CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

Australian Terror Laws in Action

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10th Biennial Conference

Bali Hyatt Hotel, Sanur Beach, Bali
Saturday 2 July – Friday 8 July 2005

The Criminal Lawyers Association of the Northern Territory

Conference 2005

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1. INTRODUCTION

In the wake of the atrocities in New York and Washington DC on 11 September 2001 most countries introduced legislation to guard against and to punish acts of terrorism. A new language emerged utilising phrases that are now commonplace. Australia, like most other western democracies, has committed itself to an apparently endless 'war against terrorism'. This war has taken the shape of a pseudo-religious crusade. Thus far all of the people questioned under the new ASIO powers and charged under the new Terror Laws have all been Muslims. In Sydney, a disturbed former Liberal Party staffer threatened the life of the NSW Premier because of political dissatisfaction. The NSW Police Counter Terrorism Command investigated him. He was not charged with any terrorist related crime and there has been no suggestion by any commentator that he should have been.

It is now opportune to review the way that Australia's terror laws have been utilised in the nearly three years since they were passed. This paper is an overview of the cases that have been commenced. It is important for me to declare my interests at the outset. I have acted for or am currently acting for four people who have been charged with terrorist crimes. Some of these men have been subjected to ASIO's questioning regime. The paper is largely descriptive. It is a defence lawyer's point of view.

Initially the Commonwealth Government was tempted to pass a much more draconian regime of laws than was ultimately passed by Parliament in 2002. The current laws did not embrace many of the excesses of the US Patriot Act and did not institute quasi-judicial military tribunals such as the one which is to determine the fate of the detainees in Guantanamo Bay. Even so, the first draft of the Commonwealth's raft of measures was certainly very oppressive. It created a

series of absolute and strict liability offences carrying life imprisonment with a reversal of the onus of proof. It criminalised membership of certain proscribed organizations. It provided for detention without charge for a week with the ability to roll over the week into two weeks and so on ad infinitum without access to lawyers, friends or relatives. It created a regime of coercive questioning with no right to refuse to answer and where the answers could be used in evidence in criminal prosecutions.

The Law Council of Australia was instrumental in convincing the Parliament to moderate the Government's legislation. Its voice was the most coherent amongst the many that opposed the legislation in part or in whole. Ultimately the legislation was amended in many substantial respects.

These provisions are now in operation. The picture is emerging that the Government is prepared to utlise its legislative armory against terrorist suspects in a way that is quite exceptional. The combination of ASIO's coercive powers, the broad definition of terrorist offences, the extremely harsh conditions of custody in which terrorist suspects are held and the running commentary of politicians and the media about the arrest, prosecution and detention of terrorist suspects are all combining to create very difficult conditions for the trials of these people. These trials and their committal hearings are increasingly ultiising provisions that enable evidence to be heard in camera, the use of pseudonyms, the suppression of evidence from publication, the use of witnesses being held in overseas prisons — including prisoners held without charge under severe security legislation and evidence extracted from suspects being held in conditions that would be regarded as illegal or tyrannical in Australia. The prospect is looming of non-security cleared defence lawyers being excluded from parts of these cases.

There has been what I describe as a "whole-of-government" approach to these terrorist prosecutions. ASIO targets the suspects. Some are coerced into

speaking behind closed doors. ASIO backgrounds safe journalists and politicians. The police raid suspects' houses. Documents are seized. People are arrested in a blaze of publicity. Many Commonwealth and State politicians feel justified in maintaining a running commentary about terrorist trials.

The NSW government seems to make strategic announcements about their anti-terrorist policies at times that coincide with important developments in terrorist court cases. The Carr government excels in media management and spin doctoring. Laws have been changed overnight in an attempt to rein in the odd judicial officer who is prepared to grant bail to people charged with terrorist offences.

2. THE TERRORIST OFFENCES

The terrorism offences are to be found in the Commonwealth Criminal Code Act. These offences were added to the Code in 2002 and 2003. These offences criminalise a great range of acts and omissions and extend Australia's criminal jurisdiction to all parts of the planet. There are obvious terrorist crimes such as engaging in a terrorist act (s.101.1) and detonating an explosive device in a government facility or public transportation system (s.72.3), both carrying maximum penalties of life imprisonment. But there are also many offences that criminalise acts which fall short of the actual commission of a terrorist act but which also carry very heavy penalties.

The Code criminalises:

providing or receiving training connected with terrorist acts (s.101.2) – 15 years imprisonment;

possession of things connected with preparation for or assistance in a terrorist act(s101.4) – 15 years imprisonment;

collecting or making documents likely to facilitate terrorist acts (s.101.5) – 15 years imprisonment;

preparing or planning for a terrorist act (s.101.6) – life imprisonment;

directing the activities of a terrorist organisation (s.102.2) – 25 years imprisonment;

membership of a terrorist organisation (s.102.3) – 10 years imprisonment;

recruiting a person for a terrorist organisation (s.102.4) – 25 years imprisonment;

training or receiving training from a terrorist organisation (s.102.5) – 25 years imprisonment;

receiving funds from or making funds available to a terrorist organisation (s.102.6) – 25 years imprisonment;

providing support to a terrorist organisation (s.102.7) – 25 years imprisonment; and

collecting funds to facilitate or engage in terrorism (s.103.1) – life imprisonment.

As well as all of these substantive offences, the Criminal Code also criminalises attempts to commit these offences (s.11.1), the incitement of these offences (s.11.4) and the use of an innocent agent to commit the offences (s.11.3). Aiders and abettors and conspirators can also be prosecuted, convicted and punished in the same manner as the principal offenders (ss.11.2 and 11.5).

So far, five men have been charged with offences under Division 101 of the Criminal Code. None have yet been charged with the commission of a violent terrorist act. One has been charged with receiving training connected with terrorist acts – he is alleged to have trained with a terrorist organisation in Pakistan. One was charged with possession of a videotape connected with the

preparation for a terrorist act. Two others have been charged with making or collecting documents likely to facilitate terrorist acts and one charged with preparation and planning terrorist acts. One has been charged with receiving funds for terrorist activities. None of the acts of the five persons charged thus far could properly and legally be described as "attempts". They are all alleged to have taken steps which, properly analysed, constitute acts of preparation for an ultimate act of terrorism. Usually, the law only criminalises substantive offences and attempts to commit them. Mere acts of preparation are not traditionally considered to be sufficiently proximate to a criminal act to justify criminal sanctions. The new terrorism offences are unusual in this regard.

Section 100.1 defines a terrorist act to mean an action or threat of action done or made with the intention of advancing a political, religious or ideological cause and with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country or intimidating the public or a section of the public. The act must cause death or serious harm to a person, serious damage to property, endanger a person's life, create serious risks to the health or safety of the public or seriously interfere with, disrupt or destroy an electronic system such as an information, telecommunications or financial system. Ordinary acts of protest, dissent, advocacy or industrial action which are not intended to cause serious harm, death or endanger the life of a person or create a serious risk to the health or safety of the public do not constitute terrorist acts.

3. THE ASIO PROVISIONS

Part III, Division 3 of the ASIO Act provides ASIO with extraordinary powers to detain and conduct coercive questioning of anybody who may substantially assist in the collection of intelligence that is important in relation to a terrorism offence (s.34C). This detention and questioning takes place after the issue and service of a warrant under s.34D. The subject of the detention and questioning does not

have to be suspected themselves of complicity in any terrorist act. It is sufficient if the person could substantially assist in the collection of intelligence about terrorism. Practically speaking, it is likely that the overwhelming majority of persons detained and questioned under these powers will actually be suspected of the broad range of terrorism offences. I certainly suspect, that given the broad scope of terrorism offences, nearly all of the people who have been subject of s.34D warrants have been suspected by ASIO of complicity in one of the many terrorism offences in the Criminal Code.

Warrants may stay in force for up to 28 days. During the term of the warrant, the subject can be questioned for a total of 24 hours (an initial eight hour period with two subsequent eight hour periods with approval) or for 48 hours if a person requires the assistance of an interpreter. A person who is detained pursuant to a warrant can be held for a maximum of 168 continuous hours (seven days).

The questioning is coercive. Failure to answer questions or to give information is a criminal offence that carries a maximum of five years imprisonment. So too is failing to produce records or things that are required to be produced under the warrant. Giving false or misleading answers is also a criminal offence carrying a maximum penalty of five years. Hence a person is required to provide information, documents or things even though the answers and material may incriminate them. But what is said or produced cannot be used in evidence against that person in criminal proceedings (s.34G(9)). Note, though, that this is merely "use immunity". It is NOT derivative use immunity. This gives rise to some potential problems.

It is open to the examiner to require a subject to produce documents or things during the course of questioning. If the subject produces the document whilst the warrant is in force pursuant to a request made of him under the warrant then neither the information that the person gave about the document nor the document itself could be tendered in evidence at a criminal trial. But, if ASIO or a

police officer learns about the existence of a document or thing because of information provided pursuant to a warrant, it is still open to the law enforcement authorities to seek the issue of a search warrant and then obtain the document for use in a criminal prosecution. I understand that this is exactly what has happened in one of the criminal prosecutions that has been commenced thus far.

The questioning of a subject under these warrants takes place before a retired judge described in the Act as a "prescribed authority". The questioning is usually conducted by a lawyer from the Australian Government Solicitor's Office on behalf of ASIO. The prescribed authority must explain the warrant to the subject (s.34E) and has a statutory duty to ensure that all time limits are strictly complied with. The prescribed authority also must assess whether or not to grant a request to extend the period of questioning and also has the power to order the detention or continued detention of someone under the warrant.

A person can only be detained under a warrant if there are reasonable grounds for believing that if the person is not immediately taken into custody and detained they might alert a person involved in a terrorism offence that the offence is being investigated; or may not appear before the prescribed authority; or may destroy, damage or alter a record or thing that the person may be requested in accordance with the warrant to produce. These same reasons might also lead to a person being detained during the course of questioning even if the initial warrant only required them to appear for questioning without being detained (s.34F(3)).

ASIO has advised the Parliament that so far eight people have been the subject of Section 34D warrants. All of these warrants have been for questioning and none have been for the detention of any suspect. In every case the suspect has been questioned for many hours.

Much of the debate about ASIO's increased powers has focused on the potential use of the detention power yet, so far, this power has not been utilised. From my

perspective, this suggests that the very basis for the existence of this power has been overstated. The questioning and detention regime seems, therefore, to be disproportionate to the threat that terrorism poses to Australia.

Further, based on my experience of the questioning powers in operation I am concerned that they are being used by ASIO for general intelligence gathering. The regime was never designed for this purpose. Rather, it was designed to deal with an imminent threat of a terrorist attack. It also seems that the questioning regime is being used to supplement and enhance general policing powers. It was never intended for police purposes. These extraordinary detention and questioning powers were implemented for intelligence purposes only. In my experience the questioning at ASIO hearings largely relates to past, historical events that have no direct connection with any imminent terrorist threat. Indeed, much of the questioning in one hearing related to my client's indirect associations with other people and lacked any apparent connection to a particular act of terrorism.

My concern is that the questioning regime is being used by ASIO to gather information to add to its broader base of intelligence. The powers are not strictly used to obtain information that might be relevant to a specific, identifiable terrorism offense. They are not being used for their stated and intended purpose.

I also believe that the questioning powers are being used to supplement general policing powers and to assist in securing prosecutions. There is a pattern of close cooperation between ASIO and the police — both the AFP and their state counterparts. The use of the questioning regime to gather evidence for prosecutions is facilitated by the absence of a derivative use immunity. It is standard practice for police investigators to be present at ASIO questioning. These police are obviously using the information obtained through the questioning process to advance criminal investigations. The ASIO questioning is in reality a de facto police interrogation. These powers are as wide as they are

and more powerful than police questioning powers because they are designed for use in support of national security issues — i.e. to ward off the threat of imminent terrorist attacks. They should not be used for ordinary police work.

4. THE TERRORIST TRIALS

i. Jack Roche

Jack Roche was charged with offences that predated the introduction of the special terrorist offenses in the Criminal Code. His case is a reminder that our criminal justice system was capable of dealing effectively with terrorist related crimes without the need to create the new crimes.

Mr Roche was charged with a conspiracy to commit an offence under section 8(3C)(a) of the Crimes (Internationally Protected Persons) Act 1976. He was dealt with in the Supreme Court of WA and, during the course of his trial, pleaded guilty to the charge which in essence alleged that he was party to a conspiracy to explode a bomb at the Israeli Embassy in Canberra.

The section under which he was charged carried a maximum penalty of 25 years. The same section provides a series of offences with varying punishments. The most serious involves the murder or kidnap of an internationally protected person, an offence punishable by life imprisonment. Other offences concerned with attacking the person and a range of offenses concerned with the intentional destruction of property carry penalties ranging from 10 to 20 years. Threatening to commit any such an offence carries 7 years imprisonment.

On any view of it Roche's participation in this offence was objectively very grave. Mr Roche received funds from a co-conspirator in Karachi, traveled to Kuala Lumpur where he met with the now notorious mastermind of the Bali bombing, Hambali. The two of them discussed various plans relating to the conspiracy

before Roche traveled to Indonesia where he purchased a camera and altered his appearance. He returned to Malaysia where he received a further sum of money and reported on his activities. He then flew to Perth, bought a second hand Toyota and borrowed a video camera. He drove from Perth to Sydney and then Canberra and filmed both the Israeli Embassy in Canberra and the Sydney Consulate. Later he flew to Indonesia and met with Abu Bakar Bashir. Finally, Mr Roche made enquiries in Australia about the location of mines and the ability to obtain explosives and then purchased copper head ignitor and model rocket head ignitors before deciding against proceeding with the plan.

Mr Roche received 9 years imprisonment after receiving a 12-month discount on account of promised future cooperation (pursuant to s 21E of the Crimes Act). A non-parole period of 4 years and 6 months was fixed. The Crown appealed against the contended inadequacy of the sentence. The West Australian Court of Appeal dismissed the appeal 2 to 1 (Murray ACJ and Templeman J dismissing the appeal; McKechnie J would have upheld the appeal and re-sentenced the respondent to 15 years with a non parole period of 9 years.)

It seems that most of the prosecution's evidence was obtained as a result of interviews between investigative authorities and the accused, a feature of several other trials that are currently pending.

ii. Zaky Mallah

Zaky Mallah was the first person in Australia charged with the new terrorist offences under the Criminal Code. He was my client and I am pleased to report that he was acquitted of these terrorist charges at his trial in the NSW Supreme Court in March 2005.

Zaky Mallah was a nineteen-year old Australian born youth whose parents had died when he was a teenager. He lived by himself in a one bedroom housing commission flat in the southwestern suburbs of Sydney. He worked as a supermarket shelf stacker and later as a pizza delivery boy. At the time of these

offences he had no prior convictions.

He had applied to the Department of Foreign Affairs and Trade for a passport and consequently was interviewed by ASIO. His application was refused by reason of an assessment that he might prejudice the security of Australia or of a foreign country.

He sought a review of this decision by the AAT which conducted a hearing in March 2003. For much of that hearing he and his barrister were excluded whilst evidence was tendered in his absence. Mr Mallah was very frustrated by this process.

He became the subject of a great deal of media attention with appearances on national television, the Allan Jones Show and in newspaper articles. This publicity led to a hostile reaction to him. There were break-ins to his home and he was relocated by the Housing Commission.

He became very depressed upset and angry especially with ASIO and DFAT. He prepared a videotape in the nature of a suicide message. He also bought a gun and some ammunition. His phone was tapped. The authorities quickly learnt of his acquisition of the gun. His home was raided and his gun was seized. He was charged with firearm offences. He attended Bankstown Court and was fined. The DPP appealed against the lenient penalty. His arrest led to heightened interest from the media, something he began to enjoy. He was featured on the front page of the weekend edition of The Australian in an article entitled "Tortured World of an Angry Young Man". The newspaper published some of the posed 'glamour photographs' that he had supplied and paid him $500.

In this environment the NSW Counter Terrorist Command set up an operation using an undercover police officer who made contact with the accused pretending to be a freelance journalist wishing to write a story about him. This "journalist" offered him media coverage on the front page of Time magazine and

a lucrative payment for any videotape that could be used in television coverage. Mr Mallah explained to the "journalist" that he had a plan to kill an ASIO or DFAT officer and that he had produced a video tape that could be used to explain his reasons for this act.

After three meetings, only one of which was the subject of a Controlled Operations Certificate issued under the Commonwealth Crimes Act, the undercover police officer paid Zaky Mallah $3000 in return for the suicide bomber video tape. Mr Mallah was then immediately arrested and charged with one count alleging that he had committed an act in preparation for or in the planning of a terrorist act, contrary to s 101.6 of the Criminal Code Act, namely, that he sold the video tape as part of a plan to kill an ASIO officer.

Mr Mallah was refused bail and for most of the 16 months that he was on remand he was kept in the highest security conditions in strict isolation in the notorious Goulburn Jail, spending 22 or 23 hours per day in his cell with limited access to a telephone or access for visitors. He was denied permission to join the Friday religious services for members of his faith. His cell was subject to continuous video surveillance. Whenever he was moved it was in the custody of a SWAT team. When I first visited him in remand he was guarded by four prison officers wearing flack jackets and truncheons, one of whom was video taping him as he sat in the interview room wearing orange overalls.

Early in the process we offered to plead guilty to one charge of threatening a Commonwealth Officer, an offence under s 147.2 of the Criminal Code Act that carries a maximum penalty of 7 years. The Commonwealth DPP rejected this offer and then added that charge to the indictment as an extra charge. They also added a third count, also a charge under s 101.6 alleging that he acquired the rifle and ammunition in preparation for and in the planning of a terrorist act.

At the trial the accused initially pleaded not guilty to all charges but pleaded guilty to the charge of threatening a Commonwealth Officer at the end of the

Commonwealth case. This left the jury to determine the two terrorist related charges.

We had sought to exclude all of the evidence obtained by the undercover officer on the basis that he had engaged in conduct that was unlawful involving offences by him of inciting the very terrorist act (the sale of the video tape) that the accused was charged with. We also argued that the undercover officer had acted improperly and unfairly by obtaining confessions from the accused by misrepresenting himself in his conversations with the accused. The trial judge, Justice Wood, found that the police officer had engaged in conduct that amounted to an aiding and abetting or counseling or procuring of the offence charged against the accused (R v Mallah [2005] NSWSC 358 at para 85) and that the police officer had acted unfairly when he questioned the accused. His honour deemed many of the accused's admissions to have been obtained improperly as a consequence of the deliberate false statements made to the accused during the course of the questioning (para 98). Nevertheless, His honour determined to admit the evidence at the trial.

Mr Mallah's case at trial was that he had never had a serious plan to take anyone hostage or to kill them, let alone to die himself in a siege. He gave evidence that he bought the rifle for self-protection because of the series of break-ins and threats he had experienced. He said that his dealings with the journalists were to secure publicity for himself and to obtain money for items that were newsworthy. Much of his discussion with the undercover police officer was nonsense. He was stringing him along so that he could get the money that was on offer.

The jury delivered verdicts of "not guilty" in relation to the two terrorist charges. On 21 April 2005 Wood CJ at CL sentenced Mr Mallah in relation to the charge of threatening a Commonwealth officer to imprisonment for 2 years and 6 months to date from 3 December 2003. His honour ordered his release at the expiration of one year and nine months and made a recognisance release order requiring him

to be of good behaviour for two years.

The jury verdicts reflected a widespread impression that the authorities had over charged this young man. After the acquittals the Federal Police Commissioner distanced the AFP from the proceedings by pointing the finger in the direction of the NSW Counter Terrorism Command who had brought the charges. In fact both the AFP and the NSW Police were instrumental in the prosecution. The Commonwealth DPP had carriage of the matter throughout. The Commonwealth Attorney General informed the media after the trial that he would examine ways of tightening the law.

iii. Izhar Ul-Haque

Izhar Ul-Haqueis a 21-year old medical student who was arrested in April 2004 and charged with receiving training from a terrorist organization, an offence which carries 25 years imprisonment. He has been committed for trial to the Supreme Court in Sydney. The trial will commence later this year.

The case involves an allegation that Mr Ul-Haque trained in Pakistan controlled Kashmir with an organisation called Lashkar-e-Toiba (LET). This charge has been laid even thought LET was not proscribed as a terrorist organisation by Australia at the time of Mr Ul-Haque's alleged participation. Most of the evidence against Mr Ul-Haque was obtained in a series of interviews with the AFP. There is no doubt that Mr Ul-Haque participated in a training camp run by LET. There seems to be agreement that, following a three-week training course, Mr Ul-Haque decided not to proceed with his preparations for Jihad in Kashmir. Rather, he decided that he would better serve his ideals by returning to Australia and completing his medical studies.

After spending some time in custody following his arrest, his barrister Ian Barker QC, secured his release on bail. During the course of the bail application dozens of friends and former teachers testified to his good character, all of which generated a remarkable degree of favourable publicity in the media. He was

granted bail in circumstances where there was little adverse reaction even from the Federal Government.

iv. Faheem Lodhi

I am acting for Mr Lodhi who has been charged with two counts of making and collecting documents connected with preparation for a terrorist act (s 101.5 of the Criminal Code Act) – maximum penalty of 15 years — and two counts of preparing for a terrorist act (s 101.6) — maximum penalty life imprisonment. He has also been charged with five counts of making false statements under questioning at ASIO (s 34G of the ASIO Act). One charge of recruiting Izhar Ul-Haque to participate in the activities of a terrorist organisation was withdrawn last year.

All of these charges relate to Faheem Lodhi's alleged involvement with LET activities in both Pakistan and in Sydney. The charges resulted from ASIO and AFP investigations into a French citizen, Willy Brigitte.

In October 2003 Brigitte was detained by the Department of Immigration and, after refusing to speak about his activities, he was deported to France where he his currently in custody. He has been held since October 2003 without being charged.

ASIO and the AFP have been working in close conjunction in the course of this investigation. Mr Lodhi, employed by a Sydney firm of architects, was detected purchasing maps of the electricity grid, making enquiries about the availability of chemicals, downloading aerial photographs of Victoria Barracks, Holdsworthy Barracks and HMAS Platypus and acquiring a large quantity of toilet paper which the prosecution allege is capable of producing nitro-cellulose.

In order to prove the terrorist nature of these offences it is necessary to demonstrate that all acts were done with an intention to kill or to cause serious harm and were motivated by a religious, political or ideological cause. To prove

the relevant cause, the prosecution intended to rely on the evidence of four overseas witnesses who all gave evidence at the committal hearing over objection on video link.

One of these witnesses, Naharudin, is being held in Singapore without charge under the National Security Legislation. Three other witnesses are serving sentences in the United States and have all reached plea agreements with the US Government to give evidence in various trials in the US, Australia and, it seems, the UK.

These four witnesses have not lived up to the prosecution's expectations. One of the Americans has already been "dropped" by the US in their criminal prosecutions. A second American emerged badly from his cross-examination a the committal hearing in February 2005 where it was revealed that he had been arrested by Saudi Arabian police in Riyad, held without warrant and without charge for approximately 4 weeks in solitary confinement in a cell with the lights on 24-hours a day, interrogated regularly throughout the night by Saudi police then handed over the FBI who, after stripping him naked and photographing his genitals dressed him in prison greens, placed him in irons and placed dark goggles over his faced then transported him from Riyad to Washington. He told Central Local Court in Sydney that it was in this flight that he first confessed his involvement in LET activities.

The Crown Prosecutor announced to the court in June 2005 that the DPP no longer relied on that witness's purported identification of Willy Brigitte as a participant in LET training camps in Kashmir.

The Singaporean witness has become even more problematic for the prosecution. He has, at least for the time being, been discarded by the DPP for all purposes even thought he is the only witness who purports to be able to identify Faheem Lodhi as a participant in LET training camps in Pakistan. The prosecution dropped him after the defence subpoenaed documents which it knew

adversely affected his credibility and, in particular, his ability to accurately identify the accused without prompting from his Singaporean handlers. The Commonwealth refused to produce the documents on subpoena even though similar documents had been produced to the defence in the Ul-Haque case

Mr Lodhi's committal hearing was punctuated by regular sessions in camera, orders prohibiting the publication of evidence and even orders refusing to allow the defence to cross-examine the Singaporean witness on certain specified topics — even thought those topics were relevant and probative. At one stage the magistrate closed the court and then ordered the accused to be taken to the cells so that legal argument could be had in his absence because the Commonwealth had argued that the accused's presence in court constituted a national security risk. All of this was, of course, over the defence objection.

Mr Lodhi has now been arraigned in the Supreme Court. His trial will take place either late 2005 or early 2006. He is the only prisoner in NSW classified "AA". This security rating involves extremely harsh conditions of custody, including virtual solitary confinement, limited visiting rights and extraordinary security when attending court. Mr Lodhi is now transported by helicopter from Lithgow gaol (4 hours drive away) each time he has to appear in a Sydney Court. This is despite the fact that the only friend or supporter who has attended court at any stage has been the accused's quiet, law-abiding brother.

v. Bilal Khazal

Mr Khazal is a thirty four year old former Qantas baggage handler who has been charged with collecting and making documents likely to facilitate an act of terrorism (s 101.5) maximum penalty of 15 years. His charge relates to the use of his home computer to collect information from the internet relating to Islamist, "jihad" issues and the subsequent reformatting of this material and republishing it on the internet. Mr Khazal has been convicted in his absence by a military tribunal in Lebanon of a charge relating to his financing of a Lebanese terrorist

organisation. He has also been charged in Lebanon with participation in the bombing of a McDonald's restaurant.

The Lebanese charges are based on largely discredited hearsay evidence, yet the Australian government has vowed to extradite him to Lebanon to face the military tribunal at the conclusion of his Australian proceedings. The Lebanese military tribunal must be considered as analogous to but worse than the American tribunal established to deal with the Guantanamo Bay detainees. It is interesting that the Australian Government has forged an agreement with the Lebanese Government to extradite Mr Khazal even thought no agreement to extradite any other person has ever existed.

The Khazal case has highlighted the extent of politicians' participation in the process of terrorist trials. Mr Khazal was granted bail by a magistrate in Central Local Court. There was media outrage. The Carr Government changed the Bail Act overnight in time for the DPP's review of the grant of bail in the Supreme Court. During the course of the Supreme Court bail review, the Commonwealth Parliament considered and passed legislation to insert even stricter bail laws for terrorist charges in the Crimes Act.

Despite these legislative amendments Justice Greg James upheld the decision to grant Mr Khazal bail on very strict conditions.

The Commonwealth regards the material Mr Khazal published as extremely sensitive. His lawyers are bound by very strict non-disclosure orders, one of which requires the brief of evidence to be locked in a safe in the lawyers' chambers. The DPP supplied the safes. Mr Khazal has been committed for trial.

vi. Jihad Jack Thomas

Mr Thomas has been charged in Victoria with receiving funds from al-Qaeda, providing support to al-Qaeda and possession of a false passport. He is represented by Lex Lasry QC and Rob Stary.

Pakistani authorities arrested Jack Thomas in 2002. He was held without trial for five months. During that time he was questioned by the CIA, the FBI, the Pakistani Secret Service and the AFP. The prosecution relies heavily on admissions made during the course of the AFP interviews in Pakistan. Mr Thomas complained to the AFP about threats that had been made to harm him and his wife when being interviewed by American investigators. Mr Thomas also reportedly asked the AFP if he could contact a lawyer. He was apparently told that this was not possible. The interview proceeded in apparent breach of the Commonwealth Crimes Act. Needless to say, the defence will mount a strong attack on the admissibility of the AFP admissions.

Mr Thomas was also held in very strict conditions of custody. Victorian Corrective Services took a similar approach to their NSW colleagues. Mr Thomas was held in solitary confinement for 21 hours a day and kept under constant surveillance. Largely as a result of the harsh conditions under which he was being held at the Barwon Prison, the Chief Magistrate granted bail to Mr Thomas in February 2005.

At his committal hearing in April 2005 the magistrate discharged him in relation to one count that alleged that he planned to break detainees out Guantanamo Bay. He was committed to trial in relation to three other charges and bail continued.

5. CONCLUSION

Another potential problem for accused charged with terrorism offences is the National Security Information (Criminal Proceedings) Act which contains provisions that can restrict defence lawyers from appearing in certain parts of the proceedings unless they hold a security clearance approved by the Secretary of the Attorney General's Department. Under this act a trial can be heard in camera or partially in camera and non-security cleared lawyers can be excluded at trial. These provisions relate to all of the accused who are yet to stand trail. So far none of these provisions have been utilised.

At the very least, though, it is highly likely that most, if not all, of the forthcoming terrorist trials will be heard with some evidence given in camera and with much debate about access to material that the Commonwealth claims is subject to national security privilege.

The terrorist offences and the ASIO interrogation and detention provisions were enacted as a response to a particular set of circumstances. The ASIO provisions have a three-year sunset clause and currently the Parliamentary Joint Committee on ASIO, ASIS and DSD is conducting an inquiry into the effectiveness of the Act. This review should keep in mind the principles that were formulated by Lord Lloyd of Berwick in his report to the United Kingdom Parliament on whether or not there was a need for specific counter terrorism legislation in the event of a lasting peace in Northern Ireland. He formulated four guiding principles which apply the rule of law to the challenge of terrorism:

(a) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure.

(b) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.

(c) The need for additional safeguards should be considered alongside any additional powers.

(d) The law should comply with international law.

A strong argument exists that the extraordinary ASIO powers and the laws creating the raft of terrorist offences are disproportionate to the threat which terrorism poses in Australia. The balance has been tilted too far towards the needs of security and against the rights and liberties of the individual.