ARC Centre of Excellence in Policing and Security

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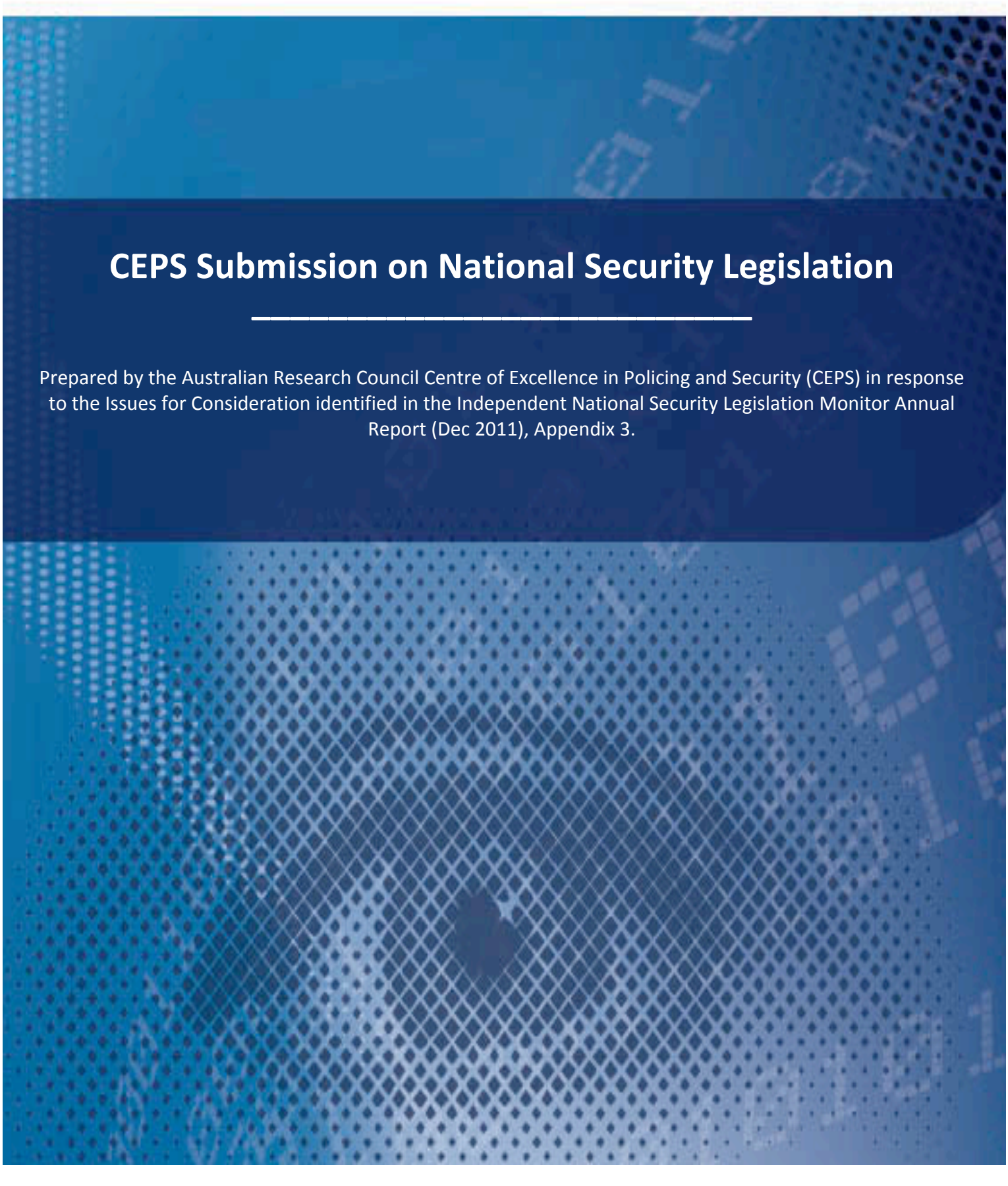
CEPS Submission on National Security Legislation

Prepared by the Australian Research Council Centre of Excellence in Policing and Security (CEPS) in response to the Issues for Consideration identified in the Independent National Security Legislation Monitor Annual Report (Dec 2011), Appendix 3.



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CONTENTS

About CEPS

The Australian Research Council (ARC) Centre of Excellence in Policing and Security (CEPS) was established by the ARC in 2007 to boost policing and security research capacity in Australia in the post 9/11 environment. It is one of the largest non-science research investments in Australia by the ARC, based on a university partnership between Griffith University (the administering organization), the Australian National University, University of Queensland and Charles Sturt University, as well as policing agencies including inter alia the Australian Federal Police, Queensland Police Service and Victoria Police.

Our Vision

CEPS research leadership shapes policy and practice reform to strengthen the security and wellbeing of Australia.

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Deliver an exceptional and internationally renowned program of research.

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Play a key role in developing the next generation of policing and security scholars.

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Stimulate increased research and policy interest in national and international policing and security issues.

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Effectively engage the public, research, policy and practitioner environments on policing and security issues.

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Achieve national and international distinction.

How to read this submission

This submission is not a comprehensive response to all of the issues or questions raised by the INSLM in his Annual Report. The INSLM is invited to contact any of the authors directly to seek clarification and further information if required.

CEPS researchers were invited to respond to the INSLM request, and to focus their answers to the particular topics under consideration and their areas of expertise or scholarly interest.

Authors were encouraged to include their own recommendations where appropriate.

The submission contains an overview of the evolution of National Security policy in Australia authored by Ms Kate O'Donnell.

Authors have included references to relevant source material in footnotes, and there is also a selected bibliography.

In general, CEPS research extends beyond the range of topics examined here. The Office of the INSLM is encouraged to monitor our website (www.ceps.edu.au) to identify recent publications and new research projects relevant to his review functions.

All opinions in this submission are expressed in a personal rather than institutional capacity, and should not be attributed to CEPS industry partners.

Acknowledgments

CEPS would like to acknowledge its principal funding source: The Australian Research Council. It would also like to thank those CEPS colleagues who responded, but especially Kate O'Donnell and Lisa Gilmore for their roles in assisting CEPS coordinate, format and edit the submission.

Professor Simon Bronitt

Director, CEPS

Background

Author/s: Kate O'Donnell (Griffith University)

Author Profile: Kate O'Donnell is a PhD student whose research is focused on the policing of disruptions to critical infrastructure by Issue Motivated Groups. Before commencing her PhD, and in a career spanning more than 25 years, Kate held senior roles in the Queensland Government including in policy development, Ministerial liaison and transport security.

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Context

- This part of the submission is included to provide brief background and contextual information for the INSLM on the development of Australia's civil (non-defence) Counter Terrorism (CT) policy and arrangements (excluding legislation dealt with elsewhere in this submission).

- Australia's national security arrangements have developed over time in a number of waves influenced by acts of terrorism both on Australian soil and internationally, a series of security incidents, and the reviews and arrangements that followed.

- During the 1940s and 1950s, Australia's policy environment showed an emerging focus on national security, foreign intelligence and concerns about espionage linked to the cold war during which:
    - ASIO was established in 1949 on a 'pseudo-war' footing
    - ASIS was established in 1952 by executive direction
    - a Royal Commission on Espionage was conducted (1954 – 55) focused on Soviet espionage in Australia.

- The policy focus on countering what was then termed 'domestic violence' or 'politically motivated violence' continued during the 1960s and 1970s. By the late 1970s, Australia had already seen:
    - a further Royal Commission focused on the history, administrative structures and functions of Australia's security and intelligence services (1974)
    - the development of the first *Plan for Anti-Terrorist Action* (1973) and the identification of possible targets of international terrorism (1976)
    - the establishment of formal government committees to focus on CT including: a Special Inter-Departmental Committee on Counter-Terrorism (to coordinate advice from overseas about terrorism and to recommend appropriate security precautions) (1973); and a Special Inter-Departmental Committee on Domestic

Violence (to focus on politically motivated violence that did not have international connections) (1974).

- The term 'domestic violence' considered in this context is drawn from the Australian Constitution and the powers of the Commonwealth to use its powers, including military, to protect States.

- In this context, there was also considerable thought given over to defining 'terrorism' for the Australian context. The debate included drawing distinctions between 'domestic', 'national' and 'international' terrorism.

- As part of the response to the bombing outside the Hilton Hotel on 13 February 1978, two reviews were initiated that have particular significance.

- Sir Robert Mark, a former Commissioner of the London Metropolitan Police, was appointed to advise on the organisation of police resources in the Commonwealth area including protective security and CT that would (among other things) lead to the formation of the AFP with their ongoing role in CT policing.

- Justice Robert Marsden Hope, a NSW Supreme Court Judge, was appointed to conduct a wide ranging and independent protective security review. The review concluded in 1979 and considered (among other things):
    - the constitutional role of the Commonwealth Government
    - cooperation and information sharing
    - Defence aid to the civil power.

- When Hope's Report was considered by the Intelligence and Security Committee of Cabinet, in respect of the roles of local authorities and normal law, it was determined that the general rule be "in any battle against terror the local law enforcement authorities using the normal processes of the criminal law must predominate."
(Intelligence and Security Committee, Federal Cabinet, Decision 10183(IS) 5 Nov 1979).

- This policy principle was retained by successive governments until the post 9/11 era which saw the series of sweeping legislative changes which are currently being considered as part of the INSLM review and by COAG.

- Australia's CT arrangements have also been influenced by a series of reviews, agreements and policy arrangements that have included (but are not limited to):
    - the formation of SAC-PAV in 1979 (the Standing Advisory Committee on Commonwealth State Co-operation for Protection Against Violence)
    - the Holdich review of 1986 in response to an upsurge of the upsurge of terrorism in Europe and the Middle East during 1984 and 1985

- the establishment in 1987 of the position of Inspector-General of Intelligence and Security with their ongoing role in oversight of intelligence agencies
- the Codd review of 1992 in response to a security failure at the Iranian Embassy in Canberra
- the SAC-PAV review of 1993 focused on the operations and focus of the committee
- the Cornall review of 2001 focused on the plans and arrangements for CT
- the transfer in 2001 of Emergency Management Australia from Defence to the Attorney-General's Department
- the 2002 Intergovernmental Agreement on Australia's Counter-Terrorism Arrangements
- the replacement of SAC-PAV by the NCTC (National Counter-Terrorism Committee)
- the 2002 formation of the Trusted Information Sharing Network (TISN)
- the 2005 Intergovernmental Agreement on Surface Transport Security
- the Critical Infrastructure Protection (CIP) Review of 2007 focused on critical infrastructure protection
- the Smith Review of 2008 focused on homeland and border security
- the COAG Senior Officials Review of 2009 focused on critical infrastructure protection
- a shift over time to inclusion of the private sector into CT planning; and
- a shift over time from a narrower focus on protective security to the adoption of an all-hazards approach and later incorporation of the concept of 'resilience' into key policy and arrangements.

Q8 Are the time limits (eg 7 days detention for 24 hours questioning) applicable to questioning warrants too long, too short or about right? (30-32)

Author/s: Professors Mark Kebbell and Simon Bronitt

Author Profile: **Mark Kebbell** is a Professor in the School of Psychology at Griffith University. As a forensic psychologist, Kebbell's research interests include investigative interviewing and devising effective, legal and ethical ways of eliciting accurate accounts from victims, witnesses and suspects.

Simon Bronitt is Director of CEPS. Simon was previously a Professor of Law in the ANU College of Law and Associate Director of the Australian Centre for Military Law and Justice, ANU. Between 2006-2009 he served as the Director of the ANU Centre of European Studies in the Research School of Humanities. Drawing on comparative and interdisciplinary perspectives, Simon has published widely on criminal justice issues, including counter terrorism law and human rights, covert policing, telecommunications interception and international criminal law.

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Comment

- This is a 'goldilocks' question in the sense that it assumes that there is some ideal period of detention which can accommodate the practical needs of intelligence-gathering for national security purposes, while simultaneously minimising the risks of oppressive or coercive treatment of the interviewee. In our view, focusing on the duration of detention permitted for questioning (whether it is longer or shorter) misses the mark. The key question should be whether the system has appropriate safeguards against abuse, and is in a position to exercise surveillance and control over the questioning process.

- It should be noted that the current period of detention under this questioning warrant is much longer than standard police questioning in relation to the investigation of offences, which also include federal terrorism offences. The present law places prescribed time limits on the length of time a person may be detained and questioned before charge (or release). This specified time-limit around Australia is not uniform, though typically is a variant of the "reasonable time" formulation with a prescribed maximum period of detention. For federal offences, including for terrorism offences, the maximum detention of 2 hours (for minors and Aboriginal persons) to 4 hours (for

all other cases): *Crimes Act 1914* (Cth), s 23DB. The periods can be extended with judicial approval.

- While criminal investigation interviews by police serve a different purpose from intelligence interviews, the psychological pressures of any "official" interviewing by non-uniformed public officials on the topic of terrorism should not be understated. Granting the protection of 'use immunity' to the interviewee offers some protection, though it does not free the person entirely from these pressures. Psychological pressures can apply whether or not the person being interviewed is under arrest, held on suspicion, merely a 'person of interest'. Indeed an innocent third party who may have useful information and valuable intelligence may suffer acute stress, fearful that being known as cooperating with the authorities might lead to reprisals. [It should be noted that persons being interviewed may not always understand the precise legal and procedural distinctions between these processes, and grasp the difference between investigative and intelligence-gathering questioning by police and security officials – also, as in the ordinary criminal justice system, interviewees can 'transition' between these three categories while in 'official' custody].[1]

- There is considerable value in reviewing the literature relating to police interviewing of suspects on the issue of coercion, particular the insights from psychological research. In this field, there has been a long-standing recognition of the risk of oppression arising from pre-trial questioning by state officials, without supervision by a magistrate or judge. These risks were identified early last century by the English judges, who published a set of guidelines (Judges Rules 1912) that formed the basis for modern administrative and legal frameworks governing police questioning in the common law world, including Australia. The Judges Rules operated to minimise the risk that interviewees will be coerced into making false and/or involuntary confessions. While quality and reliability of interviewing practice has improved significant since the 1990s, miscarriages have occurred. There seems a special vulnerability in terrorism cases. There has been a number of high profile cases where terrorist suspects' confessions were subsequently deemed inadmissible have occurred overseas including the infamous miscarriages of justice in the Birmingham Six and Guildford Four cases. A similar case has occurred in Australia in the case of *R v ul-Haque* [2007] NSWSC 1251 where charges were dropped because key confession evidence was ruled inadmissible.

[1] Dixon, D., *Law in Policing: Legal Regulation and Police Practices*, (1997).

- Coerced confessions arise from the nature of the interview (methods used) and the suspects' characteristics. While suspects might know that they have not committed the crime, they may confess as a result of the coercive nature of police questioning or in the belief that they will achieve some advantage from confessing early. From the perspective of the rules of evidence, confessions obtained under either these circumstances are considered to be involuntary and are discouraged. For example, suspects may confess simply to stop the interview, believing that truth will come out later or that a lawyer will be able to clear up matters at a later time. Longer periods of detention and interview make false confessions more likely, although far from inevitable.

- Other factors include suggestive and aggressive questioning, repeated questioning, and prolonged questioning over a period of time. Further, questioning whilst the suspect is tired, violence or threats of violence, social isolation, and absence of a solicitor[2] can also increase the likelihood of a false confession. Essentially all these factors are likely to make the questioning more unpleasant, reduce the suspect's ability to make appropriate decisions, and increase the suspect's belief that the only way to terminate the interview is through confessing.

- The more of these factors that are present in an interview and concern the interviewee, the greater the likelihood of a false confession. Nevertheless, presence of these factors does not make a false confession inevitable, simply more likely.[3] The more of these factors that are present in an interview and concern the suspect, the greater the likelihood of a false confession. The most effective ways of ensuring confessions are not coerced is to ensure all interviews are recorded, are scrutinised by independent oversight agencies and that interviewers are aware that they will be required to interview appropriately and that their interviews will be scrutinised and they will be held accountable for them.

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[2] Kebbell, M. & Wagstaff., G, 'Face Value? Evaluating the Accuracy of Eyewitness Information', *Police Research Series Paper No. 102*, Home Office, Policing and Reducing Crime Unit, UK Government, 1999.

[3] Gudjonsson, G., *The Psychology of Interrogations and Confessions: A Handbook,* (Chichester: Wiley Series in Psychology of Crime, Policing and Law, 2002).

Recommendations:

1. *There is no "ideal" point at which length of detention will lead to a marked increase in the likelihood of a false confession; there are simply too many variables involved related to the specific vulnerabilities of an interviewee and the context of the questioning.*
2. *Given this complexity, it may be appropriate to develop a new threshold of detention based on a 'reasonableness' standard, stipulating relevant criteria and prescribed maximum periods (for example, 24 hours) before requiring further justification, external review and approval.*
3. *To minimise the risk of coercion being applied to interviewees, there should be mandatory video-recording of all interviews, and these records must be preserved and scrutinised by independent third parties (Inspector General) to ensure that no coercion was applied.*
4. *Interviewers must be trained in appropriate best practice techniques used in law enforcement (for example, cognitive interviewing techniques), particularly in cases involving interviews with vulnerable persons.*
5. *There must be effective remedies against interviews which involve coercion, including in serious cases the prosecution under the new federal torture offence, which now applies to misconduct which occurs in Australia, as well as overseas. New offences were inserted into the Criminal Code (Cth) by the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (Cth). The new offence of torture in Section 274.2 of the Criminal Code carries a maximum penalty of 20 years imprisonment.*

Q11 Is the 5 years imprisonment for failing to answer questions truthfully etc under a questioning warrant appropriate and comparable to penalties for similar offences? (32)

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Author Profile: **Saskia Hufnagel** is a Research Fellow within the 'Vulnerable Infrastructures' Project at CEPS. She taught various courses in the field of comparative, criminal and European Union (EU) law at the ANU College of Law, the University of Canberra and the ANU Centre for European Studies. Her work focuses on comparing legal frameworks in Australia and the EU in the fields of criminal law and human rights law. Saskia is a qualified German legal professional and accredited specialist in criminal law.

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Comment

- As stated in the Annual Report on page 28, the fact that a perjury offence is harshly punished is not in itself remarkable. It may be regarded however as a breach of the right against self-incrimination, because an individual is required to produce evidence against him or herself either in form of a statement or the handing over of documents.

- In addition, perjury criminalises giving false evidence on oath, usually in a court hearing and protects the criminal trial. Giving false evidence in other situations and not on oath does not necessarily amount to a criminal offence unless it has particular consequences. These offences would only apply to witnesses, not the offender.

- 'Concealing a serious offence', 'False accusations', 'Hindering an investigation' and 'Perverting the course of justice' are offences that can apply if a person is not under oath when making the statement and any ensuing penalties can carry with them a 5 year maximum sentence of imprisonment in Australian jurisdictions. This is also the case in many other civil law jurisdictions (eg Germany).

- The right to silence only exists in criminal proceedings and this is not the case with respect to the ASIO Act questioning warrant. The object of legal protection here is not the criminal justice system.

- If the criminal justice system was the object of legal protection, the right to silence would be applicable and basic human rights, as proclaimed under the International Covenant on Civil and Political Rights, the European Convention on Human Rights and many other international and national human rights documents would be clearly infringed. Given this

is not the case, the question remains whether the punishments given under the ASIO Act are appropriate.

- The easy answer is 'no' considering that a witness/suspect should not be forced by the state to incriminate him or herself in the first place.

- Considering that the process takes place 'outside' the criminal justice system, human rights considerations relating to it might not be applicable. In that case the actual maximum sentence of 5 years for perjury could be appropriate as it is similar or higher throughout Australia as well as many European jurisdictions.

- In NSW the maximum penalty is 10 years (section 327 *Crimes Act 1900* (NSW)), but the offence is frequently punished by good behaviour bonds or fines.

Recommendation:

The 5 years maximum sentence is appropriate if one considers the ASIO investigation process to be a similar object of legal protection as the criminal trial process. If this is the case, then the protection of the same rights as in the criminal trial process should also be exercised. Accordingly, the right to silence should equally be applicable.

Q12 Is the abrogation of privilege against self-incrimination under a questioning warrant sufficiently balanced by the use immunity? (32-33)

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Comment

- The privilege against self-incrimination is a fundamental legal right, recognised under both domestic and international law. As the High Court of Australia noted, the privilege serves to uphold human rights, specifically preserving the right to human dignity.[4] Like most human rights, it is not however unqualified. Legislation has made significant in-roads into the privilege, and from a public policy perspective, these qualifications have merit beyond simply making the jobs of police investigators and those tasked with prosecution easier.

- Reflecting this trend toward qualification by legislation, the INSLM noted in the most recent Annual Report: "On balance and provisionally, the view of the INSLM is that there are so many such provisions given effect every day in Australia that the issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege." (at 28).

- With respect, from a human rights perspective, the question of erosion of the privilege, and the justification for admitting such statutory qualifications, deserve further critical attention than this assessment suggests. The relevant legislative powers under consideration are contained in sections 34 L(8) and L(9) of the *ASIO Act 1979* (Cth).

- From a human rights perspective, it is clear that statutory qualifications to the privilege are permissible provided that they are justifiable in the sense of being both necessary and proportionate to the relevant policy objectives being pursued. Also, another issue is whether the punishment for a failure to comply with the disclosure obligations is proportionate to the harm.

- It must be recalled that these powers are directed to intelligence-gathering rather than evidence-gathering - persons subject to these questioning before a prescribed authority

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[4] See *EPA v Caltex* (1993) 178 CLR 477 where the High Court traced the evolution of the privilege as a means of protecting individuals from abuse, noting with approval Murphy J's earlier dicta in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150 that "The privilege against self-incrimination is a human right, based on the desire to protect personal freedom and human dignity."

are not necessarily suspected of *any* involvement in a terrorist act, and in fact, may be questioned simply because of their social, family and professional relationship with another 'person of interest'. Also refusal to cooperate by these 'third parties' is not merely related to fear of self-incrimination.

- There may be well-founded safety concerns that any cooperation with authorities would expose themselves and others to risks of harm, beyond merely criminal investigation. Indeed, persons under questioning may be concerned that intelligence obtained will be shared with other jurisdictions with weaker human rights regimes and control over security agencies, and that this might result in action beyond our jurisdiction such as extraordinary rendition, indefinite detention, extra-judicial killing, torture or other inhuman treatment or punishment. For this reason, it may be desirable to extend the statutory protection by including within the offence definition itself a sub-clause that the limits the offence to failures to cooperate with the prescribed authority "without reasonable excuse". This recognises that fear of incrimination (of self or others) is not the only reason why a person may choose not to cooperate in the investigation of terrorism.

- There is a wealth of literature on the role and qualifications to the right to silence (pre-trial and trial), though most of this is directed to the statutory amendments arising from the UK reforms in the 1980s introduced first to deal with terrorism in Northern Ireland, and which subsequently 'normalised' with their adoption throughout the UK mainland and applied to non-terrorism investigations. There is little to be gained in rehearsing that particular debate in this context as the INSLM acknowledged.

- A more useful line of enquiry is to explore the practical operation of the equivalent powers enacted to deal with the investigation of serious and organised crime, and the experience in Australia of granting 'use immunity'. The use immunity is a well-established tool in encouraging cooperation. There are both statutory and administrative practices (which tend to receive less attention in the literature) that confer protection against subsequent use of incriminating material obtained for intelligence-purposes.[5]

- A recent critique of coercive examination powers has recently been published by Adam Chernok, "Risking the Examination," (2012), 86(5), *Law Institute Journal,* (May 2012). The author's commentary is based on his experience as a lawyer assisting the Office of Chief Examiner, Victoria Police. [He also worked on this topic during his tenure at CEPS as a Visiting Practitioner in Residence in 2011]. In this article, the author focuses on the Victorian "Coercive Powers Orders" (CPOs) which police can apply for in the Supreme

[5] An exception, which examines the administrative practices governing the police and prosecution use of ad hoc 'immunities' (including use immunities), is Bronitt, S., "Interpreting Law Enforcement Immunities: The Relationship between Judicial, Legislative and Administrative Models" in Corcoran, S., and Bottomley, S. (eds), *Interpreting Statutes* (Sydney: Federation Press, 2005).

Court of Victoria when there is a suspicion that someone has or is about to commit an organised crime offence pursuant to section 5 of the *Major Crime (Investigative Powers) Act 2004* (MCIPA).

- Once a CPO is made, summonses can be issued requiring a person's attendance at an examination, where it is an offence to give false and misleading information for example. Chernok discusses (at 54) how a witnesses' privilege against self- incrimination is abrogated during the course of the examination pursuant to section 39 of the MCIPA. This abrogation is offset by the availability of a "use immunity", which prevents the witnesses' evidence being used against them in criminal proceedings, except for any offences in the MCIPA or the *Confiscation Act 1997* (Vic).

- Chernok reviews the case law in the light of the various Charter challenges to these powers (at 54), and includes two recent decisions: *AJH v Chief Examiner* [2011] VSC 499 and *REG v Chief Examiner* [2011] VSC 532. In summary, the case law establishes that a Charter compliant interpretation requires that the use immunity must be given a broad interpretation. In *DAS v Human Rights and Equal Opportunity Commission (*2009) 198 A Crim R at 305 Warren CJ extended the scope of the protection provided by the legislative immunity in the MCIPA to include *derivative* use immunity. This means that not only answers of a witness cannot be used against him or her, but also the immunity renders inadmissible any *further* evidence derived from those answers. The rationale for this relates the importance of the privilege, which is given legal effect under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).

- Chernok concludes (at 56) that the Office of Chief Examiner (established pursuant to the MCIPA), would be best served by adopting an approach which sees it protecting a witness rather than adopting a course which sees a witness choosing to accept sanctions for refusing to answer questions rather than put their families and themselves at risk.

- The incumbent Chief Examiner, Mr Damien B. Maguire, offered a rejoinder to Chernok's contribution in a subsequent issue of the journal. In his letter to the editor, the Chief Examiner rehearses the arguments, from a policy perspective, about the importance of these powers in the investigation of serious and organised crime in that state in the following terms:

> The Act was implemented to seek to address the "code of silence" which frequently inhibits the ability of police and prosecuting authorities to successfully prosecute organised crime offences. The use of coercive powers involves of its very nature the forceful obtaining of evidence from reluctant witnesses including witnesses who have concerns for their safety. A consideration of the subject matter, scope and purpose of the Act makes it clear that evidence obtained by the use of coercive powers is able to be utilised in criminal prosecutions. The release of evidence obtained by the use of coercive powers has always been sought to be implemented in

> accordance with the law. Differing opinions have been expressed in Supreme Court judgments as to how this can be achieved. In the case of witnesses who have concerns as to their safety, these concerns have always been carefully and reasonably considered and the interests of these witnesses balanced with the need for the evidence to be available for the prosecution of serious criminal conduct.

- The idea of striking the right balance is used extensively in such debates, but rarely is any evidence of actual the empirical impact of these powers provided, including potential counterproductive impacts that there use may work to stem the flow of intelligence.

Recommendations:

1. *In light of the above analysis, the Victorian case law relating to the use immunity has direct relevance to the powers being reviewed by the INSLM. It is recommended that the INSLM give close consideration to the human rights arguments and submissions considered by the Supreme Court of Victoria in relation to analogous provisions.*
2. *Any legal compulsion to cooperate with the State should be viewed as 'exceptional' in a liberal democratic state, and there must be clear limits on the legitimate uses of such powers (with oversight and review) and more importantly, clarification of how far the use immunity conferred extends. It is recommended that the immunity should extend to derivative uses.*
3. *Moreover, it is recommended that a "reasonable excuse" defence should be included expressly in the legislation, clarifying that a person's legitimate and genuine fears for safety and/or safety of others with whom they have a close personal relationship negate liability under the offence provision.*

Q13 Do the conditions permitting use of lethal force in enforcing a warrant sufficiently clearly require reasonable apprehension of danger to life or limb? (33)

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Comment

- The inclusion of this type of special powers to use force caused considerable community disquiet when first enacted; fuelling concern over whether these powers signalled the beginning of a more aggressive "shoot-to-kill" policy in terrorism matters. There is generally a dearth of material on this general topic though it should be noted that an international edited book on the topic will be published in November 2012: Simon Bronitt, Miriam Gani and Saskia Hufnagel (eds), *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Hart Publishing, Oxford).

- This collection includes a chapter by S Bronitt and M Gani, "Regulating Reasonable Force: Policing in the Shadows of the Law" (authors' proof available on request). This chapter addresses inter alia the relationship between the law, practice and policy governing use of reasonable force, and extends to a specific analysis of the use of force provisions in aid of terrorism law enforcement specifically the use of force provisions relating to the preventive detention and control orders. It should be noted that this measures were subject to media and political critique, and were ultimately redrafted to align the specific powers to executive these counter terrorism orders with the general powers available to law enforcement to effect an arrest, or act in self-defence. The added requirement about respect for human dignity is important signalling that that the manner in which warrants are executed should avoid the spectacle of status degradation and public humiliation that has accompanied some terrorism investigations and prosecutions.[6]

> ***Recommendation:***
>
> *In general terms, counter terrorism laws should adopt a similar and consistent approach to the use of force (including lethal force) in relation to all types of counter terrorism orders (preventive detention, control orders and questioning warrants).*

[6] see generally, Bronitt, S., "The Common Law and Human Dignity" in J Brohmer (ed.), *The German Constitution Turns 60: Basic Law and Commonwealth Constitution – German and Australian Perspectives* (Peter Lang, Internationaler Verlag der Wissenschaften, 2011), 77-88

Q20 Is the degree and nature of permitted contact by a person being questioned under a warrant sufficient? (35-36)

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Comment

- The legislation permitting (and restricting) contact in the *ASIO Act 1979* does not sufficiently consider a balancing of basic rights (proportionality). For a detailed comparison with the German 'contact ban' enacted in the *German Code of Criminal Procedure* during the height of German terrorism in the 1960s and 1970s see:
  1. Michaelsen, C., 'The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German–Australian Comparison', *City University of Hong Kong Law Review,* (2010), 2(1), 19; and
  2. Hufnagel, S., 'German Perspectives on the Right to Life and Human Dignity in the War on Terror', *Criminal Law Review*, (2008), 32(2), 100.

- Human rights infringements by the state can be justified if where an equal human right could be breached if the right was not restricted; for example, the right to life or physical integrity of a suspect was endangered by giving the suspect access to a lawyer.

- A person usually has the right to contact a lawyer of his or her choice when detained by police. This right is included in the ASIO questioning and detention regime. The warrant has to specify that the subject is permitted to contact a lawyer during questioning or detention (section 34E (3) *ASIO Act 1979* (Cth)). The Act does impose restrictions however. The right only applies when a person has been detained or taken before a prescribed authority for questioning and has informed that authority of the identity of the lawyer they wish to contact.

- A person can also be questioned in the absence of a lawyer if a 'prescribed authority' so orders (section 34ZP *ASIO Act 1979* (Cth)).

- The entitlement to the lawyer of choice can be removed for example if a 'prescribed authority' believes that a person involved in a terrorism offence may be alerted to the fact that the offence is being investigated or that a record or thing that the person may be asked to produce may be destroyed, damaged or altered (section 34ZO *ASIO Act 1979* (Cth)). This entitlement is similar to the German contact ban and implicitly contains the balancing of rights.

- Sections 34ZQ (4) and 34ZQ (6) of the *ASIO Act 1979* (Cth) further restrict access to a lawyer. Section 34ZQ(4) provides that contact 'must be made in a way that can be monitored by a person exercising authority under the warrant' and section 34ZQ(6) prescribes that the lawyer must not intervene in the questioning of the detained person or address the prescribed authority during questioning, except to request clarification of an ambiguous question.

- The result is that the lawyer becomes a 'puppet' and is inhibited from exercising his or her proper function and protecting the rights of the 'subject'.

Recommendations:

1. *The degree and nature of permitted contact by a person being questioned under a warrant is not sufficient.*
2. *The limitations on access to a lawyer under this provision, where they are not consistent with proportionality, should be repealed.*

Q21 Should questioning and detention warrants remain available at all? (11-12, 34-35)

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Comment

- The Annual Report notes that there have been no questioning and detention warrants issued yet and that accordingly, the INSLM will be investigating further the need for these provisions (at 30).

- There is a risk that the formal protections related to questioning/detention under a warrant are routinely circumvented by informal practices. Although there are no data available on this, my assessment is informed (and inferred) by examining the experience, processes and practices that have developed in relation to police interviewing in custodial and non-custodial contexts.

- In relation to custodial interviewing, the police interview environment is (ostensibly at least) highly regulated and legally constrained, with prescribed limits on the time available to question suspects, mandatory cautioning of the suspect's right to silence and access to legal representation etc. There are also mandatory taping requirements. This 'protected' environment resembles the safeguards available to questioning under the questioning and detention warrant above. However it is notable, as the INSLM observes, that there have been no uses of these powers, raising questions about whether the powers are in fact redundant.

- Before abolition is considered, it is necessary to gather further evidence on informal practice and whether questioning or detention practices are being applied outside the regulated environment. Bearing in mind the general success routinely claimed by the government in relation to the identification and neutralisation of security threats, it is reasonable to assume that intelligence-gathering albeit by informal "unofficial" questioning is taking place, without recourse to the exercise of formal powers.

- Reviewing available sociolegal research in relation to the role of safeguards during police interviews supports my concern.[7] In Australia, procedural protections during interviews were enacted to deal with the false and fabricated confessions, which had caused

[7] See D David Dixon, *Law in Policing: Legal Regulation and Police Practices* (1997).

numerous miscarriages in the 1980s and 1990s and significantly damaged public confidence in policing. Significant law reform took place in the 1990s, led by the Australian Law Reform Commission's (ALRC) two inaugural references on *Police Complaints* and *Criminal Investigation* (ALRC 1 and 2, 1975).

- Almost three decades later, while formal police interviews are generally conducted in a lawful manner, there remains considerable scope for police investigators to circumvent the control or oversight formal procedural safeguards. This now occurs primarily through police resorting to other (non-custodial) forms of interviewing conducted by undercover police or informers (known also as covert interrogation).[8] The proliferation of covert interviewing (including the use of elaborate scenario techniques) has occurred without systems of legislative and is often the preferred technique for obtaining (inadmissible) intelligence and (admissible) confession evidence. This trend towards covert policing is directly related to the increased legal regulation around formal police interviews.[9]

Recommendations:

1. *The warrant system is intended to render interview and detention practices transparent and accountable. It should be strengthened not abolished.*
2. *In both the relevant legal provisions and in administrative guidelines, there should be stronger messages that 'informal' and 'consensual' forms of cooperation (whether questioning or detention) are to be discouraged – not least because the affected person would be forfeiting the protections and official safeguards, (including use immunity), that the legislature had intended to apply to these interviews.*

[8] Bronitt, S., 'The Law in Undercover Policing: A Comparative Study Of Entrapment and Covert Interviewing in Australia, Canada and Europe', *Common Law World Review*, (2004), 33(1), 35-80. http://dspace-prod1.anu.edu.au/handle/1885/41110

[9] For an exploratory essay on promoting alternate models of regulation in this field, beyond narrowly legalistic ones, see S Bronitt, "Regulating covert policing methods: From reactive to proactive models of admissibility" in Bronitt,S., Harfield, C., and Michael, K., (eds), *The Social Implications of Covert Policing* (University of Wollongong Press, the Centre for Transnational Crime Prevention, Faculty of Law, 2010). http://works.bepress.com/cgi/viewcontent.cgi?article=1180&context=kmichael

Q42 Do international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders? (48-49)

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Comment

- The only other jurisdiction to have introduced control orders is the United Kingdom (UK), upon which the Australian scheme is based.

- An important distinction between the two systems is the degree of judicial oversight and input in the issuing process. A comparative study of the two control order systems has found that the increased involvement of the Australian Federal Magistrate has resulted in the downgrading of restrictions and obligations, and has thus acted as judicial oversight on an administratively issued order (Donkin, 2011). The UK has relied on legal challenges to bring about changes to conditions and restrictions (see below).

- Similar provisions include the Canadian "peace bonds",[10] which allow restrictions (including curfews and restrictions on movement) to be imposed on individuals thought to pose a threat. Breaching an order is a criminal offence.

- To my knowledge, no other jurisdiction has introduced preventative control orders.

UK Control Order Scheme

- Abscondees were frequently cited as evidence of non-derogating control orders being ineffective (seven individuals absconded prior to June 2007, most of whom with relatively minor restrictions and no curfew). None have absconded since (Anderson, 2012).

[10] A peace bond is a preventative measure that pre-dates terrorist-related application, being in the Canadian Criminal Code since 1892 (Section 810).

- No controlee was ever subsequently charged or prosecuted with a terrorist offence. The only prosecutions of controlees have occurred in the form of breaches to conditions set out in the control orders, for which some individuals have been sentenced to prison terms.

- In his final report, the British Independent Reviewer on the *Prevention of Terrorism Act 2005*, David Anderson, QC, devotes an entire section to effectiveness (pp.73-75), enforceability, (p.75) counter-productivity (pp.75-77) and fairness (pp.77-79) (Anderson, 2012). He summarised his finding with regard to effectiveness as follows (p.6):

> In summary, control orders were an effective means of protecting the public from a small number of suspected terrorists who presented a substantial risk to national security, but whom it was not feasible to prosecute. A conscientious administrative procedure, coupled with close judicial scrutiny and an improved disclosure regime, ensured a substantial degree of fairness to the subject. But there is something unsettling about any system which allows the executive to impose intrusive measures on the individual, challengeable only by way of a closed material procedure and after significant delay. Accordingly, while some compromise of fairness may be justifiable in the interests of national security, it is essential that the use of this and similar powers should be kept to an absolute minimum.

- The UK issued 52 control orders in total. Several individuals have been on a control order for over 4 years. 23 controlees were subject to relocation. Currently, 9 individuals are on Terrorism Prevention and Investigation Measures (TPIMs).

- The UK has since replaced its two-tiered control order system with TPIMs effective from January 2012. This is due to several factors, including multiple legal challenges some of which have resulted in control orders being overturned often due to the controlee's inability to view the information against them.[11] Others have set the upper limit of curfews to 16 hours, from 18 hours. The new scheme has introduced a higher standard of proof, reduced the severity of some of the restrictions, (e.g. suspending forced relocations) and reduced the length of curfews from a maximum of 16 hours per day to "overnight".

- While both British Independent Reviewers support the use of control orders, it is important to note the recurring apprehension of some of the more restrictive measures, such as lengthy curfews and forced relocations under the control order scheme. Legal challenges and the subsequent abolition of the scheme have, to some extent at least, ensured that such measures are used only in exceptional circumstances.

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[11] *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009). The finding in *AF* may have had a significant knock-on effect on the sustainability of the control order system due to the Home Office reliance on sensitive intelligence. Moreover, it has enhanced the measures of procedural fairness, and strengthened position of Special Advocates, forcing the government to revoke orders where it is not prepared to disclose the intelligence against the controlee (Kavanagh, 2010).

Recommendations:

1. *Restrictions and obligations should be necessary and proportionate.*
2. *Prosecution must remain the primary objective to deal with individuals suspected of terrorist involvement, using the multitude of preparatory offences in the Criminal Code (Cth).*

Q43 Does non-use of control orders and preventative detention orders suggest they are not necessary? (48-49)

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Comment

- It has been suggested that Australian control orders were used as a 'stop gap' to compensate for the lack of terrorism offences in the *Criminal Code* (Cth) at the time the two Australian controlees, Jack Thomas and David Hicks had received training with a subsequently proscribed terrorist organisation (Donkin, 2011). This is now an offence under section 102.5 of the *Criminal Code* (Cth), and several other terrorism-related offences have since been added to the Criminal Code. To reiterate, these groups were proscribed only after the alleged training had taken place, leaving the government with no legal recourse to prosecute retrospectively.

- The Australian implementation of only two control orders against suspects with alleged links to Al-Qaeda may thus be a reflection of:

    - restraint by the AFP;
    - a lack of terrorist suspects against whom there is insufficient evidence to prosecute; or
    - indicative of a legal gap in 2005 to deal with individuals who were thought to pose a risk based on suspicions of having trained with extremists prior to it being outlawed.

- Depending on whether these laws are meant to serve a symbolic purpose, which to some extent Preventative Detention Orders (PDOs) appear to be given their lack of use to date, abolishing these provisions would appear unlikely to leave a gaping legal hole in Australian anti-terrorism law.

Recommendation: Refer to Q45

Q44 Should control orders and preventative detention orders be more readily available? (49)

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Comment

- Given the answer to the previous questions and the human rights implications of such measures, both these orders should only ever be considered as a measure of last resort.

- Prosecution must be the primary objective if the response to terrorism is to be perceived as fair and legitimate.

- The introduction of a myriad of terrorism offences into the *Criminal Code* (Cth) should provide prosecutors with alternatives to such orders. Accordingly, it would appear that this is the preferred route for police and prosecutors to follow.

Recommendation: Refer to Q45

Q45 Should control orders and preventative detention orders require a relevant prior conviction and unsatisfactory rehabilitation? (48-49)

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Comment

- One of the reasons these measures are seen as being so controversial is that they require no previous convictions, or indeed a relevant finding of guilt before imposing severe sanctions and restrictions on an individual suspected of posing a terrorist threat.

- Should this provision be changed, such control orders would become similar to other preventive measures, such as sex offender orders, which are imposed after a conviction.

- In many ways, a shift towards a reactionary preventive measure would alleviate much of the controversy surrounding control orders. That being said, adequate safeguards and standards must remain.

- Clarification is required on whether the conditions of conviction and unsatisfactory rehabilitation are required to be met together or are they regarded as separate conditions?

Recommendations for Q 43-45:

1. *In addition to the importance of judicial review, the significance of additional independent oversight of any use of these orders by the Inspector General of Intelligence and Security, the Joint Parliamentary Committee on Intelligence and Security and the Independent National Security Legislation Monitor should be recognised and highlighted.*

2. *One of the ways this might be achieved would be to set up a specific tribunal, akin to those used in mental health cases.*

Q46 In light of 1373 and international usage, international comparisons and scholarship, is the definition of "terrorist act" in the Code able to be improved? (50-54)

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Comment

- The INSLM generally takes a positive view of the definition of terrorist act: "[T]he Australian definition of terrorism in the Code represents on any view a serious and commendable attempt to achieve comprehensiveness and precision. It is the provision of all in the Counter Terrorism (CT) Laws deserving of verbatim quotation in this report." (at 43). That said, there is some reservation expressed about the inclusion of motive as an element of the offence (at 45).

- The Australian definition was borrowed from the *Terrorism Act 2000* (UK). The UK definition itself drew heavily from working definitions of terrorism developed by the Federal Bureau of Intelligence (FBI) in the United States used to guide its operations. What is striking is that the FBI definition, though increasingly influential in domestic and international legal discussions of terrorism, was not intended to serve as a legal term of art. The terrorist act definition derogates from the standard criminal law approach to criminal responsibility in the *Criminal Code* (Cth). Motive is usually irrelevant to liability but under this definition lies at the heart of the legal inquiry into guilt. Because the prosecution must provide proof beyond reasonable doubt of a particular motivation, the politics and religion of the defendant is likely to assume a prominent focus in terrorism trials.[12]

- There is extensive scholarly debate on the topic, which is mostly hostile to the inclusion of motive on the ground that it introduces 'politics' and 'religion' into the courtroom, as well as adding a further level of complexity and burden to the tasks of law enforcement and prosecution. While arguing against its relevance to the issue of liability, there is a case to support the inclusion of these wider motives as an aggravating matter in sentencing, an approach that has been favoured in some European jurisdictions which adopted a minimalist approach to post-9/11 CT law reform.

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[12] Roach, K., "The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive" in Lynch A.,, MacDonald, E. and Williams, G., (eds), *Law and Liberty in the War on Terror*, Federation Press, 2007, Ch 4, 39–40. See also S Bottomley & S Bronitt, *Law in Context* (4th ed), Sydney: The Federation Press, 2012), Ch 11.

- While the definition of terrorist act bears similarity to conventional existing political offences, such as treason and sedition under Commonwealth law, the difference is that the definition is not limited to acts of disloyalty/treachery directed toward Australia or its system of government. The definition is politically neutral, extending its scope to include the governments "of any foreign country." This applies irrespective of that government's political legitimacy or human rights' record. It also means that nationalist liberation efforts or civil resistance movements aiming to destabilise violent authoritarian regimes potentially fall within this definition. Indeed the English Court of Appeal has upheld a conviction for a terrorism offence of a person in the UK who engaged in action aimed to overthrow the Libyan dictatorship of Colonel Gaddafi. As the Court noted, the Act applies to countries which are governed by tyrants and dictators: "There is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause": *R v F* [2007] 2 All ER 193, [32].

- The difficulty with adopting this broad legal definition of terrorism is that the safeguard against over-criminalisation rests primarily with the discretion of the prosecutors (and their determination of the public interest) as well as the ultimate check that prosecutions require the consent of the Federal Attorney-General to pursue terrorism charges. While the exercise of such discretion is unavoidable, it should never be a "cure-all" for overbroad criminal laws.

- The issue of the potential impact of the definition of terrorist act on "issues motivated groups" (IMGs) which act to disrupt critical infrastructure, and the potential criminalisation of political protest has been address specifically in a CEPS public lecture by Professor Bronitt: http://www.ceps.edu.au/events/25. The current definition does contain some safeguards for legitimate protest action, exempting 'advocacy, protest, dissent or industrial action' from the section provided it is not intended to cause serious physical harm/death, endanger life or create a serious risk to the health/safety of the public. The inclusion of this limitation is a good idea (borrowed from sedition law), though it is limited in scope. It does not apply to advocacy, protest, dissent or industrial action which intends to create a serious risk to public health and safety – this may mean that some IMGs which engage in non-violent, though disruptive, action may be caught within the definition of terrorism. There is clearly a need to investigate the potential impact of the present terrorism definition on IMGs, to refine the legal definition, as well as develop prosecution guidelines in relation to these high profile cases involving IMGs.

Recommendations:

1. *The continued inclusion of terrorism motive merits further examination, including whether the terrorist context of the proscribed harmful conduct is more appropriately addressed through sentencing aggravation provisions.*
2. *The extension of terrorist acts to include acts which target "any foreign government", irrespective of political legitimacy, is too broad, and requires re-evaluation in light of R v F [2007] 2 All ER 193. There is clearly a need to examine the potential impact of the present terrorism definition on IMGs.*

Q48 Should hostage-taking be explicitly included as a terrorist act? (21, 53)

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Comment

- There are specific federal offences related to aviation security presently enacted in Australia, pursuant to our international treaty obligations: *Crimes (Aviation) Act 1991 (Cth),* section 13. There are also aviation security offences, which deal with assaults on crew and these were revised and penalties upgraded with new offences relating to assaults against aircrew in 2011.

Recommendations:

1. *For the reasons noted above, it is recommended that the existing offence not be integrated into the terrorist act definition, which only adds another layer to the offence definition, viz proof of a proscribed motive (religious, political etc). This would only further complicate the prosecution's burden of building the brief of evidence.*
2. *Another approach is recommended, consistent with the approach suggested above, which is to enact a sentence aggravation provision, which would enable the terrorist motive to be considered at the punishment phase. It should be noted that under existing sentencing practice, it is likely the court would take this into account to distinguish between international terrorist acts, and domestic protest behaviours of issues motivated groups which might disrupt or constitute a threat to aviation operations in Australia.*

Q49 Does the separate requirement for a motive (including the intention of advancing a religious cause) produce avoidable disadvantages including prejudicial trial evidence? (22-25, 52-54)

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Comment

- The difficulties with the current definition in relation to the role of motive as part of the definition have been examined above in question 46.

Q50 Should terrorist acts or threats of them be defined always to involve dangers to life and limb as opposed only to property or infrastructure damage? (54)

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Comment

- Terrorist acts are not limited to conduct which involve mere physical harm, but extend to damage to property and infrastructure. The latter extension is potentially overbroad as relatively minor acts of criminal damage targeting property, which have an ideological aim, can become a very serious offence. An alternative approach is to limit the definition of terrorist act in this regard to "*designated* critical infrastructure" which requires identification of particular areas or types of property which require this heightened legal protection. This has been applied in relation to the powers to take action (including deadly force) against hijacked aircraft: s 51T *Defence Act 1903* (Cth) Part IIIAAA. [There is criticism that the scheme is broader than it may appear, since pre-emptive lethal force may be lawfully used by ADF members where the threats are only to property (albeit designated as critical infrastructure)].[13]

Recommendation:

Assuming the "terrorism act" definition is broadly retained in its current form, there is merit in examining the use of a restricted definition of property or infrastructure, limited only to critical installations or types of property so designated by the Executive/relevant Minister, applying statutory criteria (which preferably would be open to review).

[13]Bronitt S., and Stephens, D., 'Flying Under the Radar' - The Use of Lethal Force Against Hijacked Aircraft: Recent Australian Developments' (2007), *Oxford University Commonwealth Law Review,* 7(2), 265-277.

Selected Bibliography

Anderson, D., *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2000,* London: The Stationary Office, 2012.

Bottomley, S & Bronitt S., *Law in Context* (4th Edn), (Sydney:Federation Press, 2012).

Bronitt, S., 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform,' in *Fresh Perspectives on the War on Terror*, M. Gani & P. Matthews (eds), (ANU E Press: 2008).

Bronitt, S., 'Interpreting Law Enforcement Immunities: The Relationship between Judicial, Legislative and Administrative Models,' in *Interpreting Statutes*, S Corcoran and S Bottomley (eds) (Sydney: Federation Press, 2005).

Bronitt, S., 'The Common Law and Human Dignity' in J Brohmer (ed.), *The German Constitution Turns 60: Basic Law and Commonwealth Constitution – German and Australian Perspectives* (Peter Lang, Internationaler Verlag der Wissenschaften, 2011), 77-88.

Bronitt, S., 'The Law in Undercover Policing: A Comparative Study Of Entrapment and Covert Interviewing in Australia, Canada and Europe,' *Common Law World Review*, (2004) 33(1),p 35-80.

Bronitt, S., 'Regulating covert policing methods: From reactive to proactive models of admissibility' in S Bronitt, C Harfield and K Michael (eds), *The Social Implications of Covert Policing* (University of Wollongong Press, the Centre for Transnational Crime Prevention, Faculty of Law, 2010).

Bronitt, S., and Stephens, D.,'Flying Under the Radar - The Use of Lethal Force Against Hijacked Aircraft: Recent Australian Developments' (2007), *Oxford University Commonwealth Law Review*, 7(2), 265-277.

Chernok, A., 'Risking the Examination,' *Law Institute Journal of Victoria*, May 2012, p.52-56.

Dixon, D., *Law in Policing: Legal Regulation and Police Practices* (1997).

Donkin, S., *The Evolution of Pre-Emption in Anti-Terrorism Law: A Cross-Jurisdictional Examination*, Doctoral Thesis, School of Criminology and Criminal Justice, Griffith University, 2011.

Donkin, S., Ransley, J. & Finnane, M. (submitted for consideration), *Terrorism Prevention and Investigation Measures (TPIMs): New Measure or Old Labour?*

Gudjonsson, G., *The Psychology of Interrogations and Confessions: A Handbook,* (Chichester: Wiley Series in Psychology of Crime, Policing and Law, 2002).

Hufnagel, S., 'German Perspectives on the Right to Life and Human Dignity in the War on Terror', *Criminal Law Review*, 2008, 32(2), p.100.

Hogg, Russell., (2008), 'Executive Proscription of Terrorist Organisations in Australia: Exploring the Shifting Border between Crime and Politics,' in *Fresh Perspectives on the War on Terror*, M. Gani & P. Matthews (eds), (ANU E Press: 2008).

Michaelson, C., 'The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German-Australian Comparison,' *City University of Hong Kong Law Review*, 2010, 2(1), p.19.

Roach, K., 'The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror*, (Federation Press: 2007).