coerce by intimidation the Australian Government into withdrawing Australian troops from a foreign country.

2. The scope of the Offence provisions

The Offence Provisions are concerned principally with the creation of criminal offences involving activity which is aimed intentionally or recklessly towards the commission of a terrorist act, in Australia or elsewhere, and with activity

concerning intentional or reckless involvement in or with terrorist organisations, based in Australia or elsewhere.

In the context of international terrorism in the modern era in which communications between participants can be instant and difficult to detect and in which terrorist attacks can be prepared quickly and carried out without warning, special measures are required. Events can move very rapidly from a situation where an individual (or a group of individuals) is apparently doing nothing with which they could be charged under traditional domestic criminal law to one where they cause catastrophic loss of life. Indeed, even where the activities of such persons have attracted the attention of law enforcement agencies, there may be no offence with which they could be charged under traditional criminal laws until a stage dangerously proximate to the commission of a serious violent act. Thus, it is argued, the ability of Police to intervene at a stage much earlier than would have been possible without the availability of the terrorism offences significantly enhances the capacity of law enforcement and the criminal justice system to protect the community.

It is submitted that the evidence led in many of the cases referred to above provides strong support for this argument.

It is conceded readily that the type of <u>conduct</u> which <u>may</u> be caught by the offence provisions is (necessarily) of almost limitless scope. However, as Rose and Nestrovoska point out (*ibid*), "the difficulty of establishing criminal intention will correctly define the limits of remote acts".

Each offence requires proof of an intentional or reckless link between the alleged conduct and a "terrorist act" as defined in s. 100.1 of the Criminal Code. This link is either direct as required by the offences in Division 101, or indirect as required by Division 102. It is proof of this link with a terrorist act (or, where relevant, a link with a terrorist organisation as defined or

specified) which confines the scope of each offence to activity which may reasonably be characterised as terrorist activity deserving of sanction by the criminal law.

The point may be illustrated by reference to the case of *R v Lodhi* mentioned above. He was convicted, *inter alia*, of an offence contrary to s.101.6 of the Criminal Code, namely doing an act in preparation for a terrorist act. The relevant conduct was enquiring of chemical suppliers about the availability of certain chemicals which, in combination, were suitable for making a bomb. The fault element attaching to that conduct was satisfied by proof of intention. That is, it was proved that in making the enquiry *Lodhi* meant to "do an act in preparation for a terrorist act".

So much seems simple enough. The alleged conduct was proved by direct evidence and was not disputed. However, in order for the jury to convict, the jury was required to find beyond reasonable doubt that the prospective action or threat of action to which the "act in preparation" was directed had all of the characteristics of a "terrorist act" as defined. Although not expressed as such, the separate characteristics of a "terrorist act" which must be proved by the prosecution are themselves to be treated and pleaded as elements of the offence (see the decision of the NSWCCA in *R v Lodhi* (2006) 199 FLR 303 at 323-324). In the trial of *R v Lodhi*, proof that the accused intended that his conduct was "an act in preparation for a terrorist act" involved proof beyond reasonable doubt that his intention was directed at preparation for the following:

An action or threat of action involving the detonation of one or more explosive or incendiary devices to be done with the intention of:

a) *Advancing a political, religious or ideological cause, namely the cause of "violent jihad";*
   and

b) With the intention of coercing or influencing by intimidation the Government of the Commonwealth or a State;

or

c) Intimidating the public or a section of the public;

And

With the intention that the action or threat of action would be of a kind that would in the ordinary course of events:

a) Cause serious harm that is physical harm to a person; or

b) Cause serious damage to property; or

c) Cause a person's death; or

d) Endanger a person's life other than the life of the person taking the action; or

e) Create a serious risk to the health and safety of the public or a section of the public.

And

The action or threat of action was not advocacy, protest, dissent or industrial action; or

(to the extent that the action or threat of action could be so characterised) that it was of a kind which was intended;

i. To cause serious harm that is physical harm to a person; or

ii. To cause a person's death; or

iii. To endanger the life of a person other than the person taking the action; or

iv. To create a serious risk to the health or safety of the public or a section of the public.

As will be apparent from the above, proof of the requisite fault element (the intent with which the ostensibly innocent conduct was carried out) was a complex and exacting task for the prosecution. But it was of course proof of each facet of that fault element which gave *Lodhi's* conduct its serious criminal character. In the trial of *R v Lodhi*, proof of that element of "intent" was assisted, *inter alia*, by evidence of *Lodhi's* possession of a recipe in his own handwriting for the manufacture of high explosives using the very chemicals about which he enquired. There was also evidence that *Lodhi* used a false name and address in making that enquiry. And there was evidence of his possession of a substantial quantity of documents on compact disc and video glorifying the actions of suicide bombers, providing paramilitary instruction and supporting the pursuit of "violent jihad".

The terrorism offence provisions enabled Police to charge *Lodhi* with serious criminal offences well before his conduct amounted to an "attempt" to commit a "traditional" offence, such as criminal damage. Likewise, because the evidence did not reveal that *Lodhi* was acting with any other person, a conspiracy charge was not available. Theoretically at least, had *Lodhi* not been arrested he could have advanced his plans to a point where he was able to carry out a terrorist act involving the detonation of a powerful bomb in a public place within a matter of a few days. At the date of his arrest *Lodhi* had probably not committed any offence which pre-existed the 2002 reforms.

3. Do the Offence Provisions work in practice?

Since the terrorism Offence Provisions were introduced in 2002 there have been a number and variety of prosecutions brought under them. My own experience and observation is that the Offence Provisions have worked well enough. Those against whom charges have been pursued to trial have sought to test the scope and validity of the provisions both at trial and on appeal. Thus far, it may be said that the provisions have generally withstood those challenges.

As with prosecutions of "traditional" indictable offences, some of the cases brought to trial have resulted in convictions, some in acquittals. Again, as is generally the case, the outcomes have reflected the strength or weakness of the evidence of fact as distinct from any legal problem with the new provisions. To the extent that legal issues have played a significant part in the outcomes they have been concerned with the admissibility or discretionary exclusion of evidence.

The cases involving terrorism offences which have been brought to trial to date include the following:

R v Mallah (acquitted by a jury of planning to do a terrorist act but pleaded guilty to threatening a Commonwealth Officer);

R v Thomas (convicted at his first trial of receiving funds from a terrorist organisation and acquitted of providing support or resources to that organisation. He appealed successfully on the basis that admissions contained in an interview conducted in Pakistan with Officers of the Australian Federal Police should have been excluded by the trial judge. He was retried on the basis of admissions he had made to a journalist at in a video-taped interview conducted at shortly before his first trial. He was acquitted by the jury on his second trial);

R v Lodhi (convicted of doing an act in preparation for a terrorist act and two offences of possessing documents connected with preparation for a terrorist act, knowing of that connection. The convictions were upheld by the NSW Court of Criminal Appeal. Special leave to appeal to the High Court was refused);

R v Izhar Ul Haque (he was charged with undergoing training with a terrorist organisation. Evidence of admissions made by Ul Haque to the Australian

Federal Police was excluded by the trial judge. As a result, the Crown filed a *nolle prosequi*);

R v Benbrika and others (Benbrika and six others were convicted at trial of being members of a "home grown" terrorist organisation. Benbrika and three of the other accused were also convicted of more serious terrorism offences concerned with directing or managing the terrorist organisation. Two other persons charged with Benbrika pleaded guilty to being members of that terrorist organisation. Four of those tried with Benbrika on the charge of being a member of the same terrorist organisation were acquitted by the jury);

R v Bilal Khazal (he was convicted by a jury of making a document connected with preparation for a terrorist act, knowing of that connection. The jury failed to agree on a charge of inciting acts in preparation for a terrorist act);

R v Elomar and others (five of the nine accused were convicted by a jury of conspiring to do acts in preparation for a terrorist act. The remaining four accused pleaded guilty to lesser terrorism offences).

R v Fattal and others (three of five accused were convicted by a jury of conspiring to do acts in preparation for a terrorist act. The remaining two accused were acquitted by the jury)

It is submitted the only real "difficulties" with the Offence Provisions in practice are those faced by the prosecution in proving each element beyond reasonable doubt. In my opinion, those "difficulties" are simply a reflection of the reasonable and appropriate limits placed by the legislature upon the scope of the offences contained therein. For example, the requirement in proof of the "terrorist act" that the prosecution prove that the action or threat of action is not (mere) "advocacy, protest, dissent, or industrial action" preserves the freedoms of speech, dissent and reasonable public protest.

Where the conduct may be so characterised, unless the "advocacy, protest, dissent or industrial action" can also be shown to involve an intention to cause death, serious physical harm or serious risk to public safety, the action is not a "terrorist act" within the terms of the Criminal Code.

4. Are the Offence Provisions fair and reasonable?

Again, it is submitted the simple answer is "yes". The Crown has much to prove, particularly as to "intent" before an offence is made out. The more complex issues raised by this question are concerned with ensuring a fair trial for those accused of such offences.

A feature of investigations of terrorist activity is that the activities of Police authorities almost inevitably intersect with activities of those agencies responsible for national security. The respective duties and responsibilities of the several agencies concerned with these matters differ in accordance with the separate statutory provisions under which they operate. Great care is required by each agency to ensure that its activities are carried out in a manner that is both compatible with the objects of other agencies operating in the same or a related area and does not compromise a future prosecution.

Whilst, it is my observation that great care is taken by all agencies involved in the investigation and prosecution to ensure that no prejudice to a person accused of terrorism offences arises from this dichotomy, the ultimate responsibility for ensuring a fair trial is that of the trial judge.

This is not a straightforward task for a trial judge. It has been recognised by trial judges that there is a particular risk that human prejudices may intrude into the trial process. Stern warnings have been issued accordingly. However, experience suggests that juries have been, and are, able and willing to follow judicial direction and bring an unbiased mind to their deliberations. I do not believe any evidence has emerged to date to suggest otherwise.

It is noteworthy that in the trial of *R v Benbrika and others* the jury acquitted four of the twelve accused. The verdicts of the jury (both guilty and not guilty) were consistent with the relative strengths and weaknesses of the evidence. The jury acquitted each of those accused against whom there was no direct evidence of knowledge that the relevant organisation was a terrorist organisation. Had the approach of the jury been influenced by prejudice, there were sound bases in the circumstantial evidence upon which they could have convicted each of those four accused, without criticism.

5. Definition of "terrorist act"

I do not subscribe to the view that the definition of "terrorist act" in s 100.1 of the Criminal Code be altered by removing from it the requirement that the action be done with the intention of advancing a political, religious or ideological cause.

The argument for the removal of the requirement seems to be based largely on the assumption that, absent the need to prove such an intention, the prosecution will not be permitted to lead evidence of the possession by the accused of writings and electronic recordings suggesting that the accused had an interest in the pursuit of such a cause. It is argued that such material is in many instances unduly prejudicial and that trials would be substantially 'fairer' if it was excluded.

The flaw in that argument is that, whilst the evidence would not be required in proof of that element if removed, it would in most cases still be highly probative of the other elements of the offence. It would tend to prove motive. It would tend to prove the intent or recklessness with which relevant 'conduct' was carried out. It is submitted that in all cases tried to date, the removal of the requirement would not have reduced the scope of the evidence permitted to be led at the trial.

Trial Judges have been careful to minimise the risk of unfair prejudice. Videos showing the actual beheading of 'enemies of Islam' have been heavily edited or excluded. The display to the jury of 'gruesome images' has been limited or excluded. Descriptions have been permitted in substitution. The quantity of and manner of presentation of 'extremist material' in the possession of the accused has been the subjected to judicial control. Appropriate warnings against unfair prejudice have not only been given, they have apparently been heeded.

It is surely a better definition of "terrorism" and "terrorist act" that it include an intention to advance a political, religious or ideological cause. Its removal would do little more than lighten the burden on the prosecution.

6. Finally

It should be appreciated that where the prosecuting authority is faced with a choice between a charge pursuant to the terrorism Offence Provisions and a charge from the array of 'traditional offences', it is likely that a 'traditional' charge will be preferred. If there is evidence of murder or a conspiracy to murder, it will generally be easier to prove than an offence of committing a terrorist act or conspiracy to do so on the same facts.

HH Judge Richard Maidment
County Court of Victoria