

The Definition of ‘Terrorist Act’ in Part 5.3 of the Commonwealth Criminal Code

GEORGE SYROTA[†]

Australia’s counter-terrorism legislation is based on two key concepts – a ‘terrorist act’ and a ‘terrorist organisation’. This article is concerned primarily with the former.

‘Terrorist act’ is defined in Part 5.3 of the Criminal Code 1995 (Cth). The definition is modelled on the definition of ‘terrorism’ in section 1 of the Terrorism Act 2000 (UK). However, although the two definitions have much in common, there are important differences between them. The Australian definition is narrower and more intricate than its UK counterpart.

This article is divided into three parts. Part A explains how the definition of ‘terrorism’ in section 1 of the Terrorism Act 2000 (UK) was drawn up. Part B compares that definition with the definition of ‘terrorist act’ in Part 5.3 of the Criminal Code. It points to particular cases of terrorism that would be covered by the UK definition but not by the Australian definition. It also suggests ways in which the Australian definition might be amended to give it broader coverage. Part C exposes some ambiguities in the two definitions.

PART A: INTRODUCTION	308
1. The Structure of Part 5.3 of the Criminal Code	310
2. Importing the UK Definition of ‘Terrorism’ into Australian Law	312
3. Incorporating the Definition of ‘Terrorist Act’ into the Criminal Code	316
4. Defences	319
UK DEFINITION OF TERRORISM – A LEGISLATIVE HISTORY	320
1. The Prevention of Terrorism (Temporary Provisions) Act 1974	320
2. The FBI’s Definition	321
3. The Blair Government’s Definition	322
PART B: SUBSTANTIVE DIFFERENCES BETWEEN THE UK AND AUSTRALIAN DEFINITIONS	328
1. Safeguards for Civil Liberties	328
2. Terrorist Acts Involving the Use of Firearms or Explosives	329
3. Other Weaknesses in the Australian Definition	335
PART C: AMBIGUOUS WORDS AND PHRASES	337

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PART A

INTRODUCTION

Few laws enacted by the Commonwealth Parliament over the past 10 years have been as controversial as the five interrelated anti-terrorist laws that received the royal assent in July 2002. The police, on the one hand, have hailed them as indispensable to the war on terrorism.¹ Civil liberties groups, on the other hand, have condemned them as unnecessary, oppressive and unjust.² The press and academics have also been critical of the new laws, as have the Greens and Democrats who combined to oppose them in Parliament.³

The laws in question were part of the Howard government's response to the terrorist attacks that occurred in New York, Washington DC and Pennsylvania on 11 September 2001 and to the similar if less audacious attacks that Al-Qu'ida and other terrorist groups had made on the United States, the United Kingdom and other Western countries over the previous decade.⁴

Although the primary object of the new laws was to make it more difficult for terrorists to attack people and property located inside Australia, a secondary object was to make it more difficult for them to use Australia as a base from which to attack targets abroad.⁵ The five laws were:

- The Security Legislation Amendment (Terrorism) Act 2002 ('SLATA');
- The Suppression of the Financing of Terrorism Act 2002;
- The Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002;
- The Border Security Legislation Amendment Act 2002; and

1. See Senate Legal and Constitutional Legislation Committee, *Report on the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Legislation* (May 2002) [3.12]–[3.18] (hereafter 'SLCLC Report').

2. Ibid [3.3]–[3.11]; D Farrant, 'Anti-Terrorist or Anti-Democratic?', *The Age* (Melbourne), 2 May 2002.

3. Senator Grieg, on behalf of the Democrats, told Parliament, 'The Australian Democrats oppose these bills': SLCLC Report, above n 1, 80. Senator Brown, on behalf of the Greens, put the point more colourfully: 'I reiterate that if you go to South Korea you will find a country with a much shakier democracy than we have has shelved legislation like this, simply because the people were so opposed to it': Commonwealth, *Parliamentary Debates*, Senate, 25 Jun 2002, 2562.

4. Examples include the bombing of the US Navy's guided missile destroyer *USS Cole* in the port of Aden, Yemen (12 Oct 2000), and the bombing of the US embassies in Nairobi and Dar es Salaam (7 Aug 1998). In London, terrorists launched mortar attacks on the Headquarters of MI6 (21 Sep 2000), Heathrow Airport (9–13 Mar 1994) and 10 Downing Street (7 Feb 1991). Car bombs exploded outside the BBC's Headquarters in West London (4 Mar 2001), beneath Hammersmith Bridge (1 Jun 2000) and in the Financial District (10 Apr 1992).

5. Criminal Code 1995 (Cth) ss 15(4) (extended geographical jurisdiction – category D), 100.1(4) & 100.3. The Terrorism Act 2000 (UK) also applies extra-territorially: s 1(4); Carlile Report, below n 28, [75]–[82].

- The Telecommunications (Interception) Legislation Amendment Act 2002.⁶

Since 2002, the Commonwealth Parliament has enacted more than two dozen additional counter-terrorism laws.⁷ The State and Territory parliaments have also been active in this field.⁸

The results of the Commonwealth legislation can be summarised as follows. First, additional powers of surveillance, search, seizure and detention have been granted to ASIO, the Australian Federal Police and the Australian Protective Service for use in the investigation and prosecution of terrorist crimes. Secondly, the Attorney-General has been granted a power to declare certain organisations to be ‘terrorist organisations’.⁹ Membership of, or giving assistance to, any such organisation is a crime. Thirdly, the offence of treason has been redefined and the penalty for it reduced from death to life imprisonment. Fourthly, a new Part, entitled ‘Terrorism’, has been incorporated into the Criminal Code 1995 (Cth). This Part creates over a dozen terrorism offences; in addition, it establishes a new regime of control orders and preventative detention orders for use against suspected terrorists.

Despite their radical nature, the five bills listed above completed their passage through Parliament in less than four months. They were introduced into the House of Representatives on 12 March 2002 and received the royal assent in the first week of July. The Senate Legal and Constitutional Legislation Committee, which was asked to report on the bills, was given only six weeks to do so.¹⁰ Justice John Dowd, the then President of the Australian section of the International Commission of Jurists (‘ICJ’), warned that it would not be possible to scrutinise the bills thoroughly in such a short space of time.¹¹ ‘The devil is in the detail’, he told the Committee’s

6. The most important and controversial of these Acts was the first – SLATA. It amended the Criminal Code by inserting a new Part into it – Part 5.3 – which deals with terrorism. The Suppression of the Financing of Terrorism Act 2002 inserted Div 103 (‘financing terrorism’) into the Criminal Code. This Act implemented UN Security Council Resolutions 1276 and 1373, and Article 2 of the International Convention for the Suppression of the Financing of Terrorism. The Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 inserted Div 72 into the Criminal Code (‘international terrorist activities using explosive or lethal devices’). See SLCLC Report, above n 1, [2.30], [4.20].

7. Parliamentary Joint Committee on Security and Intelligence, *Report on Australia’s Terrorism Laws* (Dec 2006) [5.9] (hereafter ‘PJCSI Report’).

8. See below n 22.

9. Criminal Code, Div 102. The Attorney-General has so far used this power to outlaw Al-Qu’ida, Hizzbollah, Jemaih Islamiah and 16 other terrorist organisations: see Security Legislation Review Committee (Chair: Simon Sheller AO QC), *Report* (Jun 2006) ch 7 (hereafter ‘Sheller Inquiry’).

10. The Committee began its inquiry on 21 March 2002 and tabled its report on 8 May 2002. It described the bills as ‘some of the most important to come before the Parliament in the last 20 years’, adding that they ‘raised significant and sometimes complex technical issues’: SLCLC Report, above n 1, [1.11].

11. SLCLC Report, *ibid*, [1.8]–[1.10], [3.71]. The Law Council of Australia echoed this view. Although the Committee had no power to extend the six week time-limit, it did extend its schedule of public hearings ‘in order to hear as many witnesses as possible’: *ibid*.

chairman; however, his request that the ICJ and others be given more time to make submissions to the Committee in regard to the bills was turned down:

We [the ICJ] do not consider that the importance of this legislation is acknowledged by the absurdly limited time that is provided to consider the legislation. The interaction of the Commonwealth Crimes Act, the Criminal Code and these bills requires extensive and careful consideration which, unfortunately, it has not been possible to give.¹²

Six years have passed, but many aspects of this important legislation have still not received detailed analysis. This article aims to correct that omission. It focuses on the offences in Part 5.3 of the Criminal Code and in particular on the term ‘terrorist act’, which underpins them. Other changes to the Criminal Code effected by the legislation are not considered.

1. The structure of Part 5.3 of the Criminal Code

Part 5.3 of the Criminal Code is entitled ‘Terrorism’. It was inserted into the Code by the first of the five statutes listed above (ie, ‘SLATA’). The Explanatory Memorandum for that statute stated that the purpose of the Part is ‘to combat terrorism by ensuring that there are criminal offences to deal with terrorism and membership of a terrorist organisation’.¹³

Part 5.3 is comprised of six divisions. Division 100 sets out the constitutional basis for the Part and defines a number of key concepts used in it. Divisions 101-103 contain the new terrorism offences. Divisions 104-105 were added to the Part in 2005.¹⁴ They introduce a new regime of control orders and preventative detention orders similar to that established in the United Kingdom in the wake of the London bombings on 7 and 21 July 2005.¹⁵

Section 101.1, which creates the primary terrorism offence, provides: ‘A person commits an offence if the person engages in a terrorist act’. The penalty is life

12. SLCLC hearings: Commonwealth, *Parliamentary Reports*, Senate, 8 April 2002.

13. During its 2nd reading in the House of Representatives, the A-G summarised the objectives of SLATA as follows: ‘[The bill] is part of a package of important counter-terrorism legislation designed to strengthen Australia’s counter-terrorism capabilities.... [It] introduces a number of new offences for terror-related activities that are not caught by existing legislation. It has been prepared in response to the changed security environment since September 11’: Commonwealth, *Parliamentary Debates*, House of Representatives, 12 Mar 2002, 1040–41.

14. Anti-Terrorism Act (No 2) 2005 (Cth).

15. Div 104 enables the courts to impose a control order on a person ‘for the purpose of protecting the public from a terrorist act’. Div 105 enables them to impose a preventative detention order on a person in order ‘to prevent an imminent terrorist act occurring’ or ‘to preserve evidence of, or relating to, a recent terrorist act’.

imprisonment. Sections 101.2–101.6 create a number of ancillary offences, all of which require proof of a terrorist act.¹⁶

Division 102 deals with ‘terrorist organisations’, a concept which is defined in section 102.1(1) as –

(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting or fostering the doing of a *terrorist act* ...; or (b) an organisation that is specified by the regulations for the purposes of this paragraph.¹⁷

Division 102 creates seven offences, all of which relate to terrorist organisations. They include: (i) directing the activities of a terrorist organisation; (ii) being a member of a terrorist organisation; (iii) recruiting for a terrorist organisation; and (iv) training, or receiving training from, a terrorist organisation.¹⁸ The penalties range from three to 25 years’ imprisonment. Division 103 makes it an offence, punishable by life imprisonment, for a person to finance terrorism or a terrorist.

It is clear that ‘terrorist act’ plays an important role in Part 5.3.¹⁹ Not only does it form part of the definition of each of the offences created by divisions 101 and 103, but it also forms part of the definition of ‘terrorist organisation’ in division 102 and thus, by implication, it is incorporated into the definition of each of the offences created by that division. In addition, the scheme of control orders and preventative detention orders established by divisions 104 and 105 of the Criminal Code depends on this concept.²⁰ The National Counter-Terrorism Plan, developed by the Commonwealth government in consultation with the State and Territory governments, also depends on it.²¹ Virtually all State counter-terrorism legislation enacted after 11 September 2001 is likewise based on this concept.²²

16. The relevant offences are: s 101.2 (Providing or Receiving Training Connected with Terrorist Acts); s 101.4 (Possessing Things Connected with Terrorist Acts); s 101.5 (Collecting or Making Documents Likely to Facilitate Terrorist Acts); s 101.6 (Other Acts Done in Preparation for, or Planning, Terrorist Acts).

17. Emphasis added.

18. Ss 102.2–102.5. S 102.6 creates an offence of getting funds to, from, or for, a terrorist organisation. S 102.7 creates an offence of providing support to a terrorist organisation; s 102.8, added to the Criminal Code in 2004, creates an offence of associating with terrorist organisations.

19. ‘Terrorism’ plays the equivalent role in the UK counter-terrorism legislation: Carlile Report, below n 28, [12].

20. See n 15, above.

21. Cth Govt, *National Counter-Terrorism Plan*, 2nd edn, 2005 [5]; PJCSI Report, above n 7, [5.9]–[5.11].

22. See eg Crime and Misconduct Act 2001 (Qld) s 22A; Terrorism (Preventative Detention) Act 2005 (SA) s 3; Terrorism (Community Protection) Act 2003 (Vic) s 4; Terrorism (Extraordinary Powers) Act 2005 (WA) s 5. The Terrorism (Police Powers) Act 2002 (NSW) s 3 adopts the Commonwealth’s definition, but excludes threats. The Terrorism (Police Powers) Act 2005 (SA) s 2 also excludes threats. The Northern Territory’s counter-terrorism legislation pre-dates 11 Sept 2001 and is in different terms: Criminal Code 1983 (NT) s 50. See PJCSI Report, above n 7, [5.9]–[5.11].

2. Importing the UK definition of ‘terrorism’ into Australian law

‘Terrorist act’ is defined in section 100.1 of the Criminal Code. The definition is modelled on the definition of ‘terrorism’ in section 1 of the Terrorism Act 2000 (UK).²³ However, although the two definitions have much in common, there are important differences between them.²⁴ The Australian definition is not only more intricate but also far narrower than its UK counterpart. Both the Commonwealth Attorney-General and the Director of Public Prosecutions have criticised the Australian definition for its narrowness and complexity;²⁵ however, a recent review by the Parliamentary Joint Committee on Security and Intelligence has recommended only minor changes to it. The two definitions are set out on pages 349–50, below, for comparison.

It is not surprising that the Howard government chose to model the definition of ‘terrorist act’ on the definition of ‘terrorism’ in the Terrorism Act 2000 (UK). That definition had been formulated by some of the most brilliant legal minds in the United Kingdom. It originated in a report by Lord Lloyd of Berwick entitled *An Inquiry into Legislation against Terrorism*.²⁶ This report, which the British government had commissioned in 1995 and which was published the following year, included many recommendations for strengthening the UK’s counter-terrorism laws. It also recommended the adoption of a new statutory definition of terrorism based on a definition used by the Federal Bureau of Investigation in the United States. The British government accepted many of Lord Lloyd’s recommendations, but believed his proposed statutory definition of terrorism was too narrow. It widened that definition and included the revised version in its Consultation Paper, *Legislation against Terrorism*, issued in 1998.²⁷ The following year it incorporated an even wider definition of terrorism into clause 1 of the Terrorism Bill 1999/2000 (UK). That definition was debated at length in Parliament, where further amendments designed

23. In the UK, the Reinsurance (Acts of Terrorism) Act 1993 (UK) s 2(2) provides an alternative definition of terrorism, but for insurance purposes only.

24. The Sheller Inquiry’s view that the definitions of ‘terrorism’ and ‘terrorist act’ are ‘in almost identical terms’ overlooks the critical differences between them: above n 9, [6.21].

25. PJCSI Report, above n 7, [5.7], [5.12]; Sheller Inquiry, above n 9, [6.18], [6.20], [6.24]. According to the prestigious Gilbert +Tobin Centre of Public Law, UNSW, the Australian definition of ‘terrorist act’ is one of the finest definitions of terrorism in the world: *ibid*.

26. Lord Lloyd of Berwick, *Inquiry Into Legislation against Terrorism*, Cm 3420 (London: HMSO, 1996) (hereafter ‘Lloyd Report’). Lord Lloyd’s remit was to consider whether there would be a need to retain specific counter-terrorism legislation in the UK if a lasting peace could be achieved in Northern Ireland. Not only did he conclude that there would be such a need, but he recommended that the UK’s counter-terrorism legislation be strengthened considerably. The background to Lord Lloyd’s inquiry is set out in a House of Commons Research Paper compiled by Ms Mary Baber: House of Commons Library, *The Terrorism Bill No 10 of 1999-2000*, Research Paper No 99/101 (London, Dec 1999) 8 (hereafter ‘Baber Research Paper’).

27. Home Office/Northern Ireland Office, *Legislation Against Terrorism: A Consultation Paper*, Cm 4178 (London: HMSO, 1998) (hereafter ‘Consultation Paper’).

to narrow it were introduced.²⁸ The final definition was, therefore, something of a compromise between those who wanted an extremely wide definition and those who feared that such a definition could be used to undermine traditional civil liberties.²⁹ Nevertheless, it has proved influential: several countries, including Australia, New Zealand, Canada and South Africa, have incorporated aspects of it into their own statutory definitions of terrorism.³⁰

A Resolution adopted by the UN Security Council in the aftermath of the September 11th attacks placed all member States under an obligation to co-operate with each other to reduce the spread of terrorism.³¹ The Howard government reacted to that Resolution swiftly and positively.³² It did so, in part, by enacting SLATA and the other four statutes listed at the start of this article. The Terrorism Act 2000 (UK), which had been in force for approximately one year, provided a convenient template for the government's legislation.³³ Not only did its core element – the definition of 'terrorism' in section 1 – appear to strike a reasonable balance between the protection of civil liberties and the promotion of national security, but the fact that it had won the support of most of the major political parties in the United Kingdom suggested that equivalent legislation might also enjoy general political support in this country.³⁴

Nevertheless, the much smaller scale and very different nature of terrorism in Australia eventually persuaded the Howard government to opt for more conservative legislation than that approved by the UK Parliament. The pressure to do so came from two sources: the Coalition of Australian Governments ('COAG') and the Senate. COAG agreed to support the Howard government's plan to introduce national

28. See Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation, *Report on the Definition of Terrorism*, 15 Mar 2007 (hereafter 'Carlile Report') [9]: '[T]he definition included in what became the Terrorism Act 2000 was debated at length in Parliament'.

29. Consultation Paper, above n 27, [3.18].

30. Terrorism Suppression Act 2002 (NZ) s 5(1)–(3); Criminal Code (Canada), Pt II.1 ('Terrorism'); Protection of Constitutional Democracy against Terrorist and Related Activities Act 2003 (SA); Council of Europe, *Convention on the Prevention of Terrorism 2005*. See PJCSI Report, above n 7, [5.19]; Carlile Report, above n 28, [18]; SLCLC Report, above n 1, [3.56]–[3.60].

31. The UN Security Council adopted Resolution 1373 on 28 September 2001. Based on Chapter VII of the UN Charter, the Resolution called upon States, 'to work together urgently to prevent and suppress terrorist acts, including through increased co-operation and full implementation of the relevant international conventions on terrorism': Sheller Inquiry, above n 9, [5.11]; SLCLC Report, above n 1, [2.4]–[2.11].

32. Hon D Williams QC, 'Upgrading Australia's Counter-Terrorism Capabilities', *News Release*, 18 Dec 2001. The News Release announced Cabinet's decision to introduce 'new counter-terrorism legislation and enhanced Commonwealth powers ... to combat terrorism'. Cf SLCLC Report, above n 1, [2.12]–[2.69].

33. The Terrorism Act received the royal assent on 20 July 2000, but many parts of it came into force only in the following year.

34. For commentary on the UK legislation, see eg J Rowe, 'The Terrorism Act 2000' [2001] Crim LR 527; D Williams, 'Terrorism and the Law in the United Kingdom' (2003) 26 UNSW L Rev 179; L Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 J Law & Soc 507.

counter-terrorism legislation, but only on condition that its most fundamental concept, a ‘terrorist act’, was ‘a relatively narrow one – and one that was designed to deal specifically with “terrorism” of the kind seen in New York and Bali’.³⁵ The Senate’s view, expressed in its *Report on the Security Legislation Amendment (Terrorism) Bill 2002 (No 2)*, was based on the premise that the government’s legislation should be proportionate to the threat of terrorism faced by Australia. Since the United Kingdom had ‘experienced significantly higher levels of terrorist threat and, indeed, acts of terrorism than Australia has faced or is likely to face’,³⁶ it followed that the definition of ‘terrorist act’ and the new counter-terrorism powers and offences as a whole should be less sweeping than those adopted by the UK Parliament in the previous year.

The differences between the Australian and UK legislative schemes are manifold, but may be summarised as follows:

1. The definition of ‘terrorist act’ in the Criminal Code 1995 (Cth) is less comprehensive than the definition of ‘terrorism’ in the Terrorism Act 2000 (UK). It contains safeguards for civil liberties that are absent from the UK definition (see below).
2. The terrorist offences in sections 101–103 of the Criminal Code require proof of intention, knowledge or recklessness. Negligence is not a sufficient ground of liability for them. It is, however, a sufficient ground of liability for some of the UK offences.³⁷
3. The terrorism offences in sections 101–103 of the Criminal Code place a burden of proof on the defendant only exceptionally, whereas the corresponding offences in the Terrorism Act 2000 (UK) do so more generally. (The House of Lords in its judicial capacity has, however, ruled against this reversal of the burden of proof in the United Kingdom on the ground that it violates the European Convention for the Protection of Human Rights.)³⁸

35. Sheller Inquiry, above n 9, [5.11], [6.20], [6.23].

36. SLCLC Report, above n 1, [3.9], [3.76]. The Commonwealth DPP, D Bugg QC, has made a similar point: ‘Australia’s relative isolation and its history of stable government have provided us with limited exposure to violent terrorist acts’. See Bugg, ‘The Reach of Terrorist Financing and Combating It: The Links between Terrorism and Ordinary Crime’ (paper presented at the IAP Conference, Washington DC, 12 Aug 2003). The paper can be downloaded from the DPP’s website: <www.cdpp.gov.au/>. A communiqué issued by COAG following a Special Meeting on Counter-Terrorism (27 Sept 2005) stated: ‘The national counter-terrorism alert remains at medium, as it has since 12 Sept 2001. A terrorist attack in Australia continues to be feasible and could occur’. The communiqué has been posted on the COAG website: <www.coag.gov.au/>.

37. The government’s original intention was to make all the offences in Part 5.3 absolute or strict liability offences. However, on the recommendation of the Senate Legal and Constitutional Legislation Committee, the government redrafted the offences so as to incorporate a fault element: SLCLC Report, above n 1, [3.81]–[3.100]. Two instances of strict liability remain: ss 102.5 and 102.8.

38. Two provisions in Part 5.3 place a legal burden on D: ss 102.3(2) and 102.6(3). ‘Legal burden’ is defined in the Criminal Code s 13.1. The Terrorism Act 2000 (UK) contains a far

4. The duty on banks and other businesses to report to the police any suspicion they may have that someone is ‘laundering’ money on behalf of terrorists, or is otherwise involved in terrorism, is more limited in Australia than in the United Kingdom.³⁹
5. The glorification of terrorism is not an offence in Australia, whereas it is an offence in the United Kingdom.⁴⁰

The narrowness of the definition of ‘terrorist act’, combined with the need to prove intention, knowledge or recklessness and the absence of provisions placing the legal burden of proof on the defendant, demonstrate the Commonwealth Parliament’s determination not to erode individual liberty unduly. At the same time, they deprive the Australian counter-terrorism legislation of much of its utility. So far only a handful of prosecutions have been brought under it. The majority have ended in the defendant’s acquittal.⁴¹

longer list of provisions purporting to place the legal burden on D: see, eg, ss 11(2), 18(2), 19(3), 21(5), 36(3), 51(3), 93(2) and 94(4). However, these provisions must now be read in the light of the House of Lords’ decision in *Sheldrake v DPP; A-G’s Reference No 4 of 2002* [2005] 1 AC 264, which held the first of them (s 11(2)) to be in violation of the European Convention for the Protection of Human Rights. The House of Lords substituted an evidential burden. The Sheller Inquiry (above n 9, [10.14]–[10.21]) made this the basis of its recommendation that any provision in Part 5.3 which places the legal burden on D be replaced by a provision placing only an evidential burden on him or her. The PJCSI Report concurred: above n 7, [5.100]–[5.108].

39. Compare Terrorism Act 2000 (UK) s 19 with the Suppression of the Financing of Terrorism Act 2002 (Cth) sch 2. The latter requires a ‘cash dealer’ to report financial transactions to AUSTRAC if he or she has reasonable grounds to believe that the transaction is preparatory to the financing of a terrorist act: SLCLC Report, above n 1, [2.35]. The former requires *any* person (not merely a cash dealer) who believes or suspects that another person has committed an offence under ss 15–18 of the Act (money laundering, etc) to report that belief or suspicion to the police as soon as is reasonably practicable. The information on which the person’s belief or suspicion is based must have come to him or her in the course of his or her trade, business, profession or employment. Failure to report the suspicion is an offence.
40. Terrorism Act 2006 (Cth) s 1. Lord Carlile (Report, above n 28, [72]) adopted an ambivalent approach to this offence. ‘Mere preaching and glorification’, he said, ‘should not be capable of being regarded as terrorist offences’. On the other hand, he added: ‘For the time being at least, I see no need to amend the existing law in that regard’. In Australia, the mere glorification of terrorism is not an offence. However, the A-G may proscribe an organisation that advocates terrorism. S 102.1 of the Criminal Code defines ‘advocates’ to include directly praising the doing of a terrorist act in circumstances which might lead others to commit such an act.
41. Two people have been convicted of offences under Part 5.3 of the Criminal Code: Mr Jack Roche (26 Feb 2006) and Mr Faheem Lodhi (19 Jun 2006). The Victorian Court of Criminal Appeal later ordered a retrial for Roche. Lodhi’s conviction and sentence are still under appeal. In 2005, the NSW Supreme Court acquitted Mr Zeky Mallah of two terrorism offences, but convicted him of a non-terrorist crime (recklessly making a threat – Criminal Code s 147.2). In 2007, two unrelated prosecutions under Part 5.3 (Dr Mohamed Haneef and Mr Izhar Ul-Haque) collapsed in circumstances which embarrassed the police. See D Box ‘Keelty Attacked for “Court Testing”’, *The Australian*, 17 Dec 2007.

3. Incorporating the definition of ‘Terrorist Act’ into the Criminal Code

At first glance, the definitions of ‘terrorism’ and ‘terrorist act’ appear almost identical. A closer look, however, reveals important differences between them. Most of these differences are the result of Parliament’s decision to enact a definition of ‘terrorist act’ which is significantly narrower than the definition of ‘terrorism’ in the United Kingdom. That decision, in turn, reflects the different levels of terrorism that the two countries have experienced.

The other differences between the two definitions can be explained on a separate ground. The Commonwealth, unlike the United Kingdom, has a Criminal Code. Since the definition of ‘terrorist act’, and the associated counter-terrorism offences, form part of that Code, it has been necessary to draft them in accordance with the principles on which the Code is based. For example, section 5.1(1) of the Code provides:

A fault element for a particular physical element [of an offence] may be intention, knowledge, recklessness or negligence.

The offences in Part 5.3 of the Code conform to this requirement. The Howard government would have preferred negligence (or, in some cases, no fault) to be the relevant fault element, but in light of the Senate Legal and Constitutional Legislation Committee’s criticism of that approach, it accepted that the fault element should be intention, knowledge or recklessness.⁴² Moreover, it decided that a distinction should be made between offences based on intention or knowledge, on the one hand, and offences based on recklessness, on the other. The penalties would be higher for the first group of offences than the second.⁴³

The definition of ‘terrorist act’ in section 100.1 likewise conforms to the underlying principles of the Criminal Code. Since these principles are, in some respects, different from those on which English criminal law is based, the two definitions read rather differently. For example, the Terrorism Act 2000 (UK) uses the words ‘purpose’ and ‘design’ to import a mental element into the definition of ‘terrorism’, whereas the Criminal Code uses the word ‘intention’ to import a fault element into the definition of ‘terrorist act’. ‘Intention’ has been used in preference to ‘purpose’ because it is one of the four fault elements listed in section 5.1(1) of the Code: see above. To the non-lawyer, this difference in terminology may seem inconsequential. However, intention is a broader concept than purpose, and thus the phrase ‘with the *intention* of advancing a political, religious or ideological cause’ in the Australian definition of ‘terrorist act’ has a wider ambit than the phrase ‘for the *purpose* of advancing a political, religious or ideological cause’ in the UK definition of ‘terrorism’. Similarly,

42. SLCLC Report, above n 1, [3.81]-[3.100].

43. See eg ss 101.2(1) and 101.2(2) (Providing or Receiving Training Connected with Terrorist Acts). The penalty under subs (1) (a knowledge based offence) is 25 years’ imprisonment; under subs (2) (a recklessness based offence), 15 years’ imprisonment.

whereas the definition of ‘terrorism’ in section 1 of the Terrorism Act 2000 (UK) refers to action that ‘involves serious violence against a person’,⁴⁴ the definition of ‘terrorist act’ in Part 5.3 of the Criminal Code refers to action that ‘causes serious harm that is physical harm to a person’. It would be wrong to assume that the two phrases mean one and the same thing or that the decisions of the UK courts construing the definition of ‘terrorism’ will be determinative of the construction given to the term ‘terrorist act’ by the Australian courts; or vice versa. On the contrary, the two definitions may eventually be shown to cover quite different ground.

Two old English cases, *Martin* (1881) and *Saunders and Archer* (1573), may be used to illustrate the point that the two definitions, though superficially similar, would not necessarily apply to the same set of facts in exactly the same way. Neither case, it must be emphasised, involved terrorism. They can, however, be used to demonstrate certain differences in the physical elements of the two definitions.

The facts of *Martin* may be summarised as follows.⁴⁵ The defendant, D, as a practical joke, extinguished all the gas lights in a theatre thereby plunging the audience into total darkness. Moments before, he had locked and bolted the exterior door to the theatre so that no one could get out. Many people were seriously injured in the ensuing pandemonium, though no one was killed. The jury found that D intended merely to spread ‘terror and alarm’ throughout the audience, but not to cause physical injury to anyone. Nevertheless, the Court for Crown Cases Reserved convicted him of inflicting grievous bodily harm, contrary to section 20 of the Offences against the Person Act 1861 (UK).

How would the Australian definition of ‘terrorist act’ apply to these events? The physical element in that definition refers, inter alia, to ‘action’ that ‘causes serious harm that is physical harm to a person’: section 100.1(2)(a). There is no doubt that D ‘caused’ his victims serious physical harm and thus this element in the definition of ‘terrorist act’ would be satisfied. Section 1(2)(a) of the Terrorism Act 2000 (UK), on the other hand, refers to ‘action’ that ‘involves serious violence against a person’. It is a moot point whether D’s action would be covered by this section. His physical acts were: (i) extinguishing the gas lights in the theatre at the end of the performance; and (ii) placing a heavy metal bar across the external door so that no one could get out. Neither of those acts was ‘violent’ and to suggest that the two acts together ‘involved serious violence against a person’ may seem artificial. It is notable, however, that both the Australian and UK definitions refer not to the accused’s ‘act’ but to his

44. How is ‘violence’ to be distinguished from ‘serious violence’? Blackstone doubted whether it would be possible to distinguish between them: ‘The law cannot draw the line between different degrees of violence, and therefore prohibits the first and lowest stage of it’ (*Commentaries on the Laws of England*, vol 3, p 120). The Terrorism Act 2000 (UK) s 1(2)(a), however, ignores Blackstone’s warning and requires the court to determine whether the violence used or threatened was ‘serious’.

45. [1881–1885] All ER Rep 699; cf *Halliday* [1886–1890] All ER Rep 1028.

or her ‘action’. It is submitted that ‘action’ is a broader concept, which requires the court to look not only at the accused’s physical act but also at its result. If the result of the act was the infliction of serious injury on another person, that, it is submitted, satisfies the requirement for action that ‘involves serious violence against a person’ within the meaning of section 1(2)(a). This interpretation is supported by section 1(2)(b) of the Terrorism Act 2000 (UK), which refers to ‘action [that] involves serious damage to property’. For purposes of that section, ‘involves ...’ must mean ‘results in’, ‘causes’ or ‘brings about’. Consistency requires that section 1(2)(a) of the Terrorism Act 2000 (UK) be interpreted in the same way. Accordingly, in *Martin*, D’s ‘action’ ‘involved serious violence against a person’ because it resulted in another person sustaining serious injury. In short, the physical elements in the definitions of ‘terrorism’ and ‘terrorist act’ would probably produce the same outcome in this case, but by significantly different routes.⁴⁶

Saunders and Archer (1573)⁴⁷ provides a further illustration of the point that small differences in the wording of the two definitions could have a significant effect on the outcome of an individual case. D, intending to murder his wife, handed her a roasted apple laced with arsenic. She took one mouthful and then, in D’s presence, handed the rest of the apple to their daughter who ate it and died of arsenic poisoning. D was convicted of his daughter’s murder on the basis of transferred malice.

How would the physical element in the Australian definition of ‘terrorist act’ apply to a fatal poisoning like this? Section 100.1(2)(c) of the Criminal Code refers to ‘action’ that ‘causes a person’s death’. There can be little doubt that D’s action would be held to have ‘caused’ his daughter’s death for purposes of this section. *Saunders and Archer* makes it clear that the unusual sequence of events that led to her death would not be sufficient to break the chain of causation for purposes of the

46. For the sake of completeness, it should be noted that ‘action’ comes within the physical element of the UK and Australian definitions of terrorism/terrorist act if it ‘creates a serious risk to the health or safety of the public or a section of the public’. If the Crown relied on this provision in a *Martin*-type case, it would have to prove, first, that the theatre audience was ‘the public’ or a ‘section of the public’, and, secondly, that D’s action created a ‘serious risk to [its] health or safety’. ‘Section of the public’ is an ambiguous term. In *A-G v PYA Quarries* [1957] 2 QB 169, Lord Denning observed that it would be no easier to say how many people make a section or class of the public than to say how many people it takes to make a group or crowd. In *Madden* [1975] 3 All ER 155, a case of public nuisance, D told the police, falsely, that a bomb had been planted in an empty factory. Eight security officers searched the factory, but found no bomb. D was acquitted of public nuisance on the ground that the 8 security officers were too small a group to form a class or section of the public. On the other hand, in *Johnson* [1996] Crim LR 828, another public nuisance case, 13 women living in the same area to whom D made hundreds of obscene phone calls did constitute a section of the public. Whether or not the audience in *Martin* could be regarded as a section of the public for purposes of the counter-terrorism legislation is uncertain. The answer might depend on the size of the audience. See JC Smith & B Hogan, *Criminal Law* (London: Butterworths, 10th edn, 2002) 774–75.

47. (1573) 2 Plowden 473.

common law offence of murder. Nor, it is submitted, would it break the chain of causation for purposes of Part 5.3 of the Criminal Code. The Terrorism Act 2000 (UK), on the other hand, has no provision that corresponds exactly to section 100.1(2)(c). Section 1(2)(a) of the Terrorism Act refers to action that ‘involves serious violence against a person’. Since neither the action of lacing the apple with poison nor handing the poisoned apple to his wife involved violence of any kind, this section would not be relevant. Section 1(2)(c) of the Terrorism Act refers to action that ‘endangers a person’s life’. This section probably would be relevant, though D did far more than merely ‘endanger’ his daughter’s life. He killed her! Endangering a person’s life and causing a person’s death are not one and the same thing. Moreover, since D’s wife took only one small bite of the apple and suffered no serious harm in consequence, it could not be said that he had endangered her life. The Australian definition, which refers to action that ‘causes a person’s death’, is better suited to a fatal poisoning like this one.⁴⁸

4. Defences

Not only might differences in the wording of the two definitions affect the outcome of a case, but so too might differences in the general principles of criminal liability that apply in the two jurisdictions. Duress is an example. Under the Criminal Code, duress is a defence to all crimes, including murder, treason and terrorism.⁴⁹ In England, however, it is a defence to some crimes, but not all. In *Howe*, the House of Lords, reversing its earlier decision in *DPP v Lynch*, held that duress is no defence to murder by a principal in the first or second degree.⁵⁰ Nor is it a defence to treason, save perhaps the less serious kinds.⁵¹ Whether it may be a defence to offences under the Terrorism Acts 2000 and 2006 (UK) is still undecided. Some of those offences are punishable by 10–14 years’ imprisonment. There is no reason in principle why duress should not be a defence to them. Others are punishable by life imprisonment – the same penalty as for treason.⁵² Since these offences not only attract the same penalty as treason but also share some of its characteristics, it might be thought that duress should be no defence to them. The better view, it is submitted, is that duress is a defence to all crimes under these statutes. Had Parliament wished to exclude it, it could have done so by incorporating an appropriate clause into them.

48. The death of the Russian dissident Alexander Litvinenko in a London hospital on 23 November 2006 is a more recent example of murder by poisoning. Russian agents laced Litvinenko’s food with a minute amount of a radioactive isotope causing him a slow and painful death: Carlile Report, above n 28, [70].

49. Criminal Code s 10.2. State law on duress varies: D Lanham *Criminal Laws in Australia* (Sydney: Federation Press, 2006) 35–41; S Odgers *Principles of Federal Criminal Law* (Sydney: Lawbook Co, 2007) [10.2.100].

50. *Howe* [1987] AC 417; *DPP for Northern Ireland v Lynch* [1975] AC 653.

51. *Oldcastle’s Case* (1419) *Hale Pleas of the Crown*, vol 1, 50; Smith & Hogan, above n 46, 254.

52. Terrorism Act 2000 (UK) s 56 (Directing a Terrorist Organisation).

On one point, both the English and Australian law of duress is settled and clear. If D voluntarily joins a terrorist organisation, ‘knowing that he is exposing himself to the risk of being subject to coercive pressure, he loses the right to call himself innocent by reason of his succumbing to that pressure’.⁵³ In other words, if D is coerced to commit a crime by other members of a terrorist organisation which he or she has voluntarily joined, duress cannot be pleaded as a defence. In *Fitzpatrick*,⁵⁴ Lord Lowry LCJ gave the following justification for this rule:

If some such limit on the defendant’s duress does not exist, it would be only too easy for every member of a gang except the leader to obtain an immunity denied to ordinary citizens. Indeed, the better organised the conspiracy and the more brutal its internal discipline, the surer would be the defence of duress for its members. It can hardly be supposed that the common law tolerates such an absurdity.

Section 10.2(3) of the Criminal Code conforms to the common law in this respect.

THE UK DEFINITION OF TERRORISM – A LEGISLATIVE HISTORY

The next task is to explain how the definitions of ‘terrorism’ and ‘terrorist act’ were drawn up. This is not a matter of purely historical interest. The courts may have to resort to the legislative history in order to construe the two definitions. Neither definition is unambiguous and the mischief, golden or purpose rules may have to be used to resolve doubts. Each of those rules requires account to be taken of the history of the legislation.

Since the UK definition came first, it is appropriate to begin with its legislative history. Much of what is said about it is also relevant to the Australian definition, which is modelled on the UK definition.

1. The prevention of Terrorism (Temporary Provisions) Act 1974

In the United Kingdom, the first statutory definition of ‘terrorism’ appeared in section 9 of the Prevention of Terrorism (Temporary Provisions) Act 1974. That Act was aimed primarily at terrorism in Northern Ireland, but it also covered acts of terrorism by the provisional IRA and other Irish terrorist groups on the British mainland.⁵⁵ The definition was in the following terms:

‘Terrorism’ means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.

53. *R v Fitzpatrick* [1977] NILR 20.

54. *Ibid.*

55. Baber Research Paper, above n 26, 7. The Act was a response to the Provisional IRA’s bombing of two pubs in Birmingham on 21 November 1974.

Lord Lloyd's report of his *Inquiry into Legislation against Terrorism* criticised this definition as 'being at once too wide and too narrow'.⁵⁶ To the extent that it covered not only serious but also trivial acts of violence, it was too wide. Deliberately jostling the Prime Minister in Parliament could amount to 'the use of violence for political ends', but it ought not to be terrorism even in theory. On the other hand, the definition in section 9 struck Lord Lloyd as 'too narrow because, being limited to political ends, it might not be said to apply to acts of terrorism perpetrated by a single issue or religious fanatics'. A revised definition, Lord Lloyd recommended, must 'encompass the use, or the threat, of *serious* violence in order to induce fear and ... the motive must be *political in a broad sense*'.⁵⁷

2. The FBI's definition

In Lord Lloyd's view, the following definition of 'terrorism' devised by the US Federal Bureau of Investigation for operational purposes provided a useful starting point for developing a new statutory definition of terrorism. The FBI's definition was in these terms:

['Terrorism' means] the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or a section of the public, in order to promote political, social or religious objectives.

Lord Lloyd regarded this definition as superior to the definition in section 9 of the 1974 Act on four grounds.⁵⁸ First, because it specifically restricted terrorism to the use, or threatened use, of '*serious* violence', it would exclude minor acts of violence which can, and should, be dealt with under the ordinary criminal law. Secondly, because it added 'social or religious objectives' to 'political objectives', it would encompass a range of cases that section 9 excluded.⁵⁹ Take the case of a militant member of the Animal Liberation Front who, in order to draw attention to the evils of vivisection and thereby put pressure on the government to change the law, threatened to assassinate the staff of a laboratory where such experiments are carried out.⁶⁰ This would fall within the FBI's definition of terrorism because: (i) it involves a threat to use serious violence against a person; (ii) the aim is to coerce the government into making legislative change; and (iii) the objective is 'political' or 'social'. On the other hand, it would not fall within the section 9 definition because:

56. Lloyd Report, above n 26, [5.22]; Consultation Paper, above n 27, [3.14]; Carlile Report, above n 28, [8].

57. Lloyd Report, *ibid*; cf Carlile Report, above n 28, [51]–[54] (emphasis added).

58. Lloyd Report, above n 26, [5.18]–[5.23]; Baber Research Paper, above n 26, 15–20.

59. Consultation Paper, above n 27, [3.16].

60. Lloyd Report, above n 26, [5.21]. The Consultation Paper, above n 27, [3.10], referred to the Animal Liberation Front's 'persistent and destructive' campaigns against abattoirs, laboratories, breeders, fox hunts, butchers, pharmacists, doctors, furriers and supermarkets. These campaigns caused damage totalling £4.5 million in 1995 and £1.8 million in 1997.

(i) that definition did not cover threats but only the actual use of violence; and (ii) the word ‘political’, if narrowly construed, would exclude a threat of this kind.⁶¹ Lord Lloyd thought that cases like this one ought to be classified as terrorism and that the FBI’s definition would achieve this objective.

Thirdly, Lord Lloyd found that the reference to coercion of a government, or intimidation of the public, in the FBI’s definition, captured the essence of terrorism. It encapsulated the idea that terrorism involves the subversion of normal democratic processes.⁶² It was important, therefore, that this element be reflected in the new statutory definition.⁶³ Finally, he preferred the FBI’s definition to the definition in section 9 of the 1974 Act because it included threats as well as the actual use of serious violence.

A weakness in the FBI’s definition, Lord Lloyd conceded, was that it would only cover acts of terrorism that involve the use or threat of serious violence. It would not cover non-violent forms of terrorism, however devastating the consequences. For example, it would not cover a terrorist who, ‘without using violence, sets out to disrupt vital computer installations, such as air traffic control systems, thereby causing great danger to life’. Nor would it cover a terrorist who, without using violence, gains unauthorised access to a hospital computer system and corrupts the software or destroys it completely. Such action could put many lives at risk, but because it does not involve violence, it would not amount to terrorism under the FBI’s definition. Lord Lloyd believed that such action should amount to terrorism, but he could not find a ‘satisfactory way of covering this form of terrorist activity’.⁶⁴

3. The Blair government’s definition

The Blair government would not accept that a revised statutory definition of terrorism should be restricted to serious violence. It was important, it said, that it should also cover ‘the damage and serious disruption which might result from a terrorist hacking into some vital computer installation and, without using violence, altering, deleting or disrupting the data held on it’. Such activity, it added, ‘might well result in deaths and injuries and, given the increasing reliance placed on computers and electronic forms of communication, the destruction or corruption of data held in such systems

61. In the context of s 9, ‘political’ plainly referred to the separation of Northern Ireland from the rest of the UK. Thus, in all probability, it would not have covered other political objectives such as those of the Animal Liberation Front, Right to Life campaigners, etc.

62. Lloyd Report, above n 26, [5.11], [5.14]; Consultation Paper, above n 27, [3.9].

63. Cf SLCLC Report, above n 1, [3.76]: ‘The Committee considers this element is at the very heart of the nature of terrorism’. Lord Carlile’s report, above n 28, [32], [38], makes the same point: ‘The ethos underpinning their [the terrorists’] common purpose is to condemn Western society and its values, and to replace it and them by a set of values and with a legal system claimed to be a pure form of Islam’. Cf Sheller Inquiry, above n 9, [6.21].

64. Lloyd Report, above n 26, [5.22]–[5.23]; Carlile Report, above n 28, [9].

could also result in extensive disruption to the economic and other infrastructure of this country'.⁶⁵

Another problem with the FBI's definition lay in its use of the term '*social objectives*'. Cases of extortion and blackmail might be caught by it even though they had no connection with terrorism.⁶⁶ The government believed that '*ideological ends*' was a better term than '*social objectives*' and proposed the following alternative definition of terrorism in place of the FBI's definition:

The use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or a section of the public for political, religious or ideological ends.

The government conceded that this definition would have to be modified to cover non-violent forms of terrorism such as those discussed above.⁶⁷ Sections 1(2)(d) and (e) of the Terrorism Act 2000 (UK) effect this modification in the United Kingdom; sections 100.1(2)(e) and (f) of the Criminal Code do so in Australia.

(a) The width of the government's definition

The Blair government believed that the FBI's definition would, with these amendments, be sufficiently wide and flexible to cover every kind of terrorism that the United Kingdom had faced in the past or would be likely to face in the future. It would, for example, have covered the Birmingham pub bombings in 1974 and the Omagh bombing in 1998, which together cost 50 lives ('Irish terrorism').⁶⁸ Equally, it would have covered the 1988 bombing of Pam Am flight 103, allegedly by Libyan terrorists, over Lockerbie, Scotland, which cost 270 lives ('international terrorism'). It would also cover the most modern and potentially devastating forms of terrorism, such as an attack on a nuclear power plant, the deliberate contamination of a water reservoir with a biological, chemical or radioactive compound, or interference with computer systems on which hospitals, fire brigades and other vital public utilities depend.⁶⁹

65. Consultation Paper, above n 27, [3.16]–[3.17]. Cf Computer Misuse Act 1990 (UK).

66. Ibid [3.16].

67. Ibid [3.16]–[3.17]. The Explanatory Notes for the Terrorism Bill 2000 (UK) referred to the need to cover non-violent terrorist acts that can 'in a modern society, have a devastating impact' such as 'disrupting key computer systems or interfering with the supply of water or power where life, health or safety may be put at risk'.

68. The Birmingham pub bombings were one of the first major acts of Irish terrorism on the British mainland. Parliament responded by enacting the Prevention of Terrorism (Temporary Provisions) Act 1974. The Omagh bombing, which was carried out by an IRA splinter group, the Real IRA, on 15 August 1998, killed 29 people and seriously injured 220 others. It was the worst single terrorist act in Northern Ireland's history. Parliament responded by enacting the Criminal Justice (Terrorism and Conspiracy) Act 1998.

69. Lloyd Report, above n 26, [5.13]; Carlile Report, above n 28, [70]–[71].

(b) Can a government be coerced or intimidated?

There was, however, one aspect of the FBI's definition which troubled the government. The problematical words were: 'to intimidate or coerce a government'. How would a Crown prosecutor ever be able to establish in court that a terrorist had intimidated or coerced a government, when so many governments, both British and foreign, had repeatedly stated that they would never give in to terrorism? Fearing that this element of the FBI's definition would result in unjustified acquittals in terrorist trials, the government deleted it from its own definition. Hence the original definition of 'terrorism' in clause 1 of the Terrorism Bill 1999/2000 omitted any mention of an intention to coerce a government or intimidate the public.⁷⁰ That omission, however, proved unacceptable to critics of the Bill, not only because both Lord Lloyd's report and the government's own Consultation Paper had stressed the importance of this element,⁷¹ but also because it seemed that without it the definition of 'terrorism' would be too nebulous and wide.⁷² A compromise was reached whereby the element was reintroduced into the definition, but in a watered down form. It would not be necessary to prove an intention to *intimidate* or *coerce* a government, but merely to *influence* it. This compromise is reflected in section 1(1)(b) of the Terrorism Act 2000 (UK), which refers to a design 'to *influence* the government or to intimidate the public or a section of the public'.⁷³

In a recent report on the definition of terrorism in section 1 of the Terrorism Act 2000 (UK), Lord Carlile QC has criticised the use of the phrase 'to *influence* the government' in section 1(1)(b) on the ground that it sets the bar too low. He has recommended that the phrase 'to *coerce* the government' or 'to *intimidate* the government' be substituted for it.⁷⁴ However, the Home Office, in its response to Lord Carlile's report, has indicated that it prefers to retain the present wording as 'there may be problems in terms of using the word "intimidate" in relation to governments and inter-governmental organisations'.⁷⁵

The kidnapping and execution of the ex-prime minister of Italy, Aldo Moro, by the Red Brigade in 1978 illustrates how the change recommended by Lord Carlile could

70. See Baber Research Paper, above n 26, 19, where cl 1 of the Terrorism Bill 1999/2000 is set out. Baber does not explain why the requirement for an intent to coerce a government or intimidate the public was excluded from the definition notwithstanding earlier assurances that it would be included in it.

71. See, eg, Consultation Paper, above n 27, [3.16], where the government implied that the Terrorism Bill 2000 would apply only to cases involving an 'intent to disrupt or undermine the democratic process'.

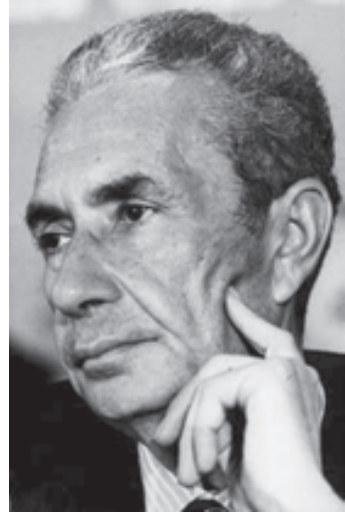
72. UK, *Parliamentary Debates*, House of Lords, 20 Jun 2000. Cf SLCLC Report, above n 1, [3.56]-[3.61], [3.75]-[3.78] where similar concerns were raised.

73. Moreover, s 1(3) of the Terrorism Act (UK) provides that if firearms or explosives are used, an intention to influence the government or intimidate the public need not be proved.

74. Carlile's Report, above n 28, [58]-[59].

75. Home Office, *The Government Reply to the Report by Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation* Cm 7058 (7 Jun 2007) [11].

work to the detriment of the prosecutor in a terrorist trial. Prime Minister Giulio Andreotti made it clear at the outset that his government would not negotiate with the kidnappers. In particular, he refused to accede to their demand that the trial of Renato Curcio, the alleged leader of the Red Brigade, and 14 other terrorists, which was taking place in Turin, be abandoned.⁷⁶ Prime Minister Andreotti's uncompromising stand would have made it impossible to prove that the kidnappers coerced or intimidated his government and difficult (though perhaps not impossible) to prove that this was their intention. On the other hand, it might have been possible to prove that they intended to *influence* his government in some way and that there was a realistic possibility that they might succeed. Hence the Home Office's reluctance to accede to Lord Carlile's recommendation that the phrase 'to influence the government' in section 1(1)(b) of the Terrorism Act 2000 (UK) be replaced with the phrase 'to intimidate or coerce the government'.⁷⁷ However, the UK legislation does much more to assist the prosecutor because it provides (in section 1(3)) that if firearms or explosives are used in an act of terrorism, it is not necessary to prove an intent to influence the government or to intimidate the public. Since firearms were used to kidnap and murder Aldo Moro,⁷⁸ it would not have been necessary under the current UK definition of 'terrorism' to prove an intention to influence Andreotti's government.⁷⁹



Aldo Moro

The Australian definition of 'terrorist act' seemingly ignores the lessons of the Aldo Moro affair and adopts the wording of the FBI's definition on this point. Paragraph (c) of the definition of 'terrorist act' requires the action to be done 'with the intention of: (i) *coercing*, or influencing *by intimidation*, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State'. If the Home Office's view is correct, such an intention would be difficult for the Commonwealth DPP to establish in a case like that of Aldo Moro where terrorists

76. The Red Brigade, an Italian Marxist revolutionary organisation, claimed responsibility for over 10 000 terrorist acts in the 1970s, including the kidnapping of Aldo Moro.

77. It may be objected that the kidnappers neither coerced nor influenced Andreotti's government and thus the switch from 'coerce' to 'influence' would not help the prosecutor in any way. However, as stated in the text, s 1(3) of the Terrorism Act 2000 (UK), which dispenses with the need to show either coercion or influence, would assist the prosecutor.

78. Moro was kidnapped at gunpoint and executed with a bullet.

79. The object of s 1(3) is 'to ensure that, for instance, the assassination of key individuals is covered': Terrorism Act 2000 (UK) (Explanatory Notes). See also UK, *Parliamentary Debates*, House of Lords, 20 Jun 2000 (Lord Bach).

attempt to hold a government to ransom. Moreover, there is no provision in the Australian legislation equivalent to section 1(3) of the Terrorism Act 2000 (UK) dispensing with the need to prove an intent to coerce or intimidate the government, or to intimidate the public, if firearms or explosives are used.

(c) Civil liberties implications of the government's definition

The Blair government's definition of terrorism was far wider than either of its antecedents. The inclusion of: (i) political, religious and ideological objectives; and (ii) threats of violence, made the definition wider than that in section 9 of the Prevention of Terrorism (Temporary Provisions) Act 1974, which covered only political objectives and excluded threats of violence. Likewise, the inclusion of non-violent forms of terrorism (eg, viral attacks on computers) made the government's definition wider than the FBI's definition, which excluded such cases. The substitution of 'to *influence* a government' for 'to *intimidate* or *coerce* a government' also made the government's definition wider than the FBI's definition. So too did the provision dispensing with the need to prove an intention to influence the government, or to intimidate the public, wherever firearms or explosives are used.

Civil liberties groups questioned the government's motives for proposing such a wide definition of terrorism. Did it intend to use that definition to undermine freedom of assembly, association and expression, and the right to strike? They raised the case of Emily Davison, the militant suffragette who threw herself in front of the king's horse as it galloped towards the finish at the Epsom Derby on 8 June 1913. Her reckless act had put not only her own life, but the lives of other people at risk.⁸⁰ Her intention was to put pressure on Asquith's government to extend the vote to women. Would what she did amount to terrorism under the government's proposed definition?⁸¹ If so, anyone who had incited or assisted her could be charged with a terrorist offence.

They also raised the case of the Women of Greenham Common, a large band of female protesters who had repeatedly disrupted operations at a Royal Air Force base in Berkshire (eg, by tearing down sections of the perimeter fence and blocking the movement of vehicles in and out of the base) in protest against the stockpiling of cruise missiles inside the base. Would action like that be terrorism under the new definition?⁸² If so, the protesters might face many years in gaol. Trade unions were

80. Davison died of her injuries four days after the Derby.

81. Carlile Report, above n 28, [34]. Davison's action 'endangered' the lives of jockeys and spectators as well as her own life: Terrorism Act 2000 (UK) s 1(2)(c). It was designed to 'influence' the government (s 1(1)(b)) and was for the purpose of 'advancing a political or ideological cause' (s 1(1)(c)). Hence the concern that the action might come within the definition of terrorism.

82. The tearing down of sections of the perimeter fence could have involved 'serious damage to property' (s 1(2)(b)). This action was designed to influence government policy with respect to disarmament (s 1(1)(b)) and thus could be said to have been for the purpose of

no less concerned that the use of serious violence on picket lines might fall within the proposed definition.⁸³

The Blair government was conscious of growing opposition to its anti-terrorism laws; however, it attempted to diffuse that opposition with the following assurance. It had, it said –

no intention of suggesting that matters that can properly be dealt with under normal public order powers should in future be dealt with under counter-terrorist legislation.⁸⁴

This was an ambiguous statement. Did it mean that the kinds of protest mentioned above would fall outside the new statutory definition of terrorism? Or did it mean that they would fall within it, but that the government would encourage the police and the Crown Prosecution Service not to prosecute offenders under the counter-terrorism legislation in cases which could equally well be dealt with ‘under normal public order powers’?

A recent independent review of section 1 of the Terrorism Act 2000 (UK) conducted by Lord Carlile QC makes it clear that the government intended the second course. Lord Carlile acknowledged that the definition of terrorism would, in theory, be wide enough to encompass simple cases of civil disobedience and industrial unrest such as those described above. However, the common sense of the Crown Prosecution Service combined with the power of a jury to return a Not Guilty verdict in any case where it believed that a prosecution was ‘arbitrary or unreasonable’, would, he thought, be a sufficient safeguard against inappropriate use of the legislation.⁸⁵ Prosecutorial discretion, he concluded, provided ‘a real and significant element of protection against abuse of rights’.⁸⁶ Not surprisingly, the Home Office agreed. In its response to Lord Carlile’s report, it stated:

Most of the actions which would generally be accepted as non-terrorist in nature fall outside the definition. It does not mean that non-terrorist activities will never

advancing ‘a political or ideological cause’ (s 1(1)(c)). Hence the possibility that the action would be viewed as terrorism under the new legislation.

83. Similar concerns were raised in Australia: SLCLC Report, above n 1, [3.64]–[3.74]. In the UK, Lord Bassam told Parliament: ‘We [the government] have also made it clear on many occasions that our definition of terrorism is not intended to catch *lawfully* organised industrial action in connection with a *legitimate* trade dispute. It is worth putting that on record’ (emphasis added). See United Kingdom, *House of Lords Debates*, vol 614, col 1449.
84. Consultation Paper, above n 27, [3.18]. Cf SLCLC Report, above n 1, [3.74]. The Rt Hon Charles Clarke, Home Secretary, told Parliament: ‘It is important that the definition in the bill should not catch actions in connection with industrial disputes, large demonstrations or even politically-motivated mass boycotts of major oil companies’: United Kingdom, *House of Commons Debates*, SCD col 31.
85. Carlile Report, above n 28, [34], [60]–[64]. As a further safeguard, the DPP’s consent is required for some prosecutions: Terrorism Act 2000 (UK) s 117.
86. Carlile Report, above n 28, [86] (Conclusion nos 6 & 7).

fall within the definition but in such cases we rely on the police and Crown Prosecution Service in making sure that the definition is not inappropriately applied.⁸⁷

PART B

SUBSTANTIVE DIFFERENCES BETWEEN THE UK AND AUSTRALIAN DEFINITIONS

1. Safeguards for civil liberties

In Australia, the Coalition of Australian Governments took a different view. It supported the idea that the Commonwealth Parliament should enact national counter-terrorism legislation which would apply uniformly in all States and Territories, but it would not support a definition of ‘terrorist act’ that was, even in theory, wide enough to cover simple cases of civil disobedience and industrial unrest such as those outlined above.⁸⁸ These cases, it felt, should continue to be dealt with exclusively under ‘normal public order powers’. The Commonwealth DPP and the Australian Federal Police should have no discretion to treat them as terrorism.

To ensure that this would be the case, a provision was inserted into the definition of ‘terrorist act’ which excludes from it all cases of ‘advocacy, protest, dissent or industrial action’, except those done with an intention –

- (a) to kill or cause serious physical harm to a person; or
- (b) to endanger another person’s life; or
- (c) to create a serious risk to the health or safety of the public or a section of the public.⁸⁹

The UK legislation has no equivalent provision. The Canadian and New Zealand legislation do, however, have similar provisions. Their object is to safeguard civil liberties.

87. Home Office, above n 75, [11]. McClellan CJ has criticised the width of the Australian definition: ‘It is apparent that the definition of “terrorist act” is capable of catching conduct that does not fall within popular notions of a terrorist act’ (PJCSI Report, above n 7, [5.29]).

88. Sheller Inquiry, above n 9, [5.11], [6.20], [6.23].

89. Criminal Code s 100.1(3). The phrase ‘advocacy, protest and dissent’ derives from the Australian Security Intelligence Organisation Act 1979 (Cth) s 17A: SLCLC Report, above n 1, [3.68]–[3.74]. The Sheller Inquiry, above n 9, [6.24] rejected the A-G’s submission that the Criminal Code s 100.1(3) should be repealed ‘to achieve greater clarity’. This section, it said, is ‘an essential protection of fundamental rights such as the right of free speech. Its omission in those circumstances is unthinkable’. Cf PJCSI Report, above n 7, [5.31].

It should also be noted that the Australian definition of ‘terrorist act’ requires an intent to *coerce* a government or to influence it *by intimidation*. This is a far stricter test than that imposed by section 1(1)(b) of the Terrorism Act 2000 (UK), which merely requires an intent to *influence* a government. Neither Emily Davison nor the Women of Greenham Common intended to *coerce* the government or to influence it *by intimidation*; at most, they intended to influence it. Likewise, detainees in the Commonwealth’s government’s Immigration Detention Centres who have gone on hunger strike and/or damaged the fittings may have done so in order to draw attention to their plight, but not to coerce the government or influence it by intimidation.⁹⁰ Nor have any recent industrial disputes in Australia, however protracted or bitter, involved deliberate coercion of a government or intimidation of the public. None of these cases could be prosecuted as terrorism under the Criminal Code; some of them, however, might, in theory, be prosecuted as terrorism under the Terrorism Act 2000 (UK).

The definition of ‘terrorist act’ in Part 5.3 of the Criminal Code undoubtedly provides better safeguards for civil liberties than the definition of ‘terrorism’ in the UK legislation. On the other hand, the narrowness of that definition makes the Australian counter-terrorism legislation a less potent weapon against terrorism than the corresponding UK legislation, which is based on a wider definition. The kidnapping and execution of Aldo Moro is one case which would, in all probability, amount to terrorism under the UK legislation, but not under the Australian legislation. The following section of this article provides other examples of this kind.

2. Terrorist acts involving the use of firearms or explosives

The definition of ‘terrorist act’ in Part 5.3 of the Criminal Code differs from the definition of ‘terrorism’ in the Terrorism Act 2000 (UK) in three respects. First, as noted above, it contains an exception for advocacy, protest, dissent and industrial action. The object of that exception is to ‘provide clarity for intelligence and police authorities that these [counter-terrorism] powers are not intended to hinder freedom of assembly, association and expression’.⁹¹ There is no similar exception in the UK legislation. Secondly, the Australian definition of ‘terrorist act’ requires an intention to *coerce* or influence *by intimidation* a government, whereas section 1 of the UK Act merely requires an intention to *influence* a government. The stricter test under the Criminal Code provides an additional safeguard for civil liberties, but at the same time it would make it harder to convict the kidnappers of Aldo Moro of a terrorist offence in this country than in the United Kingdom.

The third difference between the two definitions relates to cases of terrorism where firearms or explosives are used. Section 1(3) of the Terrorism Act 2000 (UK) provides

90. Senator Ellison, on behalf of the government, emphasised that Part 5.3 is ‘not intended for a hunger striker’: Commonwealth, *Parliamentary Debates*, Senate, 25 Jun 2002, 2562–64.

91. PJCSI Report, above n 7, [5.31].

that, in such cases, there need be no design to influence the government or to intimidate the public or a section of the public. The object of the section, according to the Explanatory Notes, 'is to ensure that, for instance, the assassination of key individuals is covered'. The Commonwealth Criminal Code has no equivalent provision.

Section 1(3) of the Terrorism Act 2000 (UK) provides:

The use or threat of action ... which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

Section 121 of the Terrorism Act provides that 'explosive' includes 'anything used or intended to be used for causing or assisting in causing an explosion'. Aircraft are not normally used as explosives. However, the hijacked aircraft that burst into flame on impact with the World Trade Center and the Pentagon on 11 September 2001 were 'used [by the hijackers] for causing ... an explosion' and thus the attacks on those buildings would have been an act of terrorism under section 1 of the Terrorism Act 2000 (UK) even if the hijackers had not had any design to influence the US government or to intimidate the public or a section of it.

Nowadays almost all major terrorist attacks involve explosives, firearms or both.⁹² Recent terrorist attacks which involved the use of explosives include: (i) the Bali bombings (2002 and 2005); (ii) the Madrid train bombings (2004); and (iii) the London Transport bombings (2005).⁹³ Similarly, firearms were used in: (i) the kidnapping of Patty Hearst (see below); (ii) the kidnapping and execution of Aldo Moro; and (iii) the kidnapping and execution by Iraqi insurgents of the CARE Australia worker Margaret Hassan in 2004.⁹⁴ Firearms are also used in armed robberies, which are an increasingly important method of raising funds for terrorism.⁹⁵ Section 1(3) of the Terrorism Act 2000 (UK) relieves the Crown of the duty to establish a design 'to influence the government or to intimidate the public or a section of the public' in all cases of this kind. The Criminal Code provides no such relief; on the contrary, it requires the Crown to prove the intention specified in paragraph (c) of the definition of 'terrorist act' in every case, including those where firearms or explosives have been used. Paragraph (c) provides:

'Terrorist act' means an action or threat of action where ...

- (c) the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government; or (ii) intimidating the public or a section of the public.

92. The sarin gas attack on the Tokyo subway system by the Japanese terrorist group Aum Shinri Kyo ('Supreme Truth') on 20 March 1995 is a notable exception.

93. See n 4, above, for further examples.

94. Margaret Hassan was one of several foreign aid workers to be kidnapped and executed by Iraqi insurgents after the US led invasion of Iraq.

95. Bugg, above n 36.

Why did the Australian Parliament choose to differ from the UK Parliament on this point? Was it wise to do so? Would it not have been in Australia's interests to follow the UK example by including in the definition of 'terrorist act' a clause relieving the Crown of the duty to satisfy paragraph (c) in any case of terrorism which involves the use of firearms or explosives? The following section of this article addresses that question.

It should be noted, first, that paragraph (c), above, did not form part of the original definition of 'terrorist act' in the Security Legislation Amendment (Terrorism) Bill (No 2) 2002 (Cth). It was added to the bill during its passage through Parliament on the recommendation of the Senate Legal and Constitutional Legislation Committee. The Committee gave two reasons for making this recommendation. First, it believed that, without the addition, the definition of 'terrorist act' would be too wide. Secondly, it claimed that an intention to coerce a government or intimidate the public is integral to the concept of terrorism and pointed to the fact that many other statutory definitions of terrorism include a provision similar to paragraph (c).⁹⁶ It referred to the Terrorism Act 2000 (UK) as an example of such a definition; however, it omitted to mention that, by virtue of section 1(3) of that Act, the Crown is relieved of the duty to prove this intention in any case where firearms or explosives are used – in other words, in the vast majority of terrorist cases.⁹⁷

In his recent review of the definition of 'terrorism' in section 1 of the Terrorism Act 2000 (UK), Lord Carlile considered whether to recommend the repeal of section 1(3).⁹⁸ The effect would be to require the Crown to establish a design to influence the government or intimidate the public in all cases, including those where firearms or explosives are used, thereby bringing the UK definition of 'terrorism' more closely into line with the Australian definition of 'terrorist act'. Lord Carlile declined to make that recommendation for the following reason:

I can envisage the example of a hostage-taking designed not so much to intimidate as to extract money, or weapons, or material with explosive potential. On balance, it is sensible to retain the additional provision in respect of firearms and explosives.

The absence of a provision equivalent to section 1(3) of the Terrorism Act 2000 (UK) in Part 5.3 of the Criminal Code means that the Australian Federal Police would be unable to deal with a hostage-taking of the kind envisaged by Lord Carlile under that Part. The kidnapping of Patty Hearst may be used to illustrate this point. It is, admittedly, an unusual case; however, it attracted immense publicity at the time and the Commonwealth DPP has discussed it in a paper he delivered in Washington DC in 2003.⁹⁹

96. SLCLC Report, above n 1, [3.56]–[3.62], [3.75]–[3.78].

97. Ibid [3.60], [3.76].

98. Carlile Report, above n 28, [73]–[74].

99. Bugg, above n 36.



Patty Hearst

Patty Hearst was the daughter of the US media magnate, Randolph Apperson Hearst. In 1974, the Symbionese Liberation Army ('SLA') kidnapped her at gunpoint from her home in Berkeley, California. The SLA was not a large terrorist organisation like the Italian Red Brigade, but was composed of no more than 10-15 individuals under the leadership of a man named Donald DeFreeze. The Commonwealth DPP has described the SLA as 'a fairly ragged band of terrorists' and 'a small leftist group, ... intent on overthrowing the government of the USA'. What brought it into international prominence in 1974 was the highly unusual ransom demand it made of Patty Hearst's father. In exchange for his

daughter's release, it ordered him to make arrangements for the distribution of 75 dollars' worth of food to every destitute man, woman and child in California – an operation that would have cost him an estimated US\$400 million. In fact, Mr Hearst distributed only six million dollars' worth of food to down-and-out Californians in response to the SLA's demand. The kidnapping ended in a shoot-out in which the police killed several members of the SLA, including its leader. Patty Hearst escaped unharmed.¹⁰⁰

The kidnapping of Patty Hearst prompts two questions. First, would it come within the definition of 'terrorism' in section 1 of the Terrorism Act 2000 (UK)? Secondly, would it come within the definition of 'terrorist act' in Part 5.3 of the Criminal Code?

It seems certain that the kidnapping would come within the definition of 'terrorism' in section 1 of the Terrorism Act 2000 (UK). The forceful abduction of Patty Hearst, coupled with the subsequent shoot-out with the police in which several people were killed, would satisfy the requirement for action that 'involves serious violence against a person': section 1(2)(a). The unusual ransom demand would be evidence from which a jury would be entitled to infer that the SLA had an 'intention to advance a political ... or ideological cause' – namely, the relief of poverty and/or the redistribution of wealth from the rich to the poor: section 1(1)(c). The use of firearms in the kidnapping and subsequent shoot-out would make it unnecessary to prove a design to 'influence the government or intimidate the public': section 1(3). Thus, the essential elements of the definition of terrorism would be satisfied. This, in turn,

100. One of the most interesting aspects of this case is that DeFreeze won Patty Hearst over to his cause while she was in captivity. She assisted him and other members of the SLA to rob banks and engage in other criminal activities. Following her arrest, she told the police that her occupation was 'urban guerrilla'. She was sentenced to 25 years' imprisonment for armed robbery, but later received a presidential pardon.

would enable the police to invoke the special powers of arrest, search, seizure and detention laid down in the Terrorism Act 2000 (UK) and related counter-terrorism legislation.

Under the Australian definition of ‘terrorist act’, it would have to be shown that in the course of the kidnapping, the SLA killed or caused serious physical injury to others and that the kidnapping was done in order to advance a political or ideological agenda.¹⁰¹ Moreover, because no special dispensation applies in cases involving firearms or explosives, it would also have to be established that the SLA intended to coerce a government, or to influence a government by intimidation, or, alternatively, to intimidate the public or a section of the public. However, since the SLA’s intention was, to adapt Lord Carlile’s words, ‘not so much to intimidate [the government or the public] as to extract money [from Mr Hearst]’, this could not be done. This, in turn, would mean that the kidnapers could not be convicted of the offence under section 101.1 of the Criminal Code (engaging in a terrorist act). Nor could they be convicted of any other offence under section 101 or 103. It is possible that the SLA would be classified as a terrorist organisation with the result that the kidnapers could be convicted under section 102.3 of being members of such an organisation. However, because most of the SLA’s crimes (bank robberies, etc) appear to have been motivated more by greed than by any ideological or political purpose, and also because its ‘intention’ to overthrow the US government was simply fanciful, it is doubtful whether any such charge could be proved. Though there would be other offences under State law with which the SLA could be charged if the kidnapping took place in Australia today (eg, abduction and extortion) the counter-terrorism offences would not be relevant. Nor would the scheme of control orders and preventative detention orders established by divisions 104 and 105 of the Criminal Code be available to the police and the courts since each of those orders requires a terrorist act.¹⁰² In short, a case which probably ought to be dealt with under the new counter-terrorism legislation would instead have to be dealt with under other legislation.

Allen, a 19th century English case,¹⁰³ would also be far easier to deal with under the Terrorism Act 2000 (UK) than under Part 5.3 of the Criminal Code. The absence of a provision in the Criminal Code equivalent to section 1(3) of the Terrorism Act 2000 explains the difference. *Allen* was a member of the Fenians, an organisation of militant Irish separatists opposed to British rule in Ireland. He and two accomplices (both Fenians) attempted to rescue another Fenian, a man named Kelly, who had

101. As previously mentioned, the physical elements in the two definitions are slightly different. Under Part 5.3, action that causes another person’s death, endangers another person’s life, or endangers the health or safety of the public or a section of the public would have to be established.

102. The National Counter-Terrorism Plan together with State and Territory counter-terrorism laws (see above p 311), would likewise be inapplicable due to the absence of a ‘terrorist act’.

103. (1867) 17 Law Times (NS) 223; JF Stephen, *Digest of the Criminal Law* (London: Macmillan, 3rd edn, 1883) 160, 165 & n IX.

been taken into custody by the British police. At the time of the rescue operation, Kelly was being transported from court to prison in a police van. Allen and his accomplices attacked the van and released Kelly. In the course of doing so, they shot and killed a police constable inside the van. Later, they were arrested, convicted of murder and hanged.

If a similar rescue were to be mounted in the United Kingdom today, there is no doubt that it would be classified as terrorism under section 1 of the Terrorism Act 2000. The shooting of the policeman would be action that ‘involves serious violence against a person’: section 1(2)(a). The Fenians’ ‘political cause’, to which Allen and his accomplices subscribed, was the liberation of Ireland from British control. The rescue of Kelly – a fellow Fenian – from the custody of the British police would be action done ‘for the purpose of advancing [that] cause’.¹⁰⁴ The use of firearms in the rescue operation would mean that an intent to influence the government or to intimidate the public or a section of the public (section 1(1)(b)) would not have to be proved.

On the other hand, under the Australian Criminal Code it would be necessary to prove an intention to coerce or influence by intimidation the government, or to intimidate the public or a section of it. It is doubtful, however, whether such an intention could be established. Allen and his two accomplices did not intend to ‘coerce’ the British government into ordering Kelly’s release from custody. Nor did they intend to ‘influence’ the British government ‘by intimidation’ into ordering his release. On the contrary, they intended to secure Kelly’s release from custody without involving the British government in any way. Even if their *ultimate* objective was to coerce the British government into relinquishing control over Ireland, that was no part of their *immediate* purpose, which was to rescue one of their compatriots from police custody. It would be difficult, therefore, to argue that they carried out the rescue operation with ‘the intention of coercing, or influencing by intimidation, the government’, as the Australian definition of ‘terrorist act’ requires. Furthermore, although firearms were used to intimidate the police guards who had custody of Kelly, the number of guards present at the time would not have been large enough to constitute ‘a section of the public’ for purposes of paragraph (c)(ii) of that definition.¹⁰⁵ Thus, it seems, Allen and his accomplices lacked an intention to intimidate the public or a section of the public.

If this analysis is correct, the rescue would not qualify as a ‘terrorist act’ under Part 5.3 of the Criminal Code. Hence, Allen and his accomplices could not be convicted under section 101.1 of ‘engaging in a terrorist act’. They might, of course, be convicted of being members of a terrorist organisation (ie, the Fenians), but the

104. Terrorism Act 2000 s 1(1)(c).

105. In *Madden* [1975] 3 All ER 155, a case of public nuisance, 8 security guards were too small a group to be a class or section of the public. Cf *Johnson* [1996] Crim LR 828, where 13 women living in the same area were held to be a class or section of the public for purposes of the offence of public nuisance.

penalty for that offence is 10 years' imprisonment,¹⁰⁶ whereas the penalty for engaging in a terrorist act is life. In order to reflect the gravity of the offence, the Crown would have to charge the rescuers with murder or manslaughter, offences under State law. Charges under the counter-terrorism legislation might be included in the indictment, but merely as a back-up.

A possible answer to the foregoing analysis is that it misconstrues the phrase 'with the intention of coercing, or influencing by intimidation, the government', in paragraph (c)(i) of the definition of 'terrorist act'. It looks only to Allen's *immediate intention*, which was to rescue Kelly from police custody, and ignores his *long-term objective*, which was the destruction of British control over Ireland. No doubt Allen would have known that rescuing Kelly from police custody would not by itself have such a dramatic consequence; many other steps would be necessary to achieve that result. However, if the rescue operation was intended by Allen and his accomplices to be part and parcel of the Fenians' ongoing campaign to coerce or intimidate the British government into ceding control of Ireland, that surely ought to be enough to satisfy the 'intention' required by paragraph (c)(i).¹⁰⁷

Even this broad interpretation, which looks not merely to Allen's immediate purpose but also to his long-term objective, would not necessarily ensure that he and his associates could be convicted under section 101.1 of engaging in a terrorist act. It would still be necessary to prove that they had an intention to *coerce* the British government or to influence it *by intimidation* and thus the prosecution would run into the difficulty noted by the Home Office in its response to Lord Carlisle – namely, that 'there may be problems in terms of the word "intimidate" in relation to governments and inter-governmental organisations'. A much more certain way of bringing this case and the kidnapping of Patty Hearst within the purview of Part 5.3 of the Criminal Code would be to follow the British example and incorporate into it a provision equivalent to section 1(3) of the Terrorism Act 2000 (UK).

3. Other weaknesses in the Australian definition

Two other criticisms can be made of paragraph (c) of the definition of 'terrorist act'. First, it refers to action done with the intention of: (i) coercing or influencing by intimidation 'the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country'; or of (ii) intimidating 'the public or a section of the public'. If action is done with some other intention, it cannot be a terrorist act. So, for example, action done with the intention of coercing an inter-governmental organisation like the the World Bank, the African Union or the International Court of Justice would fall outside Part 5.3 because none of these

106. Criminal Code s 102.3. Providing support to a terrorist organisation (25 years' imprisonment) would also be a possible charge: s 102.7.

107. In *Lodhi*, the NSW Court of Criminal Appeal gave its blessing to an equally wide interpretation of 'terrorist act', though in a somewhat different context: [2006] NSWCCA 101.

organisations is a government, the public or a section of the public. The UK definition of ‘terrorism’ has recently been amended to cover inter-governmental organisations.¹⁰⁸ The Parliamentary Joint Committee on Security and Intelligence has recommended that the definition of ‘terrorist act’ be similarly amended. However, this recommendation has yet to be implemented.¹⁰⁹

Secondly, it follows from what has just been said that an intention to coerce a corporation or an individual would be insufficient to satisfy the definition of ‘terrorist act’. Suppose, for example, that a terrorist threatened to assassinate the chief executive officer of an Australian corporation in retaliation for a decision by the corporation to move all or part of its operations to a third world country in order to take advantage of cheap labour. Even if the terrorist’s ‘cause’ could be described as ideological or political, the threat would not qualify as terrorism because it is not directed at a government, the public or a section of the public, but at a corporation. Even if the corporation was, like Telstra, partly government-owned, the result would be the same. It may seem strange that an intention to coerce a small town council in a remote part of Australia could potentially amount to a terrorist act (the council being the ‘government of part of a State’),¹¹⁰ but an intention to coerce a multi-million dollar corporation like Telstra, which is known to all Australians, could not. It is notable that the definition of terrorism under the Canadian Criminal Code does include cases where the target of a terrorist’s act or threat is a person or corporation. The UK definition would also cover a case where the target is a person or corporation, but only if firearms or explosives are used, because in that case the requirements of section 1(1)(b) of the Terrorism Act 2000 (UK) need not be satisfied.

It is submitted that paragraph (c) of the definition of ‘terrorist act’ should not be retained in its present form. It is true that the definitions of terrorism in other jurisdictions have similar paragraphs, but none is as restrictive and problematical as the Australian paragraph. Thought should be given to inserting into Part 5.3 a provision equivalent to section 1(3) of the Terrorism Act 2000 (UK), declaring that in cases where firearms or explosives are used, no intention to coerce or intimidate the government, or to intimidate the public, need be proved. This would ensure that cases like *Allen, Desmond* (see below) and the kidnapping of Patty Hearst are covered by the Part. It would also ensure that ‘the assassination of key figures’ like Aldo Moro is covered by it.¹¹¹ In addition, the recommendation of the Parliamentary Joint Committee on Security and Intelligence that the definition of ‘terrorist act’ be amended to cover inter-governmental organisations should be implemented. These changes would not endanger civil liberties, which would continue to be protected by the exception for advocacy, protest, dissent and industrial action in section 100.1(3).

108. Terrorism Act 2006 (UK) s 34(a). The amendment came into force on 13 April 2006.

109. PJCSI Report, above n 7, [5.41].

110. Para (c)(i) of the definition of ‘terrorist act’ refers to ‘the government of *part of a State, Territory ...*’. This would cover local government.

111. Terrorism Act 2000 (UK) (Explanatory Notes).

PART C

AMBIGUOUS WORDS AND PHRASES

Terms undefined by the legislation : functions of judge and jury

A final point of distinction between the UK and Australian legislation relates to the interpretation of the individual words and phrases that make up the definitions of ‘terrorism’ and ‘terrorist act’. The Terrorism Act 2000 (UK) defines only one word used in the definition of ‘terrorism’, namely, ‘explosive’. In addition, it provides that ‘act’ and ‘action’ include an omission, and that ‘firearm’ includes ‘an air gun or air pistol’.¹¹² However, other key components in the definition (eg, ‘purpose’, ‘design’, ‘political, religious or ideological cause’, ‘serious violence’ and ‘electronic system’), which might have been defined, have instead been left undefined. The result is that the courts will have to decide what they mean or leave it to the jury to do so on a case-by-case basis.

The Australian legislation improves upon the UK legislation by providing definitions of three of the most important components in the definition of ‘terrorist act’: (i) ‘intention’; (ii) ‘serious physical harm’; and (iii) ‘electronic system’.¹¹³ However, as in the United Kingdom, all other components of the definition have been left undefined. Since some of those components are ambiguous, the ambit of the legislation is unclear. The relevant components include:

- (a) ‘coercion’,
- (b) ‘political, religious or ideological cause’; and
- (c) ‘advocacy, protest, dissent or industrial action’.

These words and phrases have no settled legal meaning and they can be understood in different ways. ‘Religious cause’, for example, is ‘a diffuse concept incapable of clear definition’.¹¹⁴

One point that needs to be considered is whether Parliament intended the courts to treat each of the aforementioned words and phrases as a term of art whose meaning the trial judge must explain to the jury, or whether it intended the courts to treat them as ‘ordinary words of the English language’ whose meaning the jury must work out for themselves without assistance from the bench. ‘Coercion’ and ‘industrial action’ are perhaps special cases. There is already a considerable body of case-law on

112. Terrorism Act 2000 (UK) s 121. This section also provides a partial definition of ‘property’.

113. The Criminal Code s 100.1(2)(f)(i)–(vi) gives six examples of an ‘electronic system’ but does not define this term. The Code also gives a partial definition of three other expressions used in the definition of ‘terrorist act’: ‘foreign country’, ‘person’ and ‘threat’.

114. Carlile Report, above n 28, [48].

them.¹¹⁵ In view of that, it is unlikely that the judge will leave it to the jury to determine what they mean; instead, he or she will provide them with a definition based on the precedents. In regard to the other expressions (viz, ‘political cause’, ‘religious cause’, ‘ideological cause’, ‘advocacy’, ‘protest’ and ‘dissent’), the situation is less certain. *Brutus v Cozens* and *R v Feely*, two leading English cases,¹¹⁶ have decided that if a word in a statute is in common use (eg, ‘insulting’ or ‘dishonest’), the trial judge must not tell the jury what it means but must leave it to them to determine its meaning. In *Brutus v Cozens*, Lord Reid expressed the principle thus:

The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is no question of the word ‘insulting’ being used in any unusual sense.... It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved.¹¹⁷

Exactly how this principle might be applied to the individual words and phrases that make up the definitions of ‘terrorism’ and ‘terrorist act’ is unclear. On the one hand, there is nothing in the context to show that the expressions ‘ideological cause’, ‘political cause’, ‘religious cause’, etc, have been used in the two definitions in an unusual sense. It could be argued, therefore, that their meaning is a question not of law but of fact. On the other hand, Lord Reid’s principle applies only to ‘an *ordinary word* of the English language’, that is, to a word that is in everyday use and which has a settled, well understood meaning. ‘Insulting’ and ‘dishonest’ are examples of such words. It might be thought, however, that ‘political cause’, ‘ideological cause’, ‘religious cause’, ‘advocacy’, ‘protest’ and ‘dissent’ are not words of this kind and thus that the principle in *Brutus v Cozens* does not apply to them. The word ‘religion’, for example, though in everyday use, can be understood in different ways. No one doubts that Christianity, Judaism, Hinduism and Islam are religions, but opinions could differ as to whether Scientology is a religion. Other fringe cults raise the same issue. Was Ananda Marga, the group allegedly behind the Sydney Hilton Hotel bombing in 1978, a religious sect or not? Some would say Yes; others, No. If the judge leaves it to the jury to decide what a ‘religious cause’ is, uncertainty and confusion will result. The same point can be made in respect of ‘political cause’ and ‘ideological cause’.

115. See eg Smith & Hogan, above n 46, 264–66, where coercion is said to have an uncertain meaning. The authors ask whether it includes moral and spiritual as well as physical compulsion.

116. *Brutus v Cozens* [1973] AC 854; *Feely* [1973] QB 530; G Williams, *Textbook of Criminal Law* (London: Stevens, 2nd edn, 1983) 63–64.

117. *Brutus v Cozens* [1973] AC 854, 861. The case was concerned with the meaning of the word ‘insulting’ in the Public Order Act 1936 (UK) s 5.

The Australian courts are not bound by *Brutus v Cozens* and in relation to the interpretation of the individual words and phrases that make up the definition of ‘terrorist act’ in Part 5.3 of the Criminal Code they should not follow it. In the interests of certainty, they should determine what each of the aforementioned expressions means and direct the jury accordingly. It is notable that in relation to dishonesty, a key concept in Chapter 7 of the Criminal Code, Parliament has adopted the principle in *Brutus v Cozens* and *R v Feely* and declared that ‘the determination of dishonesty is a matter for the trier of fact’.¹¹⁸ It would have been simple enough to include a similar clause in Part 5.3 declaring that the meaning of the phrase, ‘political, religious or ideological cause’ is a ‘matter for the trier of fact’. The omission of such a clause from that Part was surely deliberate. It paves the way for the courts to hold that the meaning of this term is a matter for them.

Terms defined by the legislation

‘Intention’ and ‘serious physical harm’ are both defined by the Criminal Code. ‘Electronic system’ is partially defined. The next section of this article looks at their definitions and at some of the problems to which they may give rise.

1. Intention

The words ‘intention’ and ‘intended’ import a mental element into the definition of ‘terrorist act’.¹¹⁹ ‘Purpose’ and ‘designed’ are the equivalent words in the definition of ‘terrorism’ in section 1 of the Terrorism Act 2000 (UK). It should not be assumed, however, that ‘intention’ and ‘purpose’ mean one and the same thing: the former embraces a wider range of states of mind than the latter.

‘Intention’ is a difficult word. For purposes of the common law, it may be equated with a desire to bring about a particular result.¹²⁰ Section 5.2 of the Criminal Code provides a wider definition, which covers not only this mental state but also that of a person who is aware that his or her conduct must inevitably bring about a particular result, even though he or she does not desire to bring it about.¹²¹ This extension to the basic meaning of intention is designed to cover the following type of case. D plants a time-bomb in an aeroplane. The bomb explodes in mid-flight, destroying the aeroplane and killing all on board. D’s intention is to collect the insurance on baggage

118. Criminal Code s 130.4. This section ensures that the decisions in certain Victorian cases, which have held that the determination of dishonesty is a question of law, do not apply under the Criminal Code: *Brow* [1981] VR 780; *Bonollo* [1981] VR 633; *Salvo* [1980] VR 401.

119. References to ‘intention’ appear in paras (b) and (c) of the definition of ‘terrorist act’ (s 100.1(1)) and in the exceptions (s 100.1(3)).

120. Williams, above n 116, 85; Smith & Hogan, above n 46, 74.

121. Section 5.2(3) provides: ‘A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events’.

carried on the aeroplane and he or she is indifferent to the fate of the passengers and crew. Section 5.2 of the Criminal Code deems D to have an intention to kill the passengers and crew if he or she is aware that the mid-air explosion must inevitably result in their deaths. It is irrelevant that he or she does not mean to kill them.¹²²

This extension to the natural meaning of ‘intention’ could also be relevant to a case like *R v Desmond and Barrett*, decided in the mid-19th century. This case, like *Allen*, involved a rescue attempt by members of the Fenians.¹²³ The defendants, two Fenians, exploded a large barrel of gunpowder in a crowded street which ran alongside the exterior wall of Clerkenwell gaol. Their object was to blast a hole in the prison wall large enough for a number of their fellow Fenians who were incarcerated inside the gaol to escape. Twelve passers-by who were in the street at the time the gunpowder barrel exploded were killed; over 100 more were seriously injured. A number of houses close to the explosion were demolished by it. Many people were intimidated by these events. It was no part of the defendants’ purpose to kill, injure or intimidate anyone; their only object was to enable their compatriots inside the prison to escape. Nevertheless, if they foresaw that the explosion would inevitably kill or injure people who were in the crowded street, the Criminal Code would deem them to have an intention to cause death or injury. Likewise, if they were aware that the explosion would inevitably intimidate people in the vicinity, the Criminal Code would deem them to have an intention to intimidate those people even if they did not mean to do so. If the group of people intimidated was large enough to be a section of the public, the requirement in paragraph (c)(ii) of the definition of ‘terrorist act’ for an intention to intimidate the public *or a section thereof* would be satisfied. Thus, if the rescue was done with the intention of advancing a political, religious or ideological cause, the rescuers would be guilty under section 101.1 of engaging in a terrorist act.¹²⁴

2. Serious physical harm¹²⁵

The Criminal Code defines ‘serious harm that is physical harm’. It means harm that: (i) endangers, or is likely to endanger, a person’s life; or (ii) is, or is likely to be, significant and longstanding. The harm must be ‘physical’; harm to a person’s mental health is not sufficient.¹²⁶ A nervous breakdown or other severe mental trauma would not be ‘serious harm that is physical harm’ for purposes of Part 5.3. Two recent inquiries have considered whether the definition of ‘serious physical

122. *Ibid.*

123. (1867) 11 Cox CC 146. For an account of the two cases, see R Swift *Irish Migrants in Britain 1815-1914: A Documentary History* (Ireland: Cork University Press, 2002) 173–75.

124. They might, in addition, be guilty of offences under s 102 – eg, being members of, or providing support to, a terrorist organisation.

125. S 100.1(2)(a) refers to action that ‘causes serious harm that is physical harm to a person’.

126. See Criminal Code, Dictionary, under ‘Harm’, ‘Physical Harm’ and ‘Serious Harm’.

harm' should be extended to cover serious psychological harm. The Sheller Inquiry recommended that it should,¹²⁷ but a subsequent inquiry by the Parliamentary Joint Committee on Security and Intelligence recommended that it should not.¹²⁸ This difference of opinion makes it unlikely that the definition of 'terrorist act' will be extended to cover serious psychological trauma.

3. Electronic systems

Section 100.1(2)(f) of the Criminal Code refers to action that 'seriously interferes with, seriously disrupts, or destroys, an electronic system'. The section does not define 'electronic system'; it does, however, provide six examples of such a system.¹²⁹ The Terrorism Act 2000 (UK) refers to action that 'is designed seriously to interfere with or seriously to disrupt an electronic system'. This Act neither defines 'electronic system' nor does it give any examples of such a system.¹³⁰

It is notable that the UK definition refers to action that 'is *designed* seriously to interfere with or seriously to disrupt an electronic system'. This wording makes it clear that it is not necessary for the action to result in serious interference with, or serious disruption to, the electronic system: it is sufficient that the action is *designed* to have that effect. The Australian definition is narrower: the action must result in serious interference with, serious disruption to, or destruction of, the system. Mere design is not sufficient.

'Electronic system' is an ambiguous term. It may well cause difficulty in practice. The following account explains where the difficulties lie and also comments briefly on three of the six kinds of electronic system mentioned in section 100.1(2)(f), viz, (i) a telecommunications system; (ii) an information system; and (iii) a system used for, or by, a transport system.

Since 'electronic system' has no settled legal meaning, it is likely that the courts will have recourse to the dictionary definitions of 'electronic' and 'system' to determine what it means. The travaux préparatoires and general rules of statutory interpretation (eg, the 'ejusdem generis' rule and the principle 'inclusio unius, exclusio alterius') may also be helpful.

The *Oxford English Dictionary* ('OED') defines 'Electronics' as:

127. Sheller Inquiry, above n 9, [6.8]-[6.9].

128. PJCSI Report, above n 7, [5.33]-[5.37]. The Committee added that the Commonwealth would need to consult with State governments before making any such change.

129. The 6 examples are: (i) an information system; (ii) a telecommunications system; (iii) a financial system; (iv) a system used for the delivery of essential government services; (v) a system used for, or by, an essential public utility; and (vi) a system used for, or by, a transport system.

130. The Electronic Communications Act 2000 (UK) defines 'electronic' for purposes of that Act. It does not define 'electronic system'.

The branch of physics and technology concerned with the behaviour and movement of electrons, especially in semi-conductors and gases; ... circuits or devices using transistors, microchips, etc.¹³¹

The *OED* defines ‘System’ as:

A set or assemblage of things connected, associated or interdependent, so as to form a complex unity; rarely applied to a simple or small assemblage of things.

The two definitions combined make it clear that an ‘electronic system’ is not the same thing as an ‘electrical appliance’. An electric kettle, light bulb or toaster is an electrical appliance, but not an electronic system according to these definitions. None of them incorporates a semi-conductor, transistor or microchip. Nor is any of them a ‘system’. On the other hand, a computer or cathode ray tube is electronic and could be part of an electronic system.

The examples in section 100.1(2)(f)(i)-(vi) of the Criminal Code reinforce the impression that an ‘electronic system’ and an ‘electrical appliance’ are different things. An electronic system not only embodies far more complex technology, but it is also capable of far more sophisticated tasks than a mere electrical appliance. A ‘telecommunications system’, which is the second kind of electronic system listed in section 100.1(2)(f), illustrates this point. Television and radio are examples of telecommunications systems. The Global Positioning System (‘GPS’) and the systems used by NASA for communicating with the Space Shuttle and orbiting satellites are also telecommunications systems. Australia’s public telephone network is the aggregate of many interconnected telecommunications systems.¹³²

Section 100.1(2)(f)(ii) of the Criminal Code refers to action that ‘seriously interferes with, seriously disrupts, or destroys’ a telecommunications system. These words imply that the telecommunications system as a whole, and not merely a part of it, must be seriously interfered with, seriously disrupted, or destroyed, by the action. Hence, it may be necessary to determine whether the particular entity that has been adversely affected by the action is a telecommunications system or merely part of such a system. A mobile telephone, it is submitted, is merely part of a telecommunications system.¹³³ It follows that the destruction of a single mobile

131. The *Macquarie Dictionary* defines ‘Electronics’ as: ‘The investigation or application of phenomena involving the movement of electrons in valves and semi-conductors’. Cf the definition of ‘electronic communication’ in the Criminal Code.

132. The Telecommunications Act 1997 (Cth) defines ‘telephone network’ as ‘a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy’ (emphasis added). ‘Series of systems’ implies that a telephone network like the one operated by Telstra or Optus may be made up of many interconnected telecommunications systems.

133. See the Telecommunications Act 1984 (UK) s 4, which treats a mobile telephone (and a conventional telephone handset) not as a ‘telecommunications system’ but as a ‘telecommunications apparatus’.

telephone would not come within section 100.1(2)(f)(ii) because the telecommunications system as a whole would continue to function uninterrupted despite the destruction. On the other hand, action that seriously disrupted the operation of all, or a large proportion of, the mobile telephones connected to a particular network would come within this section.

In some cases it may be difficult to decide whether a particular entity is a separate electronic system or merely part of such a system. Take the case of a large, maximum security prison which is monitored by a network of 50 closed-circuit TV cameras.¹³⁴ Suppose that a prison inmate seriously disrupts one of the cameras, putting it out of action for many days. Suppose further that the other 49 cameras continue to function uninterrupted despite the serious disruption to the fiftieth camera. Has the inmate's action seriously disrupted, seriously interfered with, or destroyed, an electronic system for purposes of the Criminal Code? The answer could depend in part on whether each camera is seen as an independent electronic system or whether it is seen as no more than a one-fiftieth part of such a system. In the first case, the inmate has satisfied the requirement for serious disruption to an electronic system; in the second case, the inmate may not have satisfied it. Identifying the relevant electronic system is thus of critical importance. The legislation, however, gives no clue as to how this is to be done.

The same difficulty could arise if a terrorist seriously disrupted a small part of a public telephone network – for example, by severing the telephone lines to an isolated rural village. There could well be argument as to whether the telephone connection to that village is a separate telecommunications system – in which case section 100.1(2)(f)(ii) would be satisfied – or whether it is merely a part of a much larger system supplying the entire State in which the village is located. In the second case, the section might not be satisfied. It is submitted that the judge and not the jury should decide whether the telephone connection to the village is a separate telecommunications system, or merely part of such a system, and that expert evidence should be admissible for the purpose of assisting him or her to answer that question.

Once the relevant system has been identified, it is necessary to decide whether it has been seriously interfered with, seriously disrupted, or destroyed, by the terrorist's action. This adds a further level of complication because the statute gives no guidance as to what amount of interference with, or disruption to, the system would be regarded as 'serious'. The jury, presumably, must decide this question in light of all the evidence; however, the judge should not leave the question to them if there is no evidence on which they could reasonably find that the interference or disruption to the system was 'serious'.

134. At a Special Meeting on Counter-Terrorism held on 27 Sept 2005, COAG has recognised the importance of CCTV in countering terrorism. The full text of the communiqué is available on the COAG website: n 36, above.

‘Information system’ is another kind of electronic system listed in section 100.1(2)(f) of the Criminal Code. Like ‘telecommunications system’, it is not defined in the Code.¹³⁵ The definition of ‘system’ in the *OED* suggests that it must be something large and sophisticated. The Internet, Teletext and the Speaking Clock are examples of information systems. The network of monitors in an airport concourse which display flight arrival and departure times is another example of such a system. On the other hand, a pocket calculator, digital wristwatch or iPod is not an information system notwithstanding that it can store and/or deliver information and that it may incorporate a microchip, transistor or semi-conductor. These devices are designed to operate independently and not as part of a larger whole. Thus, they are neither a system nor part of a system according to the *OED* definition quoted earlier. As with other electronic systems, there may be difficulty in determining what the relevant system is. Such a determination is, however, a prerequisite to deciding whether there has been serious interference with, serious disruption to, or destruction of, the system.

‘A system used for, or by, a transport system’ is the sixth kind of electronic system mentioned in section 100.1(2)(f) of the Criminal Code. The Trans-Tasman ferry, the Paris Metro and the US Space Shuttle are examples of transport systems. The lifts in a multi-storey building or a mine shaft are also transport systems. It is not necessary for the transport system itself to be electronic or electrical; rather, it is the system ‘used for, or by, [the] transport system’ that must be electronic.¹³⁶ Thus, a system which controls the traffic lights at a road intersection or the boom gates at a railway crossing could be an electronic system for purposes of section 100.1(2)(f)(vi) notwithstanding that the road or rail transport system is not electronic. Likewise, a radar system used by aircraft or shipping for navigation could be an electronic system notwithstanding that the air or sea transport system is not electronic.

The travaux préparatoires, ejusdem generis rule and other rules of statutory construction

It could be argued that the foregoing interpretation of ‘electronic system’ is too narrow. A microchip could plausibly be described as an electronic system and thus any electrical device which incorporates a microchip could also be so described. If this view was adopted, many household electrical appliances (eg, the microwave oven, DVD recorder, iPod or laptop computer) would be electronic systems. A heart pace-maker might also be an electronic system under this test. There are, however, several reasons for rejecting this broad interpretation of ‘electronic system’. First, the travaux préparatoires give no hint that items like these are to be regarded as

135. Urbas ‘Cyber-terrorism and Australian law’ (2005) *Internet Law Bulletin* 5; Walker (2006) 110 *Penn State LR* 625.

136. Similarly, under ss 100.1(2)(f)(iv) and (v) it is not the ‘essential government service’ or the ‘essential public utility’ that must be electronic, but rather the system used in connection with it.

electronic systems. The Blair government's Consultation Paper warned of the danger of a terrorist 'hacking into some vital computer installation and, without using violence, altering, deleting or disrupting the data held on it.' Such action, it said, 'might well result in deaths and injuries and ... could also result in extensive disruption to the economic and other infrastructure of the country'.¹³⁷ These remarks imply that an 'electronic system' is a system on which the lives and safety of many people, or the nation's prosperity, might depend. Lord Carlile's report on the definition of 'terrorism' in section 1 of the Terrorism Act 2000 (UK) points to the same conclusion. It lists 'internet service providers, financial exchanges' computer systems, controls of national power and water' as examples of an electronic system. Serious disruption to such a system, it adds, could result in 'huge damage to the nation'.¹³⁸

The Explanatory Memorandum for SLATA likewise implies that for purposes of the Criminal Code, 'electronic system' must be given a narrow interpretation. It states that the definition of 'terrorist act' in section 100.1 is designed to capture 'interference with *essential* electronic services'. By implication, interference with *non-essential* electronic goods and services (eg, an electronic advertising billboard, test match score board or household hi-fi system) is excluded. Moreover, during the second reading of SLATA in the House of Representatives, the Attorney-General told Parliament that the definition of 'terrorist act' would cover attacks on infrastructure.¹³⁹ 'Infrastructure' means railways, roads, ports, hospitals, electricity grids, TV and radio networks, and so forth; it does not mean iPods, pocket calculators and personal computers.

The foregoing arguments suggest that, for purposes of the Criminal Code, an electronic system must have three characteristics. First, it must incorporate microchips, semi-conductors, transistors or valves. This makes the system electronic rather than merely electrical. Secondly, it must be made up of many separate but interdependent components, which 'serve a common purpose, [are] technically compatible, use common procedures, respond to controls, and operate in unison'. This satisfies the *OED* and ATIS definitions of a system.¹⁴⁰ Thirdly, the system must

137. Consultation Paper, above n 27, [3.16]; Lloyd Report, above n 26, [5.23]; Carlile Report, above n 28, [50]. The Explanatory Notes for the Terrorism Act 2000 state that s 1(2)(e) 'covers the disrupting of *key* computer systems' (emphasis added).

138. Carlile Report, above n 28, [50], [71]. Para 9 of the Home Office's reply to Lord Carlile's Report refers to an 'attack on the electronic infrastructure of a country.... [It] may not harm anyone directly, but it could have untold economic or social implications'.

139. Commonwealth *Parliamentary Debates*, House of Representatives, 12 Mar 2002, p 1041. The A-G stated: 'The definition [of 'terrorist act'] is intended to capture such acts as suicide bombings, chemical or biological attacks, threats of violence and attacks on infrastructure'.

140. The American Telecommunications Information Service ('ATIS'), a US based agency responsible for setting standards in the telecommunications industry, offers the following definition of a 'communications system' which could well be relevant to the interpretation of 'telecommunications system' under the Criminal Code: 'A collection of individual communications networks, transmission systems, relay stations, tributary stations, and data terminal equipment usually capable of interconnection and interoperation to form an

have public utility, that is, it must be useful to the public as a whole, or a significant section of it, and not merely to one or two private individuals. This requirement is implicit in the travaux préparatoires.

The third requirement is also consistent with the examples of an electronic system given in section 100.1(2)(f). The fourth and fifth examples, which refer respectively to ‘essential government services’ and ‘an essential public utility’, assume the need for public benefit. ‘Financial system’, the third example of an electronic system, makes the same assumption: it connotes a stock exchange, bank or credit union, and perhaps also a system like AUSTRAC,¹⁴¹ which is essential to the running of the economy. ‘Transport system’ and ‘information system’ likewise suggest a system that is useful to the community generally rather than a particular individual. Although something may be an electronic system even if it is not one of the six systems listed in section 100.1(2)(f), the *eiusdem generis* rule requires it to be something of comparable magnitude and purpose. Hence the suggestion that an electronic system must be useful to the public as a whole or a significant section of it.

Finally, account must be taken of the principle ‘*inclusio unius, exclusio alterius*’. It is notable that sections 100.1(2)(f)(iv) and (v) refer respectively to electronic systems that are ‘used for the delivery of *essential* government services’, or are ‘used for, or by, an *essential* public utility’. Electronic systems that are used for the delivery of *non-essential* government services, or for, or by, a *non-essential* public utility are by implication beyond the reach of the legislation.¹⁴² Cable TV is an example of a public utility. However, unlike some other public utilities (eg, water, electricity, gas and sewerage), it is not an ‘*essential* public utility’. Hence, an electronic system used for, or by, a cable TV network would appear not to be an electronic system for purposes of the Criminal Code.

Cable TV is, however, a telecommunications system and thus specifically covered by section 100.1(2)(f)(ii) of the Criminal Code. This is problematical, because while cable TV is undoubtedly brought within Part 5.3 by that section it is also a *non-essential* public utility and thus an electronic system used for, or by, it is impliedly excluded from this Part by section 100.1(2)(f)(v). Which section takes precedence? On the one hand, the rule that a penal statute must be strictly construed suggests that section 100.1(2)(f)(v) must be given precedence with the result that an electronic system used for, or by, a cable TV network is not an electronic system for purposes of Part 5.3. On the other hand, it could equally well be argued that if an electronic

integrated whole. *Note*: The components of a communications system serve a common purpose, are technically compatible, use common procedures, respond to controls, and operate in unison’.

141. An electronic system used for monitoring the movement of large sums of money between bank accounts. The system is used to detect organised crime and terrorism.

142. Public swimming pools and public lending libraries are examples of non-essential government services. An electronic system used for the delivery of such a service would appear to be outside s 100.1(2)(f).

system is an information, telecommunications or financial system it is covered by that Part regardless of whether it also happens to be a *non*-essential public utility or government service within the meaning of sections 100.1(2)(f)(iv)–(v). In other words, subsections 100.1(2)(f)(i)–(iii) take precedence over the following three subsections ((iv)–(vi)) to the extent that there is any conflict between them. This interpretation would bring an electronic system used for, or by, a cable TV network within the compass of Part 5.3 notwithstanding that cable TV is also a non-essential public utility. This latter interpretation, it is submitted, is the correct one; however, the point is plainly arguable.

The foregoing arguments do not exhaust all the interpretative problems which could arise in respect of an electronic system. The basic difficulty lies not so much with the word ‘electronic’ as with the word ‘system’. ‘System’ is a nebulous term. The Telecommunications Act 1984 (UK) and the Telecommunications Act 1997 (Cth) use it, but neither attempts to define it.¹⁴³ It seems certain that the courts will have difficulty in determining what a system is and in particular in distinguishing a system from its component parts. The word ‘essential’ in sections 100.1(2)(f)(iv) and (v) adds a further complication because it will not always be obvious whether a particular government service or public utility satisfies this criterion.¹⁴⁴ Finally, an electronic system might appear to be covered by Part 5.3 because it is an information, telecommunications or financial system, but also appear to be excluded from this Part because it is a *non*-essential government service or public utility. Cable TV is an example of such a system; there are undoubtedly others.¹⁴⁵ It is unclear how Part 5.3 applies to such a system.

Independent reviews of the British and Australian definitions

In November 2005, the Home Office requested Lord Carlile QC to conduct an independent review of the definition of ‘terrorism’ in section 1 of the Terrorism Act 2000. His report, published in March 2007, concluded that the definition is ‘consistent with international comparators and treaties, and is useful and broadly fit for purpose, subject to some alteration’.¹⁴⁶ Of the two alterations he proposed, the Home Secretary rejected the first, which would have narrowed it,¹⁴⁷ but accepted the second, which expands it.¹⁴⁸

143. See Telecommunications Act 1984 (UK) s 4; Telecommunications Act 1997 (Cth) s 7.

144. GPS, a service established and maintained by the US government for the benefit of people in all parts of the world, provides an example. It could be classified either as a public utility or, more probably, a government service. Whether it is ‘essential’ is debatable.

145. GPS, for example, is perhaps a non-essential government service.

146. Carlile Report, above n 28, [86] (Conclusions 3 - 4).

147. Lord Carlile recommended that the words ‘designed to *intimidate* the government’ be substituted for ‘designed to *influence* the government’ in the Terrorism Act 2000 (UK) s 1(1)(b).

148. Lord Carlile recommended that s 1(1)(c) of the Terrorism Act 2000 (UK) be amended to ‘ensure that it is clear from the statutory language that terrorism motivated by a racial or

Two committees have scrutinised the Australian definition of ‘terrorist act’ in Part 5.3 of the Criminal Code: the Sheller Committee, which reported to the Attorney-General in April 2006, and the Parliamentary Joint Committee on Security and Intelligence, which reported to Parliament in December 2006. Neither committee could find serious fault with the definition. Some changes were recommended, but with one exception they were relatively minor. The one substantial change, recommended by both committees, was that references to ‘threats of action’ be removed from the definition of ‘terrorist act’ and transferred to a separate provision.¹⁴⁹ This was to meet the point that by combining actions and threats of action in a single definition, Parliament had made that definition unnecessarily cumbersome and difficult to understand.¹⁵⁰

The lack of any substantial criticism of the two definitions in the aforementioned reports might suggest that they are basically sound and that the points made against them in this article are misplaced or exaggerated. However, it must be borne in mind that terrorism is not a common offence and that to date few prosecutions have been brought under the counter-terrorism legislation in either jurisdiction. In the United Kingdom, there have been fewer than eight convictions each year under the Terrorism Act 2000 and in Australia there have been only a handful of prosecutions under Part 5.3 of the Criminal Code.¹⁵¹ There has, therefore, been little opportunity for the shortcomings of the two definitions to be exposed in the court room.

It is a moot point whether the UK definition of ‘terrorism’ or the Australian definition of ‘terrorist act’ is the more problematical, but it is undeniable that the two definitions are imperfect and that both are in need of significant revision. The final part of this article, to be published in a forthcoming issue of this journal, explores some further problems in the two definitions and suggests solutions to them.

ethnic cause is included’: Carlile Report, above n 28, [86] (Conclusion 12). He also recommended that additional sentencing powers be introduced to enable heavier sentences to be imposed for ordinary crimes committed with the intention of facilitating terrorism (Conclusion 8). The Home Office has accepted this recommendation.

149. Sheller Inquiry, above n 9, [6.10]–[6.16]; PJCSI Report, above n 7, [5.38]–[5.40].

150. It is notable that Lord Carlile, who had the advantage of reading the two Australian reports, omitted to make an equivalent recommendation in relation to the definition of ‘terrorism’ in the Terrorism Act 2000 (UK) s 1. This suggests that, so far as the UK is concerned, no practical problems have arisen from the fact that s 1 covers action and the threat of action.

151. Between 11 September 2001 and 30 September 2006, 38 terrorists were convicted under the Terrorism Act 2000 (UK). One hundred and seventy six more were convicted under other legislation following investigations police conducted under their counter-terrorism powers. These figures are taken from Baroness Scotland of Asthal’s reply to a question by Lord Lloyd of Berwick seeking information about the operation of the new counter-terrorism laws: House of Lords (18 Dec 2006).

UNITED KINGDOM**Terrorism Act 2000****Section 1**

- (1) In this Act ‘terrorism’ means the use or threat of action where-
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section-
 - (a) ‘action’ includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) ‘the government’ means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

AUSTRALIA**Criminal Code 1995, Section 100.1**

- (1) 'Terrorist act' means an action or threat of action where:
- (a) the action falls within subsection (2) and does not fall within subsection (3); and
 - (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
 - (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it:
- (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.
- (3) Action falls within this subsection if it:
- (a) is advocacy, protest, dissent or industrial action; and
 - (b) is not 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.
- (4) In this Division:
- (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
 - (b) a reference to the public includes a reference to the public of a country other than Australia.