

AUSTRALIA'S ANTI-TERRORISM LAWS - THE OFFENCE PROVISIONS

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His Honour Judge Richard Maidment

Much of the “informed” public debate concerning the 2002 reforms to Australia’s anti-terrorism laws has failed to distinguish between those provisions which introduced new “terrorism” offences into the Criminal Law of Australia and those provisions concerned with other preventative measures such as detention without charge and control orders. The offence provisions require quite separate consideration from other aspects of the anti-terrorism laws. This presentation is focussed only upon the offence provisions which were introduced into the Commonwealth Criminal Code in 2002.

I do not seek in this presentation to conduct an exhaustive academic analysis of these offence provisions. Rather, I offer the benefit of my experience over a period of eight years or so between 2003 and 2011 as senior counsel briefed by the Commonwealth Director of Public Prosecutions in connection with the prosecution of cases involving alleged terrorism and related activity. To put my role as counsel in relevant context, I was briefed during that period on behalf of the prosecution in the following cases:

R v Roche (pre-trial advice only)

R v Zaky Mallah (pre-trial matters only)

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

R v Joseph Terrence “Jack” Thomas (pre-charge advice, pre-trial matters and control orders only)

R v Faheem Khaled Lodhi (committal, pre-trial and trial)

R v Abdul Nacer Benbrika and others (pre-charge advice, pre-trial and trial)

R v Mohammed Ali Elomar and others (the latter part of the pre-trial and trial)

R v Fattal and others (advice during the pre-trial arguments)

R v Abdul Nacer Benbrika and others (No. 2) (permanently stayed by Order of the Supreme Court of Victoria)

Dr Haneef - briefed by the Commonwealth Director of Public Prosecutions to conduct an internal investigation into the role of his Office in the decision to charge Dr Haneef

1. Are the Offence Provisions necessary?

The changes to the Law of Australia undoubtedly had its origins in the events of 11 September 2001. On 28 September 2001 the United Nations Security Council passed unanimously Resolution 1373. Amongst other things, it required all member States to ensure that terrorists, their accomplices and supporters were brought to justice, and that 'terrorist acts are established as serious criminal offences in domestic laws ... and that the punishment duly reflects the seriousness of such terrorist acts'. Australia was required to meet those requirements.

In 2002, Australia experienced first-hand the effects of international terrorism through the loss of 88 of its citizens in the mass murder which was the first of the “Bali bombings”. It is significant that if those responsible had been arrested in Australia it is unlikely they could have been prosecuted under Australian criminal laws pre-existing the 2002 reforms.

Apart from enabling Australia to meet its international Treaty obligations (see for example the “International Convention for the Suppression of Terrorist Bombings”, entered into force in Australia on 8 September 2002), the rationale for the “terrorism offences” introduced in 2002 is that the “traditional” pre-existing criminal offence regime did not adequately address the threat of international terrorist activity to the citizens of Australia.

Whilst the principal aim of law enforcement in this area must always be prevention of a terrorist act and protection of people and property, the capacity of law enforcement agencies and the criminal justice system of any country to facilitate successful prosecutions against those engaged in terrorist activity must surely be considered an essential component of the protective shield. That view was reflected in the introduction by the Federal Parliament of the 2002 anti-terrorism offence provisions. The 2002 reforms came about as a result of unanimous agreement between the Commonwealth and the States and Territories that Australia’s response to the perceived threat of global terrorism and the need for new laws to meet that threat, should be one made under Commonwealth laws.

In some cases where a terrorist act is being planned there will be an appropriate “traditional” offence provision available. For example, three persons tried in 2011 in England in connection with a plot to cause explosions on transatlantic aircraft were convicted of conspiracy to murder persons travelling in transatlantic aircraft. In other words, although there were specific anti-terrorism laws available in England with which the offenders could have been charged, the accused were tried for offences against traditional laws.

Clearly in that case the evidence demonstrated that a plan had been advanced to a point where particular targeted flights had been selected, the type of explosive device had been chosen and chemical components purchased. It seems that the only reasonable inference to be drawn from the nature of the explosive device to be used and the circumstantial context was that the conspirators intended to kill the occupants of each of the targeted planes.

The three accused in this English case *could* have been charged with conspiracy to carry out terrorist acts involving an intention to kill persons on transatlantic aircraft. But such a charge would have been harder to prove. Thus, it may be supposed that if prosecuting authorities have a choice between charging a “terrorism offence”, or a “traditional” offence which reflects sufficiently the criminality of the relevant activity and provides for adequate penalties upon conviction, they will opt for the latter. That is because the “traditional” offences are generally much easier to prove.

The range of “traditional” criminal offences available in Australian Law which are applicable to “terrorist activity” includes both substantive offences such as murder, making threats to kill, kidnapping, assaults causing grievous bodily harm, hostage taking, hijacking, foreign incursions, malicious damage to property, interference with communications, treason, sedition, smuggling and fraud as well as inchoate offences such as conspiracy and attempt to commit one of the substantive offences to which I have referred.

In the context of international terrorism in the modern era in which air-travel and internet communication is so fast, cheap and widely available, special measures are required to ensure that terrorist activity directed at Australian citizens can be prosecuted in Australia. It needs little imagination to recognise that events can move very quickly from a situation where an individual (or even a group of individuals) is apparently doing nothing with which they could be charged under traditional domestic criminal law to one where they cause catastrophic loss of life. Indeed, even where the activities of such persons have attracted the attention of law enforcement agencies, there may be no offence with which they could be charged under traditional criminal laws until a stage dangerously proximate to the commission of a serious violent act. Thus, it is argued, the ability of Police to intervene at a stage significantly earlier than would have been possible without the availability of the terrorism offences significantly enhances the capacity of law enforcement and the criminal justice system to protect all of its citizens and the community at large. It also enables Australia adequately to meet its International Treaty obligations to assist other countries to protect their own citizens from terrorist activity

The arguments in favour of the terrorism offence provisions first introduced in Australia in 2002 are analysed in detail by Gregory Rose and Diana Nestrovoska in an article entitled "Australian counter-terrorism offences: necessity and clarity in federal criminal law reforms" [(2007) 31 Crim LJ 20]. The authors conclude that:

... the new criminal offences were necessary to update or extend prior legislation ... Shortcomings in prior legislation prohibiting acts of political violence included a lack of extraterritorial reach, inadequate proscription of preparatory and supporting activities, inability to prohibit participation in terrorist organisations, non-implementation of applicable treaties, inadequate applicable penalties and inadequate incitement laws. Not least in these prior shortcomings was the lack of a legal definition for terrorism in the context of globally networked political violence. The 2002 reforms gave terrorism a sound contemporary legal definition ... The definition provides a toolbox within which are placed offences with more severe penalties than correlated common violent crimes. These include terrorist acts, preliminary acts supportive of terrorist acts and participation in terrorist organisations. Although remoteness at the extremities of the range of preparatory acts is undefined, the difficulty of establishing criminal intention will correctly define the limits of remote acts.

I do not propose to rehearse all of the arguments supporting these conclusions. Rather, I seek to identify some examples of conduct which was unlikely to have been caught by the criminal laws of Australia prior to the 2002 reforms but which would be caught by the anti-terrorism laws currently in the Criminal Code:

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

is motivated by a desire to intimidate the federal government into complying with demands for the abolition of all goods and services taxes;

- 2) An individual Australian resident raises funds in Australia for an overseas organisation known to be habitually engaged in the commission of politically motivated acts of mass murder;
- 3) An individual joins a group in Australia which he knows to be preparing its members to acquire the skills, capacity and desire to commit politically motivated acts of public intimidation involving acts of mass murder or kidnapping or acts causing massive damage to iconic public buildings. No specific type of act, much less a target, has yet been selected;
- 4) An Australian citizen trains extensively overseas with a paramilitary organisation known to exist for the sole purpose of engaging in politically motivated mass murder in which activity the organisation has an extensive record of success. The individual does so in order to obtain the skills and motivation necessary to carry out in Australia acts of politically motivated mass murder or of serious criminal damage likely to endanger life. Armed with the necessary skills and motivation, the individual returns to Australia without having yet determined what specific action or target will be selected;
- 5) A group of persons from the same suburb in a major Australian city train overseas with a paramilitary organisation in order to obtain the skills necessary to offer themselves as a part of a mercenary fighting force available, at short notice, to join politically, religiously or ideologically motivated insurgencies overseas;
- 6) An individual makes enquiries of a chemical supplier with intent to acquire chemical ingredients necessary for the manufacture of high explosives. The enquiry is made with the intention that an improvised explosive device will be manufactured and detonated so as to cause serious damage to a State electricity supply system in circumstances likely put at risk the safety of members of the public. The prospective actions are motivated by a desire to further a political or religious cause and to coerce by intimidation the federal Government into withdrawing Australian troops from a foreign country.

Examples 2) to 5) are fictitious. Example 1) has factual similarities to the conduct the jury found to be proved in *R v Elomar and others* (albeit that the motivation of the alleged co-conspirators in that case was different). Example 6) contains the essence of the factual basis for the charge of doing an act in preparation for a terrorist act upon which Faheem Khaled Lodhi ("Lodhi") was convicted in 2006.

2. What do the Offence Provisions involve?

The Offence Provisions are concerned principally with the creation of criminal offences involving activity which is aimed intentionally or recklessly towards the commission of a terrorist act, in Australia or elsewhere, and with activity concerning intentional or reckless involvement in or with terrorist organisations, based in Australia or elsewhere. The provisions are contained in Part 5.3 of the Schedule to the *Criminal Code Act 1995* (Cth) ("the Criminal Code"). There can be no doubt that the cascading series of offences set out in

Part 5.3 is designed to criminalise all conduct that has the capacity to assist or encourage terrorist activity where the participant acts intentionally or recklessly to that end.

As is required by the Criminal Code generally, the essential elements of each of the “terrorism offences” include (at least) one physical element and a fault element which attaches to that physical element. In each instance, the primary requisite physical element is “conduct”. That “conduct” may be constituted by an act, an omission to perform an act, or a state of affairs (s 4.1(2)). Unless otherwise specified in the offence provision, the fault element attaching to the physical element of “conduct” is “intention” (s 5.6(1)).

The type of conduct which may be caught by the offence provisions is (necessarily perhaps) of almost limitless scope. However, with the exception of offences concerning involvement in or with a terrorist organisation which has been “specified” as such by the regulations (Al Qaeda and Jemaah Islamyiah are examples), each offence requires proof of a link between the alleged conduct and a “terrorist act” as defined in s. 100.1 of the Criminal Code. It is proof of this link with a terrorist act (or, where relevant, a link with a “specified” terrorist organisation) which confines the scope of each offence to activity which may reasonably be characterised as terrorist activity deserving of sanction by the criminal law.

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

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

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

- a) *Advancing a political, religious or ideological cause, namely the cause of “violent jihad”;*
and
- b) *With the intention of coercing or influencing by intimidation the Government of the Commonwealth or a State;*
or
- c) *Intimidating the public or a section of the public;*

And

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

- a) Cause serious harm that is physical harm to a person; or*
- b) Cause serious damage to property; or*
- c) Cause a person's death; or*
- d) Endanger a person's life other than the life of the person taking the action; or*
- e) Create a serious risk to the health and safety of the public or a section of the public.*

And

The action or threat of action was not advocacy, protest, dissent or industrial action; or (to the extent that the action or threat of action could be so characterised) that it was of a kind which was intended;

- i. To cause serious harm that is physical harm to a person; or*
- ii. To cause a person's death; or*
- iii. To endanger the life of a person other than the person taking the action; or*
- iv. To create a serious risk to the health or safety of the public or a section of the public.*

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

The terrorism offence provisions enabled Police to charge Lodhi with serious criminal offences well before his conduct amounted to an "attempt" to commit a "traditional" offence, such as criminal damage. Likewise, because the evidence did not reveal that Lodhi was acting with any other person, a conspiracy charge was not available. Theoretically at least, had Lodhi not been arrested he could have advanced his plans to a point where he was able to carry out a terrorist act involving the detonation of a powerful bomb in a public place within a matter of a few days. As was suggested under paragraph 1 above, at the date of his arrest Lodhi had probably not committed any offence which pre-existed the 2002 reforms.

Whilst it is well understood that the 2002 reforms arose from international concern awakened by activities of Muslim extremists (particularly "9/11"), the provisions are equally applicable to "terrorist" activity from any other quarter. It cannot be said that the provisions themselves discriminate either against or in favour of any individual or group of individuals. When I started my career as a Barrister in England, the focus of law enforcement authorities in England was upon the terrorist activities of the Irish Republican Army which was motivated by a Roman Catholic Christian religious and political cause of re-uniting Ireland.

3. Do the Offence Provisions work in practice?

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

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

The cases involving terrorism offences which have been brought to trial to date are as follows:

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

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

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

R v Izhar Ul Haque (he was charged with undergoing training with a terrorist organisation. Evidence of admissions made by Ul Haque to the Australian Federal Police was excluded by the trial judge. As a result, the Crown filed a *nolle prosequi*);

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

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

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

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

It is submitted the only real “difficulties” with the offence provisions in practice are those faced by the prosecution in proving each element beyond reasonable doubt. In my opinion, those “difficulties” are simply a reflection of the reasonable and appropriate limits placed by the legislature upon the scope of the offences contained therein. For example, the requirement in proof of the “terrorist act” that the prosecution prove that the action or threat of action is not (mere) “advocacy, protest, dissent, or industrial action” preserves the freedoms of speech, dissent and reasonable public protest. Where the conduct may be so characterised, unless the “advocacy, protest, dissent or industrial action” can also be shown to involve an intention to cause death, serious physical harm or serious risk to public safety, the action is not a “terrorist act” within the terms of the Criminal Code.

4. The definition of “terrorist act”

It has been argued by others with experience in cases involving terrorism offences that the definition of “terrorist act” in s 100.1 of the Criminal Code should be altered by removing from it the requirement that the action be done with the intention of advancing a political, religious or ideological cause.

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

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

Further, it seems to me that the removal of the requirement fundamentally alters the nature of the offence provision from one that clearly involves ‘terrorism’ to one that may have a significantly broader ambit. I am not convinced that such a result is desirable.

5. Can the prosecution and trial of terrorism offences be fair?

My experiences in and the outcomes of the cases tried to date in Australia suggest to me that the answer is “yes”. But to justify that conclusion it is necessary to examine some issues peculiar to the prosecution of terrorism offences.

A feature of investigations of terrorist activity is that the activities of Police authorities almost inevitably intersect with activities of those agencies responsible for national security, particularly ASIO. The respective duties and responsibilities of the several agencies

concerned with these matters differ in accordance with the separate statutory provisions under which they operate. Great care is required by each agency to ensure that its activities are carried out in a manner which is both compatible with the objects of their own and of other agencies operating in the same or a related area and with the need to avoid compromising a future prosecution.

Whilst, it is my observation that great care is taken by all agencies involved in the investigation and prosecution to ensure that no prejudice to a person accused of terrorism offences arises from this dichotomy, the ultimate responsibility for ensuring a fair trial is that of the trial judge. In an environment where legitimate national security issues arise, this can be far from straight forward.

In early 2005, the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* ("the NSI Act") came into operation. Its object is, in part, to protect information the disclosure of which in criminal proceedings would be likely to prejudice national security. Although, in most instances the principles relevant to resolution of issues which fall within the legislation are more often than not those which determine issues of public interest immunity, the legislation adds a further complexity to the trial process through which counsel and the trial judge are required to navigate without prejudicing a fair trial.

In his article "Difficulty in obtaining a fair trial in terrorism cases" (2007) 81 ALJ 743, Whealy J (the trial judge in **R v Lodhi** and **R v Elomar and others**) addresses issues associated with the NSI Act and other "special challenges" faced by a judge called upon to preside over a trial of persons accused of terrorism offences. One of the challenges identified by Whealy J (at 743-745) is that of prejudice and bias. He noted that in selecting the jury for the trial of Lodhi (a Muslim), more than a dozen prospective jurors asked to be excused on the basis that they could not judge the matter other than with a prejudiced mind.

As Whealy J observed (at 744):

"I [came] to realise that the issue of the accused receiving a fair trial was a matter of considerable importance and sensitivity in the particular circumstances of the matter. One only has to reflect on the frequent barrage of articles and commentary in the media ... involving terrorism and terrorists to know that this is so. In addition, there are endless articles and commentaries in relation to practitioners of the Muslim religion, extending not only to activities overseas but to Muslims in our own local communities. There are arguments about Muslim customs, laws, practices, dress, attitudes to women, attitudes to non-believers and the like. They are sometimes sensational and ill informed."

In light of those observations, Whealy J fashioned and repeated careful directions to the jury designed to reduce the risk of such prejudice intruding upon their task. He also expressed the opinion in his article (at 744) that it was important "that judges in terrorism trials carry out a little soul searching in relation to their own possible prejudices."

Whealy J took a similar approach in presiding over the trial of **R v Elomar and others**. In the trial of **R v Benbrika and others** which concluded in 2008, Bongiorno J gave and often repeated similar directions to the jury throughout the trial.

It is noteworthy, and perhaps encouraging, that in the trial of **R v Benbrika and others** the jury acquitted four of the accused. The verdicts seemed to be based purely upon the

relative strengths and weaknesses of the evidence. The jury acquitted each of those accused against whom there was no direct evidence of knowledge that the relevant organisation was a terrorist organisation. Had the approach of the jury been influenced by prejudice, they had sound bases in the circumstantial evidence upon which they could have convicted each of those four accused, without criticism.

In my opinion, however, the responsibility of minimising the effects of prejudice in the trial of terrorism offences does not rest solely with the trial judge. Counsel for the Crown bears a heavy responsibility to prosecute in a manner which not only has an appearance of fairness, but which is in all respects actually fair. It is important, for example, that the prosecution team never to press a case beyond its inherent strength within the limits of the evidence led in the trial and that it not seek to argue petty or marginal procedural or evidentiary points. Scrupulous care needs to be taken at all stages of the criminal process to ensure the proper disclosure of material which may assist the defence.

Likewise, in my opinion, it is the responsibility of all counsel involved in such cases to modify their conduct and to choose language appropriately and sensitively. This is particularly important in circumstances where the accused comes from an ethnic background or a section of the community in which the capacity of the courts and criminal justice system to deliver a fair trial may not be well understood. The proper discharge of that responsibility should not, of course, reduce the effectiveness of counsel. Rather, it should be seen as part of counsel's duty to the court and to the criminal justice system.

The community rightly expects that terrorism related trials are always conducted fairly to the accused. Moreover, the community as a whole will be well served if the criminal justice system operates consistently to ensure, particularly amongst those of its members who most often feel the sting of prejudice, that justice can be seen to be done.

In this context, it is submitted that members of the legal profession have a wider responsibility. That is, to ensure relevant public debate (however robust) is properly informed and is not hijacked by vested interests or diverted by the often shrill criticism of the ill-intentioned or the ill-informed.

6. Prosecutorial discretion

The role of prosecuting authorities is critical. There are three stages at which the prosecuting authority has a role. Firstly, prior to charges being laid in the provision of advice to investigation agencies on the law applicable to potential charges and, perhaps more significantly, as to the sufficiency of evidence. Secondly, upon receipt of a brief of evidence in determining whether to prosecute and, if so, who to prosecute and for what offences. Thirdly, in the presentation of the case at trial.

At all stages, the prosecuting authority is called upon to exercise what is commonly referred to as 'prosecutorial discretion'. The importance of exercising that discretion fairly and reasonably in the prosecution of terrorism offences cannot be understated. In my opinion, that requires, *inter alia*, the payment of proper respect for and regard to competing community sensitivities to the whole topic of terrorism and to the very existence of the terrorism offence provisions in Australian criminal law.

Whilst the community as a whole has every right to demand that prosecuting authorities pursue vigorously and fearlessly the prosecution of those against whom sufficient evidence

of the commission of terrorism offences exists, I think it is important to guard against being, or even creating the impression of being, overzealous.

It seems to me that a failure to do so gives rise to three principle risks. Firstly, that hostility and marginalisation of ethnic communities from which the accused are drawn is likely to be increased. Secondly, that it will provide ammunition to the vocal opponents of the terrorism offence provisions and may ultimately lead to a shift in public and political opinion in favour of their abolition. Thirdly, the zealous spirit is liable to affect investigation agencies and increase the risk that they may overstep the bounds of propriety.

The notorious case involving Dr Haneef provides a clear example of the kind of fall-out that can arise from the exercise of poor judgement by prosecutors. The error was rectified quickly when Damian Bugg QC, the then Commonwealth Director of Public Prosecutions, personally reviewed the decision and discontinued the prosecution. However, it is without question that the original decision to charge Dr Haneef with a serious terrorism offence without a proper evidentiary basis caused considerable harm, particularly to Dr Haneef, but also to the reputations of the Police and prosecution authorities involved.

I think it is essential, therefore, to approach the exercise of prosecutorial discretion not only fairly, reasonably and competently but with an appropriate sense of proportion and measure of restraint.

By saying that, I should not be taken to be implying that prosecutorial discretion within the Office of the Commonwealth DPP has been exercised inappropriately to date in cases other than that of Dr Haneef; far from it. But I do think particular vigilance is required to ensure a proper balance is maintained in relation to all aspects of the prosecution processes. That must be applied broadly in the three stages of the process to which I have referred above. But it must also be applied in other important aspects of prosecutorial responsibility including when a prosecution should be discontinued, what plea offers should be regarded as acceptable and what submissions should be made as to appropriate sentences.

Prosecuting authorities are in a position of substantial influence and control. They have the capacity, by example and advocacy, to create and maintain a healthy culture in the application of the terrorism offence provisions amongst the wider law enforcement community. In my opinion, it is very much in the public interest that they continue to do so.

HH JUDGE RICHARD MAIDMENT
Judge of the County Court of Victoria

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