COUNTER-TERRORISM LAW
Preventing terrorism or pre-empting the future?

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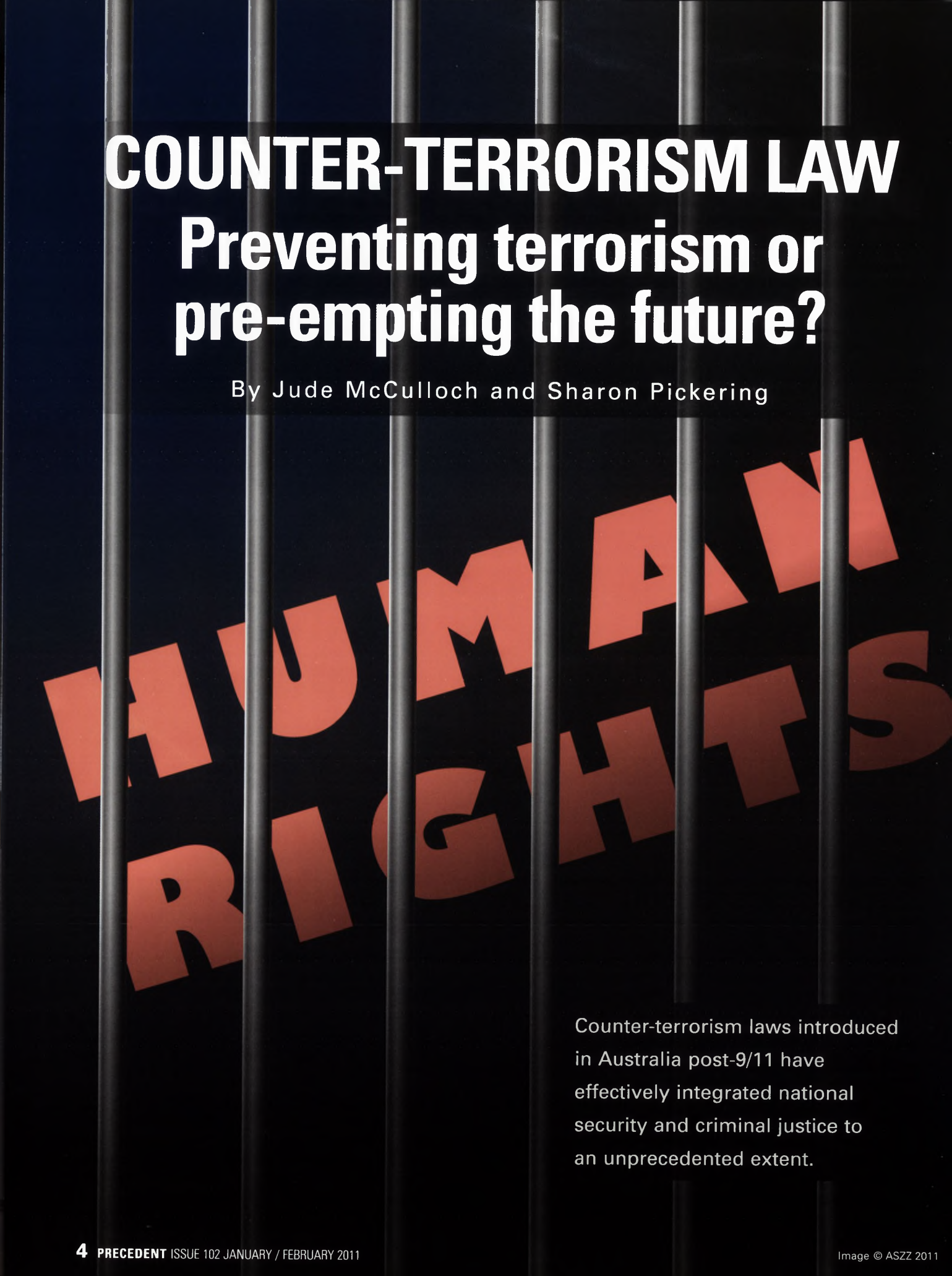

Counter-terrorism laws introduced in Australia post-9/11 have effectively integrated national security and criminal justice to an unprecedented extent.

This approach rests on the premise that terrorism represents an exceptional threat that warrants legislation tailored to a 'new paradigm in prevention'.[1] This article considers Australia's counter-terrorism legislation, arguing that what is purported to be preventative is actually pre-emptive and unlikely in fact to prevent terrorism. Beyond this, it describes some of the tensions between national security and criminal justice that arise in this new, hybrid national security criminal justice framework.

Pre-emption embodied in counter-terrorism legislation reflects the military logic enunciated in 2002 by President Bush, when he argued that 'if we wait for threats to fully materialise, we will have waited too long ... we must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge'.[2] Domestically, pre-emption is embodied in laws directed at monitoring, detaining, disrupting and, in some cases, charging and prosecuting those considered to present a future threat.[3] The term 'prevention', when associated with counter-terrorism law, is misleading, for two reasons. First, it assumes that such laws are effective in minimising the risk of mass casualty attacks. Second, it assumes that the laws align with the stated prevention agenda, rather than other hidden agendas linked to vested interests.

PREVENTING TERRORISM OR PRE-EMPTING THE FUTURE?

Since 2002, the Commonwealth has enacted over 40 pieces of counter-terrorism legislation and the states and territories have enacted further legislation.[4] A distinguishing theme of this legislation is a focus on 'prevention'. In a paper entitled *Law As A Preventative Weapon Against Terrorism*, the then federal attorney-general, Philip Ruddock, made it clear that prevention is a key element in the legislative response to terrorism.[5] Security legislation 'has been enacted with the prime object of preventing or discouraging further attacks'.[6] Traditionally, the criminal law has focused largely on crimes that have occurred. The argument for the shift in legislative emphasis towards prevention is that terrorism is an extraordinary threat requiring an extraordinary response. Counter-terrorism laws are exceptional in the sense that they depart from traditional due process protections.[7] The risk of mass casualty attacks is said to warrant the introduction of measures that seek to anticipate threats in ways beyond the remit of traditional criminal justice measures.

The Queensland Police Service, in its submission to the Clarke Inquiry into the Haneef case,[8] maintained that:

> 'Quite properly the risk associated with acts of terrorism has been reflected in legislation that recognises that the consequences of a terrorist act on Australian soil are significant and everything possible should be done to prevent that occurring. This legislation reflects the need to prevent and to intervene in the early stages of terrorism-related behaviour as an appropriate response to the level of threat or risk created by terrorism.'[9]

Preventing violent crimes, and particularly mass casualty attacks, should be the primary objective of counter-terrorism law. However, existing knowledge and the lessons of history do not support the contention that the laws are likely, in fact, to achieve prevention. It is difficult to measure success in prevention. The absence of mass casualty attacks may be the result of a low-threat environment, or the outcome of successful prevention. While there are numerous claims of foiled plots in Australia, the United States and the United Kingdom, there is scant evidence to support these assertions and a degree of cynicism about the veracity of such claims.[10] In Australia, individuals have been convicted of terrorism-related offences, but these convictions have not been tied to plans to engage in specific terrorist act/s.[11] Convictions, however, are only a rough guide to effectiveness in the law enforcement context. In the realm of counter-terrorism, where monitoring and disruption in order to 'prevent' future crimes is a major aim, convictions are even less relevant as a marker of success.[12]

Even if there were reliable evidence that attacks have been prevented by counter-terrorism laws, such success would need to be weighed against the possibility that such exceptional legislation inspires some to commit the very acts that the laws purportedly aim to prevent. There is a body of evidence from Northern Ireland that suggests that exceptional counter-terrorism measures in that jurisdiction >>

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in the early 1970s, particularly detention without trial, increased support for politically motivated violence.[13] There is also a growing body of literature in the contemporary context that points to the danger of inspiring terrorism through the social exclusion and alienation that is tied to expanded police or security agency activity under counter-terrorism laws.[14]

In the 'preventive' context, intelligence about emerging threats is vital.[15] To this end, police and intelligence agencies have been granted extensive new powers to gather information in the counter-terrorism arena.[16] More information may increase the possibility of preventing mass casualty attacks, but reduce the probability of preventing such events. Information is not useful until it is analysed.[17] A shift towards high-volume, low-value information that is diffuse and relatively meaningless in isolation may come at the expense of low-volume, high-value information that is gained through the deployment of more traditional police investigation skills. While police and security agencies have gained greater financial and human resources to assist in the intelligence-gathering task, resources nevertheless remain finite, and gathering and sorting information is resource intensive. A 'snow-storm' of data can lead to a 'white-out' effect, where valuable information is obscured by vast quantities of low-value information. There is little empirical data to test claims about the effectiveness of counter-terrorism legislation. Available research suggests that some counter-terrorism measures do not achieve the outcomes sought and others are counter-productive.[18] It is unsafe to assume that counter-terrorism laws are successful as a preventative strategy. The arguments that such laws are likely to be ineffective or counter-productive in meeting the stated aim of prevention are at least as cogent as the assertion of prevention.

The second reason for rejecting the prevention characterisation is suspicion that counter-terrorism laws are not aimed at prevention. The stated rationale may disguise political agendas or organisational interests. The government, the police and security agencies may have an interest in highlighting or exaggerating the threat of terrorism. Laws purportedly aimed at protecting the community from terrorism may serve as an effective means of emphasising threats.[19] The expression of strong national security credentials linked to 'tough' counter-measures can be mobilised as a tactic to gain voter support.[20] Expanded police and security agency powers are tied to enhanced organisational prestige and increased resources. Leading counter-terrorism agencies in Australia have gained substantially in terms of budgets since 2001.[21] More broadly, the shift towards prevention and the accompanying erosion of due process aligns with what has been called an emerging 'culture of control'.[22]

PRE-EMPTION AND PRE-CRIME

It is more accurate to refer to counter-terrorism legislation as pre-emptive rather than preventive. Pre-emption focuses attention on the strategy behind the legislation: targeting threats before they emerge. Prevention asserts an outcome that is not supported empirically, and can be challenged by historical experience and scholarship. The focus on pre-empting harmful events and integrating criminal justice and security predates the 2001 attacks. Pre-emption is part of a broad trend towards a preoccupation with security and the future in the 'risk society'.[23] Examples of laws that exemplify the pre-emptive framework outside of the counter-terrorism arena include laws that allow for the continuing imprisonment of 'dangerous people' after their sentences are complete, and monitoring and restrictions on sex-offenders after they are released from prison.[24] Outside of the criminal law context, in the health sphere people may be compulsorily detained or quarantined to prevent harm to others.[25] The focus on risk and threat anticipation have, however, undeniably consolidated and expanded post-9/11.[26]

The pre-emptive strategy involves a shift in focus away from individual offending towards strategies that are aimed at intervening before threats emerge.[27] Zedner refers to this development as a shift towards a pre-crime society 'in which the possibility of forestalling risks competes with and even takes precedence over responding to wrongs done', and where 'the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security'.[28]

Pre-crime can be broken down into two categories. The first are laws that expand the criminal law beyond the extant inchoate offences of conspiracy, attempts and incitement to include activities or associations that are deemed to precede the substantive offence that is being pre-empted.

The bulk of the counter-terrorism laws are targeted at future crimes that have not occurred, have not been attempted and for which there is no specific plan. The legislation includes offences that target preparatory conduct.[29] In considering the nature of these offences, the New South Wales Court of Criminal Appeal observed:

> 'Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special and, and in many ways unique, legislative regime. It was, in my opinion the clear intention of parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgement has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct – for example, well before an agreement has been reached for a conspiracy charge.'[30]

Prior to the enactment of preparatory laws, the law made it an offence to attempt a criminal act, engage in a conspiracy to undertake a criminal act or incite a criminal act.[31] The offence of attempt requires evidence of acts taken towards the commission of the substantive offence. Conspiracy only requires proof that two or more people made a plan to engage in a substantive criminal act.[32] Under counter-terrorism laws, a number of people have been charged with conspiring to engage in preparatory offences.[33] If the preparatory acts are pre-crime offences, conspiracy or attempts to engage in such preparatory acts might be thought of as pre-pre-crime offences.

Other laws that come within the above definition of 'pre-crime' include laws aimed at participation in and support of terrorist organisations and association offences. These laws aim to pre-empt terrorism by disrupting the networks that are seen to support or foster terrorist activity. The terrorist organisation and association offences are offences that target people on the basis of who they know and associate with, rather than what they have done.[34] The criminal law has previously incorporated offences, such as consorting, that target identity and associations, as opposed to behaviour.[35] However, historically such offences were only summary offences. The counter-terrorism offences are serious criminal offences that attract lengthy jail sentences.[36]

The second category of pre-crime laws is that involving substantial and continuing coercive police or state action without a legally required link to criminal charge, prosecution or conviction. Control orders and preventative detention orders both fall into this category. While the participation, association and preparatory offences are pre-emptive, control orders and preventative detention orders go even further by severing the link between processes that allow for detention and substantial restriction of a person's activities from the criminal process. Preventative detention orders allow for detention without charge or trial for up to 14 days.[37] Control orders allow for the monitoring and restriction, in the extreme house arrest, of people who are considered to pose a terrorist risk.[38] Control orders may be imposed independently of a conviction, so that even someone found not guilty of a terrorist pre-crime offence, or against whom there is no charge or prosecution, might nevertheless be subject to a control order.[39] Apart from control orders and preventative detention provisions, ASIO can, as part of its counter-terrorism role, detain even non-suspects to obtain information. There are now three sets of provisions in the counter-terrorism realm that allow for detention without trial.[40]

Pre-crime's anticipatory logic is the antithesis of the temporally linear post-crime criminal justice process, which commences with the presumption of innocence and progresses through discrete stages involving arrest, investigation, charge, trial and, in the case of guilty verdicts, punishment. Due process protections linked to the presumption of innocence – such as the right to silence, the right to a fair trial and the presumption in favour of bail – have been significantly undermined by counter-terrorism laws.[41] Furthermore, the onus of proof has been shifted away from the prosecution and placed instead on the defendant in a number of instances.[42] Finally, people charged with terrorism offences are not held in those sections of the prison system reserved for non-convicted prisoners, but are instead routinely and automatically placed with convicted prisoners in maximum-security settings.[43]

INTELLIGENCE AND EVIDENCE

Pre-empting threats requires an ability to predict the future accurately. While evidence is generally gathered to detect offenders and prove harms that have taken place, intelligence is used in an effort to forecast risk. The counter-terrorism framework has eroded the distinction between intelligence and evidence and the merging of the functions of police and intelligence agencies. Intelligence has traditionally been gathered by security agencies, while police have gathered evidence about criminal activity. Intelligence agencies and the intelligence they gather have traditionally been covert, while the police and the processes they use to gather evidence are expected to be open and accountable.[44]

Many of the changes to the legal framework in this era of counter-terrorism have expanded the capacity of the police and security agencies to gather intelligence, while providing unprecedented coercive powers to security agencies and expanding covert policing activities. Intelligence agencies and intelligence are increasingly embedded in criminal justice processes.[45] The expanded role of intelligence in >>

criminal justice and the merging of policing and security agency functions have led to a number of problematic inter-related issues, including the complexity of 'evidence' presented to support pre-crime or (pre) pre-crime counter-terrorism charges or coercive measures, the reliability of such 'evidence', and the politicisation of policing.

Terrorism trials in which pre-crime or (pre) pre-crime offences are alleged tend then to be both lengthy and complex. For example, a trial in the Victorian Supreme Court, which concluded in September 2008, lasted for six months and the jury took four weeks to reach its verdict after hearing 482 covertly taped conversations. The final summing-up for the jury took an entire five weeks alone. The distinction between evidence and intelligence was hard to make out. The jury was presented with a huge amount of disparate pieces of information, often relatively meaningless in isolation, and asked to bring these together to draw inferences and conclusions.[46] The complexity of the evidence/intelligence put before courts casts doubt upon the reliability of convictions.

Prosecutions for offences that are only tenuously connected to projected future events also raise questions about reliability. An assessment based on a forecast about the future becomes less reliable the further forward it attempts to project. Pre-crime offences, such as preparatory offences that criminalise behaviour prior to the inchoate offences of attempt, incitement and conspiracy are more tenuous in accurately predicting future harmful acts than the traditional inchoate offences. Applying the same logic, the (pre) pre-crime offences, such as conspiracy to engage in preparatory offences or attempt to incite a person to engage in a terrorist act, are even more unreliable in terms of accurate prediction. The further removed from a substantive offence or harm, the more the intervention seems to fall into the category of guesswork rather than scientific prediction. Where there has been no proof of previous similar offences, such as required under sex-offender legislation,[47] prediction of future risk becomes more tenuous. The pre-crime offences come perilously close to criminalising risky types (rather than risky acts) and thoughts (rather than deeds).

The merging of intelligence and evidence under hybrid criminal justice and security frameworks creates a tension between impartial justice and the partial politics of security. Pre-crime laws mobilise prejudice around identity, and lead to the intensified politicisation of policing. Pre-emptive threats and the proactive policing and security intelligence agency measures 'demand increased intelligence and much of the information will have no relation to criminal activity'.[48] The investigation of offences under counter-terrorism legislation involves gathering political information, because terrorism is essentially a political construct.[49] Security intelligence agencies and their police counterparts have long gathered information on ethnic, non-government and political groups on grounds that these groups could be fronts for terrorists, or that they might at some future time engage in ideologically motivated violence.[50] The difference in the counter-terrorism context is that intelligence may be gathered coercively (not just covertly). It may also trigger coercive interventions, such as preventive detention or control orders, and be used to prosecute pre-crime offences.

CONCLUSION

The rhetoric of prevention has been used to promote counter-terrorism laws that merge criminal justice and national security frameworks. This hybrid approach creates tensions between traditional law enforcement activities aimed at securing convictions on the basis of evidence presented in open court, and covert police and security agency operations aimed at monitoring and/or disrupting activities. Significant issues arise in the context of hybrid security intelligence and criminal justice frameworks, including increasingly complex trials, the ability to accurately predict risk, and the politicisation of criminal justice. Though prevention is the stated motivation for counter-terrorism laws, they should more accurately be understood as *pre-emptive*.

Prevention is an outcome that cannot be assumed. What has been called the 'new paradigm in prevention' may be ineffective or even counter-productive in preventing terrorism. Pre-emption is not a strategy well-matched to the stated aim of preventing terrorism, and is arguably motivated by political opportunism and the vested interests of police and security agencies. Pre-emption and the shift away from the traditional post-crime orientation of law towards pre-crime frameworks also mark a shift away from due process protections, such as the presumption of innocence. ■

This article is in part based on a chapter 'Counter-terrorism: the law and policing of pre-emption' in *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (2010) Routledge, London and New York, 13-29.

Notes: **1** D Cole, (2006) 'Are We Safer? 53 (4) The New York Review of Books 15, 17-18 quoting former US Attorney-General, J Ashcroft. **2** George W Bush, 'Graduation speech at West Point' (Speech delivered at the United States Military Academy, West Point, New York, 1 June 2002) (emphasis added). **3** For a useful summary of all prosecutions under Australia's counter-terrorism terrorism legislation, see N McGarrity, 'Testing our counter-terrorism laws: the prosecution of individuals for terrorism offences in Australia' (2010) 34 *Criminal Law Journal*, 92. **4** A Lynch and G Williams, *What Price Security?: Taking Stock of Australia's Anti-Terror Laws* (2006) 10. **5** P Ruddock, 'Law As A Preventative Weapon Against Terrorism' in A Lynch, E McDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 3, 3. **6** Security Legislation Review Committee, Commonwealth of Australia, *Report of the Security Legislation Review Committee* (2006). **7** R Ericson, 'The State of Pre-emption: Managing Terrorism through Counter Law' in L Amoore and M de Goede (eds), *Risk and the War on Terror* (2008) 57, 57. **8** For a description of the Haneef case, see M Rix, 'The show must go on: the drama of Dr Mohamed Haneef and the theatre of counter-terrorism' in (eds) N McGarrity, A Lynch, and G Williams, *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* Routledge, London and New York (2010) 199-216. **9** Queensland Police Service, *Submission to Clarke Inquiry into the case of Dr Mohamed Haneef* (2008) 1.3. **10** See, for example, T Ali, *Rough Music: Blair, Bombs, Baghdad, London, Terror* (2005), ch 5; D Cole, 'Are We Safer?' LIII(4) *The New York Review of Books* 15, 17-18; F Ansari, *British Anti-Terrorism: A Modern Day Witch-Hunt* (2005) Islamic Human Rights Commission <www.ihrc.org> at 29 March 2007. **11** See, for example, *Lodhi v R* (2006) 199 FLR 303 [63]-[70] (Spigelman CJ); *R v Benbrika* (2009)

222 FLR 433. **12** See, for example, Royal Canadian Mounted Police, 'Policing in the Post-9/11 Era' (2005), 5; R Schmitt, 'Terrorism cases fizzling out in US courts: study', *Sydney Morning Herald* (Sydney); Australian Security Intelligence Organisation, *Report to Parliament 2005-2006* (2006) 45. **13** P Hillyard, *The 'War on Terror': Lessons from Ireland* (2005) European Civil Liberties Network <http//www.ecln.org/essays/essays-1.pdf> at 16 October 2009. **14** See, for example, W Aly, 'Axioms of Aggression – Counter-Terrorism and Counter-Productivity in Australia' (2008) 33(1) *Alternative Law Journal* 20; S Pickering, J McCulloch and D Wright-Neville, *Counter-Terrorism Policing: Community, Cohesion and Security* (2008) 20. **15** Ruddock, above note 5, 5. **16** J McCulloch, and J Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38(3) *Australian and New Zealand Journal of Criminology* 400; K Roach, 'The eroding distinction between intelligence and evidence in terrorism investigations' in (eds) N McGarrity, A Lynch, and G Williams, *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11*, Routledge, London and New York, 48-68. **17** J White, *Defending the Homeland: Domestic Intelligence Law Enforcement and Security* (Belmont, CA and London: Thomas Wadsworth) 2004, p25. **18** C Lum, L Kennedy and L Sherley, 'Are Counter-Terrorism Strategies Effective? The Results of the Campbell Systematic Review on Counter-Terrorism Evaluation Research' (2006) 4(2) *Experimental Criminology* 489. **19** See, for example, R Gitttins, 'The fear game, our latest sensation' *The Age* (Melbourne) 16 November 2005. **20** J McCulloch, 'National (In)security Politics in Australia: Fear and the Federal Election (2004) 29 *Alternative Law Journal* 87; M Grattan, 'Labor Smells A New Tampa' *The Age* (Melbourne) 5 November 2003. **21** C Banham and J Pearlman, 'Budget control for federal police could cost them' *The Age* (Melbourne) 25 August 2009; Evidence to Senate Legal and Constitutional Legislation Committee, Estimates Hearings, Commonwealth of Australia, Canberra, 25 May 2006. **22** A Lynch, N McGarrity, G Williams, 'The emergence of a "culture of control"' in (eds) A Lynch, N McGarrity, G Williams, *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11*, Routledge, New York and London (2010) 3-11. **23** U Beck, *Risk Society: Towards A New Modernity* (1992); Y P O'Malley, *Risk, Uncertainty and Government* (2004). **24** See, for example, *Sex Offenders Monitoring Act* 2005 (Vic); M Brown, 'Risk, Punishment and Liberty' in T Anthony and C Cunneen (eds), *The Critical Criminology Companion* (2008) 253, 257-9. **25** See, for example, B McSherry, '"Dangerousness" and Public Health' (1998) 23 *Alternative Law Journal* 276. **26** L Amoore and M De Goede, 'Introduction: Governing by Risk in the War on Terror' in L Amoore and M De Goede (eds), *Risk and the War on Terror* (2008) 5, 8. **27** McCulloch, J and Pickering, S (2009) 'Pre-crime and counter-terrorism: imagining future crime in the "war on terror"' 49 *British Journal of Criminology* 628. **28** L Zedner, (2007) 'Pre-crime and post-criminology' 11, *Theoretical Criminology*, 261. **29** Ruddock, above note 5, 5. **30** *Lodhi v R*, above note 11 (Spigelman CJ). **31** Lynch and Williams, above note 4, 19; B McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 *University of New South Wales Law Journal* 354, 364-7. **32** P Gillies, The Law of Conspiracy (1990); G Rose and D Nestorovska, 'Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms' (2007) 31 *Criminal Law Journal* 20, 29. **33** See N McGarrity, 'Testing our counter-terrorism laws: the prosecution of individuals for terrorism offences in Australia' (2010) 34 *Criminal Law Journal* 92. **34** B McSherry, above note 31, 364-6. **35** S Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel nor Extraordinary?' in T Davis (ed), *Human Rights 2003: The Year in Review* (2004) 39. **36** B McSherry, above note 31, 365. **37** Under Commonwealth legislation, a person may be held in preventative detention only for a maximum of 48 hours: *Criminal Code Act* 1995 (Cth) div 105. State and territory legislation has been enacted to extend this maximum period to 14 days: see *Terrorism (Police Powers) Act* 2002 (NSW) s26K; *Terrorism (Preventative Detention) Act* 2005 (Qld) s12; *Terrorism (Preventative Detention) Act* 2005 (SA) s8; *Terrorism (Preventative Detention) Act* 2005 (Tas) pt 2; *Terrorism (Community Protection) (Amendment) Act* 2006 (Vic) s13G; *Terrorism (Preventative Detention) Act* 2006 (WA) s15; *Terrorism (Extraordinary Temporary Powers) Act* 2006 (ACT) s26; *Terrorism (Emergency Powers) Act* (NT) pt 2B. **38** *Criminal Code Act* 1995 (Cth) div 104. **39** In 2006, Jack Thomas was made the subject of a control order after the Supreme Court of Victoria overturned his conviction on terrorist-related charges: *R v Joseph Terrence Thomas* (2006) 14 VR 475. **40** First, the preventative detention regime in Division 105 of the *Criminal Code Act* 1995 (Cth) enables the detention of a suspect by the Australian Federal Police for up to 24 hours (with a possible extension of up to 48). Complementary state and territory legislation enables the detention of a person for up to 14 days. Second, pre-charge detention and questioning by the Australian Federal Police under Part 1C of the *Crimes Act* 1914 (Cth) for up to 20 hours (excluding any time designated as 'dead time'). Finally, the control order regime in Division 104 of the *Criminal Code Act* 1995 (Cth) may also be used to effectively place a person under house arrest. **41** See N McGarrity, 'Testing our counter-terrorism laws: the prosecution of individuals for terrorism offences in Australia' (2010) 34 *Criminal Law Journal* 92. **42** See, for example, Lynch and Williams, above note 4, 20; B McSherry, above note 31, 370. **43** *R v Benbrika and Ors* (2008) 18 VR 410. **44** See McCulloch and Tham, note 16 above. **45** White, above note 17. **46** *R v Benbrika* (2009) 222 FLR 433. **47** See, for example, *Crimes (Serious Sex Offenders) Act* 2006 (NSW); *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). **48** White, above note 17, 67 and 13. **49** J Hocking, *Terror Laws: ASIO, Counter Terrorism and the Threat to Democracy* (2004). **50** J McCulloch, *Blue Army: Paramilitary Policing in Victoria* (2001), ch 8.

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