

TERRORISM OFFENCES IN THE *CRIMINAL CODE*: BROADENING THE BOUNDARIES OF AUSTRALIAN CRIMINAL LAWS

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I INTRODUCTION

Open up any criminal law textbook and the three main categories of serious offences seem fixed – homicide, non-fatal offences against the person and property offences. Occasionally, public order, driving and drug offences score a chapter, but most criminal law scholars start from the premise that the three main categories must form the core of any exposition and analysis. Andrew Ashworth has pointed out that the number of offences continue to grow each year and ‘[p]oliticians, pressure groups, journalists and others often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern’.¹ Despite the rush to make new offences, many not requiring that any fault element be proved, the three main categories of *serious* crimes have remained unchallenged for well over a century.

In 2002, the Australian Government enacted approximately 100 new offences, many punishable by life imprisonment, which do not readily fit the traditional mould of domestic crimes. These new offences, framed under the headings of terrorism, genocide, crimes against humanity and war crimes, attempt to encapsulate customary international law doctrines which rest on different principles to that of domestic criminal laws.

The growing impact of international law, the awareness that some crimes have universal jurisdiction and the advent of global approaches to combating crime help explain the federal Government’s unprecedented step of enacting offences based on concepts of international criminal law. The challenge, of course, lies in integrating such crimes into a pre-existing domestic criminal law regime.

This article focuses on the inclusion of terrorism offences in Australian domestic law from the perspective of an academic criminal lawyer. The new

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1 Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225, 225.

terrorism offences do not fit comfortably within the traditional framework for serious crimes because they focus on why the conduct was performed and at whom it was aimed, rather than on what was done. As a consequence, there are anomalies in their drafting. There are also aspects of the terrorism offences that substantially broaden the boundaries of domestic criminal law in relation to the fault element of serious offences, and also in relation to status offences, inchoate offences and jurisdiction. In addition, the inclusion of a reverse onus provision in relation to the burden of proof, whereby the burden falls on the accused, derogates from the presumption of innocence.

The next section considers the consultation process involved in the creation of the new terrorism offences and how this differs from the usual way in which additions have been made to the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'). The article then critically analyses the substantive law relating to the commission of terrorist acts in light of ch 2 of the *Criminal Code* and highlights the discrepancies between them. The impact that the terrorism offences have on broadening the scope of fault elements, status and inchoate offences as well as on jurisdiction is then examined, before turning to issues of the burden of proof.

II THE CONSULTATION PROCESS

The process by which the new offences under the headings of terrorism, genocide, crimes against humanity and war crimes were enacted bypassed the usual consultative route for additions to the *Criminal Code*. To understand how this occurred, it is necessary to examine the development of the *Criminal Code*.

On 28 June 1990, the Standing Committee of Attorneys-General ('SCAG') placed on its agenda the question of the development of a uniform criminal code for all Australian jurisdictions. SCAG established the Criminal Law Officers Committee ('CLOC'), now known as the Model Criminal Code Officers Committee ('MCCOC'), to draft a criminal code for the Commonwealth which would serve as the model to be adopted in the States and Territories.

In July 1992, the CLOC released its first Discussion Paper setting out the general principles of criminal responsibility.² There followed a period of public consultation resulting in 52 written submissions. A Final Report was released in December 1992.³ The recommendations in the Final Report formed the basis of the Criminal Code Bill 1994 (Cth) which was passed in March 1995. Since that

2 CLOC, Parliament of Australia, *Model Criminal Code: General Principles of Criminal Responsibility*, Discussion Draft (1992).

3 CLOC, Parliament of Australia, *Model Criminal Code: General Principles of Criminal Responsibility*, Final Report (1992).

time, the MCCOC has issued over 20 discussion papers and final reports dealing with substantive crimes.⁴

The Model Criminal Code is divided into nine chapters which include the areas that are usually found in textbooks, such as general principles, property offences and fatal and non-fatal offences against the person. Some chapters contain offences that have not traditionally been explored by criminal law academics, including damage and computer offences, serious drug offences, administration of justice offences, public order offences and slavery.⁵ Up until 2002, additions to the *Criminal Code* relating to general principles, property offences and slavery were based on the recommendations of the MCCOC.

In contrast to this traditional consultative process, there was no MCCOC Discussion Paper circulated in relation to the new offences set out in ch 5, 'The Security of the Commonwealth' which was inserted by sch 1 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), or those in ch 8, 'Offences against Humanity and Related Offences' which was inserted into the *Criminal Code* as part of the ratification of the *Rome Statute of the International Criminal Court*⁶ ('*Rome Statute*') by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

The MCCOC released one report entitled 'Chapter 9: Offences against Humanity' dealing with slavery and sexual servitude, which formed the basis for the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth).⁷ Otherwise, it appears that the new offences were developed and enacted without attention to the foundational work of the MCCOC.

Because the legislation inserting new terrorism offences into the *Criminal Code* and the Bills concerning ratification of the *Rome Statute* bypassed the usual MCCOC consultative process, a thorough analysis of the new crimes by criminal lawyers seems to have been precluded.

On 12 March 2002, the federal Government introduced the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) into Parliament as part of a package designed to increase security through the expansion of investigation and enforcement procedures and powers to seize assets. This Bill was withdrawn on 13 March 2002 due to a discrepancy between its title and the title referred to in its notice of presentation. It was replaced by the Security Legislation Amendment (Terrorism) Bill (No 2) 2002 (Cth) and, together with the Suppression of the

4 See generally Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152 for an overview of the process leading to the formulation of the *Criminal Code Act 1995* (Cth). He points out that there have been few submissions by legal academics in relation to the process of developing the *Criminal Code Act 1995* (Cth): at 156. Goode interprets this as a lack of interest but, to be fair, other factors may have had an influence, such as a lack of time due to increasing administrative pressures placed on academics and the unfortunate fact that submissions do not count as research publications that attract funding.

5 See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) which deals in detail with these additional offences.

6 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, (entered into force 1 July 2002).

7 MCCOC, Parliament of Australia, *Model Criminal Code Chapter 9: Offences against Humanity Slavery Report* (1998).

Financing of Terrorism Bill 2002 (Cth), the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth), the Border Security Legislation Amendment Bill 2002 (Cth) and the Telecommunications Interception Legislation Amendment Bill 2002 (Cth), was passed by the House of Representatives on 13 March 2002. On 14 March, the five Bills were introduced into the Senate, the second reading debate was adjourned and on 21 March, the Bills were referred to the Senate Legal and Constitutional Legislation Committee. The Committee received over 431 submissions in the six weeks it had been given to scrutinise the Bills. It tabled its Report on 8 May 2002.

The Committee noted that there were concerns that the definition of ‘terrorist acts’ in the Security Legislation Amendment (Terrorism) Bill (No 2) 2002 (Cth) was too broad and did not focus sufficiently on the fault element of intention.⁸ The Committee made a number of recommendations, including that the proposed absolute liability offences of providing or receiving training, possessing things and collecting or making documents likely to facilitate terrorist acts be altered to include fault elements of recklessness and knowledge.⁹

An amended version of the Security Legislation Amendment (Terrorism) Bill (No 2) 2002 was returned from the Senate to the House of Representatives on 27 June 2002. It was assented to on 5 July 2002 and came into force on 6 July 2002.

The compressed timeframe for the consideration of the legislative package rendered impossible a thorough analysis of how these new crimes reflected the general principles enshrined in ch 2 of the existing *Criminal Code*. It suggests that the *Criminal Code* was treated as a mere vehicle for the inclusion of the new terrorism offences. Perhaps inevitably, the terrorism offences in many instances do not adequately reflect the general principles previously enacted in the *Criminal Code*, and this will be explored below. The next section outlines the new terrorism provisions in the *Criminal Code* in the light of attempts to define terrorism in international law.

III CRIMINALISING TERRORIST ACTS

Section 101.1 of the *Criminal Code* makes it an offence punishable by life imprisonment for a person to engage in a terrorist act. While this offence is not drawn directly from any international convention or treaty, it reflects recent international attempts to proffer a definition of terrorism based on the intention to spread terror through ideologically motivated crimes.¹⁰

8 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 (No 2); Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002* (2002) [3.75].

9 Ibid [3.100].

10 See Antonio Cassese, *International Criminal Law* (2003) 124 for the common elements of international definitions of terrorism.

At an international level, there has been difficulty finding a definition of terrorism that does not outlaw the struggle for self-determination. Terrorism was not included as an international crime within the jurisdiction of the International Criminal Court partly because parties at the Conference which adopted the *Rome Statute* could not agree on a definition.¹¹ One of the early United Nations General Assembly resolutions condemns terrorism as ‘criminal and unjustifiable’, but also states that nothing will ‘prejudice the right to self-determination ... or the right to struggle legitimately towards this end’.¹² Interestingly, the more recent General Assembly resolutions which condemn ‘all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed’, have omitted any reference to self-determination.¹³

Professor M Cherif Bassiouni has pointed out that ‘the search for an internationally agreed upon definition may well be a futile and unnecessary effort’.¹⁴ He states that one of the principal problems in defining terrorism ‘lies in the fundamental values that are at stake in the acceptance or rejection of terror-inspiring violence as a means of accomplishing a given goal, particularly when that goal reflects certain values’.¹⁵ On the other hand, Professor Antonio Cassese has argued that an accepted definition of terrorism has gradually emerged in the international community.¹⁶

The 1937 League of Nations *Convention for the Prevention and Punishment of Terrorism* defined terrorism as ‘criminal acts directed against a State and intended to or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’.¹⁷ This general focus on acts ‘intended to or calculated to provoke a state of terror in the general public or in a group of persons or particular persons’ has continued in the most recent attempts to regulate terrorism.¹⁸ At the domestic level, s 100.1(1) of the *Criminal Code* provides a definition of ‘terrorist act’ that picks up on this notion of an intention to create a state of terror, but couches it in terms of coercion or intimidation. This section defines a terrorist act as one falling within s 100.1(2) which is accompanied by an intention to advance ‘a political, religious or ideological cause’ and the intention of ‘coercing, or influencing by intimidation, the government’ or ‘intimidating the public or a section of the public’.

11 Kriangsak Kittichaisaree, *International Criminal Law* (2001) 227.

12 *Resolution on Measures to Prevent International Terrorism*, GA Res 44/29, UN GAOR, 44th sess, 72nd plen mtg, [1], [17], UN Doc A/Res/44/29 (1989).

13 *Resolution on Measures to Eliminate International Terrorism*, GA Res 55/158, UN GAOR, 55th sess, 84th plen mtg, UN Doc A/Res/55/158 (2001).

14 M Cherif Bassiouni, ‘International Terrorism’ in M Cherif Bassiouni (ed), *International Criminal Law* (2nd ed, 1999) vol 1, 765, 771.

15 *Ibid.*

16 Cassese, above n 10, 120.

17 *Convention for the Prevention and Punishment of Terrorism*, opened for signature 16 November 1937, League of Nations Document C.94.M.47.1938.V, art 1(2) (this Convention did not enter into force as it was never ratified), reprinted in Manley O Hudson (ed), *International Legislation* (1972) vol 7, No 499, 862.

18 *International Convention on the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

Section 100.1(3)(a) of the *Criminal Code*, which was recommended for inclusion by the Senate Legal and Constitutional Legislation Committee, specifically excludes ‘advocacy, protest, dissent or industrial action’ from the definition of terrorist act, thereby narrowing the ambit of the offence¹⁹ and avoiding some of the criticisms directed at the *Terrorism Act 2000* (UK).²⁰ Nevertheless, Aidan Ricketts has argued that the practical effect of the terrorism offences ‘is to deny Australians the right to politically associate with any political movements which may be involved in violent struggles anywhere in the world’.²¹

The actions listed as falling within the definition of a terrorist act range from causing serious physical harm to a person, causing death or endangering life, to seriously interfering with an electronic system.²² Prior to 2002, all of these actions could have been prosecuted under existing domestic criminal law. Aidan Ricketts points out that:

The combined effects of the legislative prohibitions upon the possession (without reasonable excuse) of knives, weapons, explosives, firearms and dangerous goods generally and the older common law based offences of murder, manslaughter, assault and kidnapping, clearly are broad enough to cover any terrorist attack involving violence and any attempted attack or any preparatory activity involving weapons of any kind.²³

It is interesting to note that in 2002, the Dutch Government decided not to include specific terrorism offences in its *International Crimes Act* on the basis that terrorist acts could be adequately prosecuted and punished under its domestic criminal laws.²⁴ However, the Senate Legal and Constitutional Legislation Committee was satisfied that the new provisions were justified after hearing evidence that there were gaps in the existing law.²⁵

The real difference between pre-existing offences and the new terrorism offences lies in the motive behind the proscribed act, and this will be explored in the next section.

IV BROADENING THE BOUNDARIES OF FAULT: MOTIVE AS A FAULT ELEMENT OF SERIOUS CRIMES

The traditional view of the elements of serious offences is that they consist of two elements: a physical (or external) element – the ‘actus reus’ – and a subjective fault element – the ‘mens rea’. For example, in most jurisdictions,

19 Senate Legal and Constitutional Legislation Committee, above n 8, [3.77].

20 Sir David Williams, ‘Terrorism and the Law in the United Kingdom’ (2003) 26 *University of New South Wales Law Journal* 179, 179.

21 Aidan Ricketts, ‘Freedom of Association or Guilt by Association: Australia’s New Anti-Terrorism Laws and the Retreat of Political Liberty’ (2002) 6 *Southern Cross University Law Review* 133, 141.

22 *Criminal Code* s 100.1(2).

23 Ricketts, above n 21, 146.

24 Göran Sluiter, ‘Implementation of the ICC Statute in the Dutch Legal Order’ (2004) 2 *Journal of International Criminal Justice* 158, 174.

25 Senate Legal and Constitutional Legislation Committee, above n 8, [3.34].

murder is defined as a voluntary act causing death and an intention to kill. Different jurisdictions may vary the fault element (an intention to cause grievous bodily harm and/or some form of recklessness may also suffice), but this traditional notion of a physical element and a fault element is well ingrained in domestic criminal law. It finds its way into the *Criminal Code* by way of s 3.1(1) in ch 2, which states that ‘an offence consists of physical and fault elements’. Section 3.2 then requires proof of a fault element ‘in respect of each such physical element’.

Intention has long been viewed as the cornerstone of fault elements, perhaps because it is philosophically integral to the framework of a subjectivist approach to the criminal law.²⁶ That is, criminal punishment should be restricted to those who, from a subjective perspective, intended, knew, or at least were aware of the risk of a particular harm occurring.

The law has traditionally dealt with *motive* at the sentencing stage rather than in assigning criminal responsibility. In *Hyam v Director of Public Prosecutions (Cth)*,²⁷ Lord Hailsham referred to motive as an emotion prompting an act which is quite separate from an intention. His Lordship stated:

The motive for murder ... may be jealousy, fear, hatred, desire for money, perverted lust, or even, as in so-called ‘mercy killings’, compassion or love. In this sense, motive is entirely distinct from intention or purpose. It is the emotion that gives rise to an intention and it is the latter and not the former which converts an *actus reus* into a criminal act.²⁸

The legal suppression of the notion of ‘motive’ in the formulation of offences has kept political, social and cultural explanations for the commission of offences out of the courtroom at the trial stage. The terrorism offences in the *Criminal Code* challenge this approach by including motive as a fault element.

To take a specific example, s 85ZG of the *Crimes Act 1914* (Cth) (which existed prior to the enactment of the new terrorism provisions in the *Criminal Code*) makes it an offence to ‘intentionally manipulate, or tamper or interfere with, any facility operated by’ a telecommunications carrier. The penalty is imprisonment for two years. The new s 100.1(2)(f)(ii) of the *Criminal Code* makes it an offence to seriously interfere with an electronic system including a telecommunications system. The penalty is life imprisonment. Whereas the fault element for s 85ZG of the *Crimes Act 1914* (Cth) is an intention to manipulate, tamper or interfere with the telecommunications facility, the fault element for s 100.1(2)(f)(ii) is very different. The requirement under s 100.1(1) that the act be accompanied by an intention to advance ‘a political, religious or ideological cause’ and with the intention of ‘coercing, or influencing by intimidation, the government’ or ‘intimidating the public or a section of the public’ goes to motive rather than to an intention to commit the act itself.

Similarly, unlike the framework of other serious crimes, s 101.1 – which criminalises engaging in a terrorist act – does not require proof of an intention to

26 H L A Hart, *Punishment and Responsibility* (1968); R A Duff, *Intention, Agency and Criminal Liability* (1990).

27 [1975] AC 55.

28 Ibid 73.

cause the terrorist act itself. Rather, the requisite intention, framed in s 100.1(1), is the intention to advance a political, religious or ideological cause and an intention to coerce or intimidate. This leads to the conclusion that the prosecution must prove why the act was carried out. Section 100.1(1) really requires proof of the motive behind the act rather than an intention to commit the act itself.

It could be argued that due to the existence of s 5.6(1) of the *Criminal Code*, the prosecution would have to prove an intention to engage in the terrorist act. That section states that '[i]f the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element'. This seems rather convoluted. Ian Leader-Elliott has pointed out that '[t]he legislature would be expected to displace most of the applications of s 5.6 by specific provisions dealing with fault'.²⁹ Why a fault element was not specified in relation to the physical act in the offence itself is unclear.

It appears, then, that the prosecution has to prove the motive behind the act in order to distinguish the offence of engaging in a terrorist act from other existing crimes. This significantly broadens the scope of the substantive criminal law.

Some have argued that motive should be taken into account when assigning criminal responsibility. For example, Alan Norrie has argued that ignoring the relevance of motive effectively ignores the social conditions in which individuals live.³⁰ Norrie points out that the principle that motive is irrelevant to the question of criminal responsibility originated in a system where rules relating to property were imposed on all, despite the poor's motives of 'desperate social need and indignant claim of right'.³¹ By ignoring the social conditions that led to crime, assigning criminal responsibility could be simplified. The drafting of s 100.1(1) certainly opens the door for motive to be taken into account in assigning criminal responsibility, but probably not in the way Norrie would want. Emphasising an intention to advance a political, religious or ideological cause may take into account such causes but only for the purpose of establishing guilt. The social conditions in which individuals live that give rise to terrorist acts may still be bypassed in the trial process.

In domestic criminal law, offences are generally delineated by what was done rather than why an act was done or to whom. The new offence of engaging in a terrorist act challenges that approach. It simply does not fit comfortably within the general principles of the *Criminal Code*.

There are also practical difficulties associated with proving the offence of engaging in a terrorist act and the ancillary offences flowing from it, such as providing or receiving training connected with terrorist acts,³² possessing things connected with terrorist acts³³ and collecting or making documents likely to facilitate terrorist acts,³⁴ because of confusion as to the fault element.

29 Ian Leader-Elliott, *The Commonwealth Criminal Code, A Guide for Practitioners* (2002) 93.

30 Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd ed, 2001) ch 3.

31 *Ibid* 38–9.

32 *Criminal Code* s 101.2.

33 *Criminal Code* s 101.4.

34 *Criminal Code* s 101.5.

None of the ancillary terrorism offences set out in div 101 specify a fault element in relation to the physical elements listed. This is in contrast to div 102 offences dealing with directing, recruiting and training a terrorist organisation,³⁵ which clearly attach the fault element of intention to the physical elements.

Originally, the ancillary offences were ones of absolute liability, not requiring any fault element to be proven at all. However, the Senate Legal and Constitutional Legislation Committee recommended that these be amended to include fault elements such as knowledge that the conduct was in some way connected to a terrorist act.³⁶ This was done, but there is still no mention of a fault element in relation to the prohibited conduct itself.

Turning to the general principles provisions, it would seem that s 5.6(1) applies to the interpretation of engaging in a terrorist act as well as the ancillary offences and thus imports an intention to engage in the prohibited conduct. The prosecution therefore bears the burden of proving three sorts of intention. For example, in relation to the offence of engaging in a terrorist act, the prosecution would have to prove:

1. An intention to engage in the terrorist act;
2. An intention to advance a political, religious or ideological cause; and
3. An intention to intimidate specified groups.

The first requirement is no different from most conduct crimes. Section 5.2(1) of the *Criminal Code* helpfully states that a 'person has intention with respect to conduct if he or she means to engage in that conduct'. Of course, there may still be problems associated with proving intention in this sense. The difficulty of determining intention was recognised by Kirby J in *Peters v The Queen*³⁷ when his Honour stated:

Absent a comprehensive and reliable confession, it is usually impossible for the prosecution actually to get into the mind of the accused and to demonstrate exactly what it finds was there at the time of the criminal act. Necessarily, therefore, intention must ordinarily be inferred from all of the evidence admitted at the trial. In practice this is not usually such a problem.³⁸

Once over that hurdle, the second and third requirements relating to intention head into uncharted ground in relation to domestic criminal law. Here, intention is used in a sense different to the definitions set out in s 5.2 of the *Criminal Code*. Intention in that section relates to the requisite physical element of the crime. The application of the intention requirement is different here because of the tie-in with motive, as explored above.

Because the intention to advance a political, religious or ideological cause and to intimidate the government or members of the public is an inherently vague criterion, it is difficult to know what evidence the prosecution would need to gather to prove such an intention beyond reasonable doubt. What will be

35 *Criminal Code* ss 102.2–102.7.

36 Senate Legal and Constitutional Legislation Committee, above n 8, [3.100].

37 (1998) 192 CLR 493, 551.

38 *Ibid* 551.

considered a political, religious or ideological cause may change over time. The Commission on Legal Procedures to Deal with Terrorist Activities in Northern Ireland pointed out that terrorist organisations ‘inevitably attract into their ranks ordinary criminals whose motivation for particular acts may be private gain or personal revenge’.³⁹ How would the prosecution tease out these motivations from those listed in s 100.1(1)(b) and (c)? It may be very difficult to prove the latter motivations beyond reasonable doubt in the absence of a reliable confession. Of course, it could be argued that this is entirely apt given the seriousness of the punishment following conviction for such crimes. Whatever the case, proving motive as well as intention is venturing into uncharted territory.

One other anomaly that occurs in relation to the drafting of the fault element for the terrorism offences, is that while the fault element is generally omitted in relation to the physical element of the crime, s 103.1 (which criminalises the financing of terrorism) has a ‘note’ beneath the section which states: ‘Intention is the fault element for the conduct described in paragraph (1)(a)’. This is certainly a unique approach to drafting the elements of a crime. It appears that this was simply added after the Senate and Legal and Constitutional Legislation Committee recommended that this section be amended to include an element of intent.⁴⁰ Nevertheless, this does not explain why the word ‘intentionally’ simply wasn’t inserted before the requisite physical element, rather than a ‘note’ added underneath the section.

It may be that the haste with which the terrorism offences were introduced into the *Criminal Code* meant that there was simply not enough time to fully appreciate how they fitted into the existing format of the legislation. However, the *Anti-terrorism Act 2004* (Cth), which replaces the offence of training or receiving training from a terrorist organisation with a new s 102.5, suggests otherwise. Section 102.5(3) makes the definition of certain terrorist organisations in s 102.5(2)(b) a ‘strict liability’ paragraph. The same tactic is also used in some of the subsections in ch 8 containing crimes against humanity and other offences. Having a strict liability paragraph within an offence is disconcerting for criminal lawyers because the term ‘strict liability’ has traditionally applied to legislative offences as a whole, rather than to paragraphs within them. For example, J C Smith writes that ‘[c]rimes which do not require intention, recklessness or even negligence ... are known as *offences* of strict liability’.⁴¹ There is no reference to strict liability paragraphs.

It could be argued that s 6.1(2) of the *Criminal Code* opens the way for this unusual treatment of strict liability by stating that:

If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:

(a) there are no fault elements for that physical element; and

39 Lord Diplock (Chair), *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activity in Northern Ireland*, Cmnd 5185 (1972) [5].

40 Senate Legal and Constitutional Legislation Committee, above n 8, Recommendation 6, viii.

41 J C Smith, *Smith & Hogan Criminal Law* (10th ed, 2002) 115 (emphasis added).

- (b) the defence of mistake of fact under s 9.2 is available in relation to that physical element.

Nevertheless, what strict liability actually means in s 102.5(3) is muddled by the fact that s 102.5 refers to a fault element of recklessness in relation to the definition of a terrorist organisation. How can no fault element apply to s 102.5(2)(b) under the definition of strict liability in s 6.1(2), yet recklessness be a prerequisite under s 102.5(4)?

Overall, the way in which the fault element is treated in relation to the terrorism offences leaves a lot to be desired. The focus on motive as a fault element certainly challenges the traditional notion of intention being the cornerstone of criminal responsibility. Whether this will open up the way for motive to be considered in relation to other domestic crimes remains to be seen.

V BROADENING THE BOUNDARIES OF STATUS OFFENCES AND INCHOATE CRIMES

There is an inevitable tension between the use of the criminal law to prevent harm to others and the risk of over-criminalising certain behaviour. This section deals with the implications for the domestic criminal law of two other terrorism offences – membership of a terrorist organisation⁴² and committing acts in preparation for, or planning a terrorist act.⁴³ It is argued that these offences considerably broaden the boundaries of status offences and inchoate crimes.

A *Broadening the Scope of Status Offences in Domestic Criminal Law*

The physical act of most offences consists of the commission of an act or series of acts by the accused. This reflects the principle of legality or, as it is more traditionally known, the rule of law which requires that there should be no punishment without law (*nulla poena sine lege*). An important premise behind the rule of the law is that governments should punish criminal conduct, not criminal types. Francis Allen states in this regard:

Although the point seems not often made, the *nulla poena* principle has important implications not only for the procedures of justice but also for the substantive criminal law. It speaks to the questions, What is a crime? And Who is the criminal? The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who or what they are.⁴⁴

Despite this principle, however, it is incorrect to assume that liberal democratic societies have never drafted criminal laws punishing individuals because they possess certain characteristics. During the 19th century, ‘status’ offences existed to deal with vagrants, prostitutes, drunks and habitual criminals for the benefit of the respectable classes.⁴⁵ During the 20th century, there was a

42 *Criminal Code* s 102.3.

43 *Criminal Code* s 101.6.

44 Francis Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* (1996) 15.

45 Mark Finnane, *Police and Government: Histories of Policing in Australia* (1994) ch 1.

move toward a social welfare or medical model, and away from the criminal model, to deal with drunk and disorderly individuals, and a range of civil powers of detention were available.⁴⁶ However, different ‘undesirable’ groups have been targeted at different times. Simon Bronitt has pointed out that the current legislative responses to terrorism are neither novel nor extraordinary.⁴⁷ He points out that the *Bushranging Act 1830* (NSW)⁴⁸ empowered the arrest of suspected bushrangers on the basis that they could not establish their identity, and required suspects to prove that they were not engaged in illegal activities. Similarly, Alex Steel refers to the existence of ‘razor gangs’ in New South Wales in the 1920s and 1930s as leading to the introduction of a general crime of consorting with criminals or prostitutes.⁴⁹

Status offences have generally been summary offences. The new status offence of being a member of a terrorist organisation is punishable by imprisonment for 10 years and would seem, on Francis Allen’s argument, to breach the *nulla poena* principle. The fact that s 102.1 defines ‘member’ as including an ‘informal member of the organisation’ and one ‘who has taken steps to become a member of the organisation’ considerably broadens the scope of the offence.

Similarly s 102.8, entitled ‘associating with terrorist organisations’, which was set out in sch 3 of the *Anti-terrorism Act (No 2) 2004* (Cth)⁵⁰ makes it an offence punishable by three years imprisonment to meet or communicate with those involved in a terrorist organisation on two or more occasions. The physical element of meeting or communicating is an innocuous one. It is the status of the person with whom the accused associates that criminalises this conduct. There are exceptions for relatives or partners of those involved in the terrorist organisation, providing the association relates to a family or domestic concern and a similar exception applies to legal representatives giving advice in relation to legal proceedings.⁵¹ This offence is somewhat similar to the crime of habitually consorting ‘with persons who have been convicted of indictable offences’ pursuant to s 546A of the *Crimes Act 1900* (NSW). However, the latter offence is a summary offence punishable by imprisonment for six months, and it is doubtful that meeting or communicating with such persons on just two occasions would amount to habitual consorting.⁵² The offence of associating with terrorist organisations casts a very broad net indeed.

The existence of the fault elements of knowledge that the organisation is a terrorist organisation⁵³ and of ‘intentionally’ being a member of or associating

46 Bronitt and McSherry, above n 5, 779.

47 Simon Bronitt, ‘Australia’s Legal Response to Terrorism: Neither Novel nor Extraordinary?’ (Paper presented at the Castan Centre for Human Rights Law Conference, *Human Rights 2003: The Year in Review*, Melbourne, 4 December 2003) <<http://www.law.monash.edu.au/castancentre/events/2003/bronitt-paper.pdf>> at 15 November 2004.

48 11 Geo 4 No 10.

49 Alex Steel, ‘Consorting in New South Wales: Substantive Offence or Police Power?’ (2003) 26 *University of New South Wales Law Journal* 567, 582 ff.

50 Date of Assent: 16 August 2004.

51 *Criminal Code* s 102.8(4).

52 Steel, above n 49, 572–3 and the cases cited therein.

53 *Criminal Code* ss 102.3(1)(c), 102.8(1)(a)(ii).

with a terrorist organisation may serve to limit these offences, but the concern remains that individuals will be punished because of whom they associate with, rather than for what they have done. It raises the spectre of the future enactment of other indictable status offences which will continue to seriously erode the principle of legality as it relates to the criminal law.

B Broadening the Scope of Inchoate Offences in Domestic Criminal Law

Section 101.6(1) makes it an offence, punishable by life imprisonment, to do 'any act in preparation for, or planning, a terrorist act'. It is interesting to note that one of the first persons to be charged under the new terrorism offences has been charged under this section.⁵⁴ The concern for domestic criminal law is that s 101.6 substantially broadens the scope of inchoate offences.

The three main inchoate offences – attempts, conspiracy and incitement – are treated as substantive crimes in themselves, separate from the completed offences at which they are aimed. In general, the common thread among these crimes is that there can be a conviction even though the substantive offence that was intended is not completed and no apparent harm is caused. The doctrine of attempts is designed to punish those who intend to commit a crime and who perform acts that are more than merely preparatory to the crime. The offence of attempting to commit a crime is set out in s 11.1 of the *Criminal Code*. Section 11.1(2) requires that for the accused to be found guilty, 'the person's conduct must be *more than merely preparatory* to the commission of the offence' (emphasis added).

The doctrine of attempts has been criticised as broadening the scope of criminal responsibility too far because it has a vague physical element incapable of definition.⁵⁵ Section 101.6(1) of the *Criminal Code* goes even further than the law of attempts in criminalising preparatory acts. Having a physical element of 'any act' in preparation for, or planning a terrorist act, is even more vague than the physical element of attempts and it is of grave concern that the ambit of the criminal law has suddenly been expanded to such an extent. It is also ludicrous that, technically, an accused could be charged under s 11.1 of attempting to do an act in preparation for, or planning, a terrorist act.

The law relating to inchoate offences has developed on an ad hoc basis and it will be a matter for the courts to interpret what is meant by the physical element

54 Twenty year old Zac Mullah was charged under *Criminal Code* s 101.6 on 3 December 2003 with planning a terrorist act in Sydney: ABC Television, 'Sydney Man to Face Terrorism Charges', *Lateline*, 4 December 2003, <<http://www.abc.net.au/lateline/content/2003/s1003778.htm>> at 15 November 2004. Charges have subsequently been laid against two other Sydney men: Faheem Khalid Lodhi and Bilal Khazal. Lodhi was charged on 22 April 2004 with a number of offences including committing an act in preparation for a terrorist attack (s 101.6) and making documents to facilitate a terrorist attack (s 101.5): Alison Caldwell, ABC Radio, 'Sydney Man Charged with Terrorism-Related Offences', *AM*, 23 April 2003 <<http://www.abc.net.au/am/content/2004/s1093299.htm>> at 15 November 2004. Khazal was charged on 2 June 2004 under *Criminal Code* s 101.5 with one count of collecting or making documents likely to facilitate a terrorist act: Mark Coultan and Ellen Connolly, 'The Baggage of Bilal Khazal', *Sydney Morning Herald* (Sydney), 4 June 2004, 9.

55 See, eg, P R Glazebrook, 'Should We Have a Law of Attempted Crime?' (1969) 85 *Law Quarterly Review* 28.

of s 101.6(1). Given that one of the first persons to be charged under the terrorism offences has been charged under s 101.6, there may soon be an opportunity for the courts to examine the ambit of this section.⁵⁶

VI BROADENING THE BOUNDARIES OF JURISDICTION

The one area in the legislative changes where there is a clear reference to the pre-existing general principles of the *Criminal Code* relates to jurisdiction. This term has been used in a number of different ways in domestic and international law to explain control over persons and procedures as well as constitutional and judicial structures and powers.⁵⁷ In the present discussion, jurisdiction is used in the sense of a geographical political unit that has power to prosecute an accused person.

In domestic criminal law, the traditional ‘territorial’ approach has been that all crime is local, and a state should only exercise its powers to try and punish offenders where the offence was committed within its geographical boundaries. That is, crimes should be tried where they were committed. However, the advent of crimes that know no borders such as ‘cybercrime’ has forced a re-evaluation of traditional rules, such that ss 15.1 to 15.4 of the *Criminal Code* (which were inserted in 1999) now set out four categories of extended geographic jurisdiction.⁵⁸ Category A covers Australian citizens anywhere in the world, subject to a foreign law defence (that is, it is a defence if there is no crime in the foreign jurisdiction which corresponds to the Commonwealth offence); Category B covers Australian citizens or residents anywhere in the world, subject to a foreign law defence; Category C covers anyone anywhere regardless of citizenship or residence, subject to a foreign law defence; and Category D covers anyone anywhere regardless of citizenship or residence.

The terrorism offences are able to operate extraterritorially. References to persons, incorporated and unincorporated bodies and ‘the public’ in the definition section⁵⁹ and in the unusual section dealing with the constitutional basis for the operation of the terrorism offences⁶⁰ do not specify Australia or Australians.

The traditional ‘territorial’ approach to jurisdiction has no relevance here, nor does the ‘sufficient connection’ or ‘real link’ approach between the offence and the geographic unit referred to by the High Court in *Lipohar v The Queen*.⁶¹ All the terrorism offences attract what is termed ‘extended geographical jurisdiction – Category D’.⁶² The Explanatory Memorandum for the House of Representatives states that Category D, in relation to the offence of engaging in a

56 See above n 54.

57 *Lipohar v The Queen* (1999) 200 CLR 485, 516 (Gaudron, Gummow and Hayne JJ).

58 On this point see Simon Bronitt and Miriam Gani, ‘Shifting Boundaries of Cybercrime: From Computer Hacking to Cyber-Terrorism’ (2003) 27 *Criminal Law Journal* 303, 309 ff.

59 *Criminal Code* s 100.1.

60 *Criminal Code* s 100.3.

61 (1999) 200 CLR 485, 501 (Gleeson CJ), 535 (Gaudron, Gummow and Hayne JJ), 588 (Callinan J).

62 *Criminal Code Act 1995* (Cth) ss 101.1(2), 101.2(5), 101.3(3), 101.4(5), 101.5(5), 101.6(3).

terrorist act, 'means that the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia'.⁶³ However, the wording of s 15.4 indicates that Category D goes further than this to cover 'anyone anywhere regardless of citizenship or residence'. This section also states that there is to be no 'foreign law defence' which means that an accused person cannot claim exemption from prosecution because there is no corresponding crime where he or she is found.

Obviously this is a radical departure from approaches to jurisdiction based on territoriality, sufficient connections or even nationality. What this category does is raise the possibility that the Commonwealth Director of Public Prosecutions could launch a prosecution against anyone suspected of terrorism offences anywhere in the world. Category D jurisdiction appears to reflect the international law concept of 'universal jurisdiction', the scope of which has been the subject of much academic debate. Whether or not extended geographical jurisdiction is absolute or conditional on the apprehension of the accused in Australia is unclear.⁶⁴ Given Belgium's problems concerning its attempts to have absolute universal jurisdiction over serious violations of humanitarian law, crimes against humanity and genocide, it may be that extended geographical jurisdiction in the *Criminal Code* would be interpreted as being conditional rather than absolute.⁶⁵

In recommending the categories of extended geographic jurisdiction, the MCCOC obviously wished to allay any fears of an overreaching federal criminal jurisdiction with the following comment: 'Naturally, it is intended that extended forms of jurisdiction will only be applied where there is justification for this, having regard to considerations of international law, comity and practice'.⁶⁶ Practical and financial limitations will no doubt curb any desire to initiate such prosecutions, but the mere fact that there exists the ability to do so is a radical departure from traditional approaches to jurisdiction. It provides the first step towards normalising extra-territoriality in domestic criminal law.

63 Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 (Cth) 10.

64 For an analysis of universal jurisdiction in international law, see Cassese, above n 10, 284 ff.

65 Belgium's universal jurisdiction was established by Act of 16 June 1993, *Loi Relative à la Répression des Infractions Graves aux Conventions Internationales de Genève du 12 Août 1949 et aux Protocoles I et II du 8 Juin 1977 Additionnels à ces Conventions*, (entered into force 15 August 1993) amended by Act of 10 February 1999, *Loi Relative à la Répression des Violations Graves de Droit International Humanitaire* (entered into force 2 April 1999). On 6 March 2002, the Brussels Court of Appeal held that this legislation provided only for conditional universal jurisdiction, that is, jurisdiction was conditional on the suspect being present in Belgium: Antonio Cassese, above n 10, 287 fn 17. The Belgian Senate subsequently approved an interpretive law that clarified the Parliament's intention to make the crimes subject to absolute universal jurisdiction and on 12 February 2003, a ruling by the Belgian Court of Cassation upheld this interpretation: <<http://indictsharon.net/12feb2003dectrans.pdf>> at 15 November 2004. However, the law was subsequently repealed in August 2003: *Belgium: Universal Jurisdiction Law Repealed* (2003) Human Rights Watch <<http://www.hrw.org/press/2003/08/belgium080103.htm>> at 15 November 2004.

66 MCCOC, Parliament of Australia, *Model Criminal Code – Chapter 4: Damage and Computer Offences Report* (2001), 242.

VII DEROGATING FROM THE PRESUMPTION OF INNOCENCE

The presumption of innocence developed central importance in English law during the early 19th century and led to the general rule that the prosecution bears a legal burden to prove all the elements of an offence and to rebut any defences. The legal burden is sometimes referred to as the persuasive burden because it is up to the party upon whom the burden is placed to persuade the trier of fact that the matter requiring proof is made out.

In recent years, statutory provisions have departed from the principle of placing the legal burden on the prosecution to rebut defences, particularly in relation to drug offences. For example, s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) deems a prohibited substance to be in the possession of a person unless he or she satisfies the court to the contrary. Similarly, s 233B(1) of the *Customs Act 1901* (Cth) places the burden on the accused to prove the defence of ‘any reasonable excuse’ in respect of drug-related activity. The standard of proof when placed on the accused in relation to drug offences appears to be on the balance of probabilities.⁶⁷ This follows the standard test for proving the defences of mental disorder and diminished responsibility.⁶⁸

The first draft of the terrorism offences in the Security Legislation Amendment (Terrorism) Bill (No 2) 2002 (Cth) placed the legal burden on the accused in relation to certain aspects of the ancillary terrorism offences. This was criticised by the Law Council of Australia and other bodies in submissions to the Senate Legal and Constitutional Legislation Committee.⁶⁹ The Committee considered that recklessness as well as knowledge would suffice in relation to possessing things connected with terrorist acts and in relation to collecting or making documents likely to facilitate terrorist acts, but that the burden of proof should remain with the prosecution.⁷⁰

This recommendation was largely followed, except that there now exist ‘notes’ to ss 101.4(5) and 101.5(5) stating that the accused bears the evidential burden in showing that the possession of the thing or the collection or making of the document was ‘not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act’. The notes refer the reader to s 13.3(3), which states: ‘A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter’.

Section 13.3(6) then goes on to explain that an evidential burden means ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’. This simply codifies the general principle that the accused has an evidential burden in relation to defences.⁷¹ It is unclear

67 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 589 (Dawson J).

68 Bernadette McSherry and Brownyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 56 ff.

69 Senate Legal and Constitutional Legislation Committee, above n 8, [3.84]–[3.85], [3.91].

70 *Ibid* [3.100].

71 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 534–5 (Gibbs CJ), 593 (Dawson J).

why an extra note had to be added to ss 101.4(5) and 101.5(5) (and to certain paragraphs of s 80.1 dealing with the offence of treason) to emphasise this point. Perhaps it was to show that the legislature was complying with the Committee's recommendations and not placing a legal burden on the accused.

The one provision which still places a legal burden on the accused is s 102.6(3) which has a 'note' stating that the accused bears the legal burden in relation to proving that he or she received funds from a terrorist organisation for the provision of legal representation or to help the organisation comply with the law. The note refers to s 13.4 which states:

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

Section 13.5 goes on to state that the relevant standard of proof when the legal burden is on the defence is the balance of probabilities.

Why the legal burden should be placed on the accused in relation to this defence and not others in ch 5 is unclear and may be a simple oversight. Regardless, it has significant repercussions for the whittling away of the presumption of innocence.

In England, reverse onus provisions have been challenged with varying degrees of success as offending the presumption of innocence prescribed by art 6.2 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁷² What is important to note is that the House of Lords has recently been prepared to read down reverse onus provisions in relation to possession of articles connected to terrorism and the possession of drugs such that they place an evidential rather than a legal burden on the accused.⁷³

In contrast, the trend towards the legislative drafting of defences that require the accused to prove various elements seems to be increasing in Australia without justification in terms of underlying principles relating to the trial process.⁷⁴ At least on this occasion the Senate Legal and Constitutional Legislation Committee was able to question the placing of the legal burden of proof on the accused in relation to the ancillary offences.⁷⁵ The Committee's findings in this instance provided a check on placing the legal burden on the accused, except in relation to s 102.6. In the absence of such scrutiny, however, it is doubtful that the derogation from the presumption of innocence through reverse onus provisions will abate in Australia.

72 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

73 *DPP; Ex Parte Kebeline* [2000] 2 AC 326; *R v Lambert* [2001] 3 WLR 206.

74 Bronitt and McSherry, above n 5, 114 ff.

75 Senate Legal and Constitutional Legislation Committee, above n 8, [3.96], [3.100].

VIII CONCLUSION

The enactment of terrorism offences in the *Criminal Code* displays the increasing interaction between international and domestic criminal law. Australia has traditionally taken a 'dualist' approach to legal systems such that a strict division has been maintained between international and domestic law. This has meant that for many years, international law has been viewed as something separate from and rarely impinging upon domestic law.⁷⁶

Over the past decade or so, judges have begun to look to international law in relation to the fields of criminal procedure and evidence, while emphasising that it does not constitute a binding source of law.⁷⁷ For example, the High Court decision of *Dietrich v The Queen*,⁷⁸ which dealt with legal representation for those accused of serious criminal offences, considered art 14.3 of the *International Covenant on Civil and Political Rights*.⁷⁹ That article sets out the right to legal assistance without payment where the accused does not have sufficient means to pay for it.

However, it is the impact of new technologies that enable virtually instantaneous communications, together with what Justice Michael Kirby has referred to as 'the growing integration of the world', that has led to the criminal law looking beyond Australian borders.⁸⁰ For example, the existence of computer fraud, drug trafficking and child sex tourism has forced legislators to revise the assumption that crime is primarily local. The ability of the global media to highlight conduct that calls for effective systems of criminal law and law enforcement that goes beyond national boundaries has also provided the impetus for countries to ratify international covenants and treaties.

The terrorism offences go beyond marking a clear shift in approach from local to global aspects of crime. The way in which the offences are drafted broadens the boundaries of Australian criminal laws in a number of ways. They broaden the fault element of serious offences (motive as fault) as well as the scope of status offences, inchoate offences and jurisdiction. While reverse onus of proof provisions were largely omitted after scrutiny by the Senate Legal and Constitutional Legislation Committee, s 102.6(3) still exists as an example of how the presumption of innocence can be legislatively whittled away.

While it was always going to be difficult to integrate terrorism offences into pre-existing domestic criminal law, the new offences appear to be in careless disregard of the principles enshrined in ch 2 of the *Criminal Code*, particularly in relation to the fault elements of each offence. The compressed time frame for the

76 Justice Michael Kirby, 'The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms' (Paper presented at the Conference marking the 10th Anniversary of the Bangalore Principles, Bangalore, 28 December 1998) <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_bang11.htm> at 15 November 2004.

77 See, eg, *Dietrich v The Queen* (1993) 177 CLR 292, 321 (Brennan J).

78 (1993) 177 CLR 292.

79 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

80 Justice Michael Kirby, 'The Future of Criminal Law – Some Big Issues' (Paper presented at the Criminal Lawyers' Association (NT) Conference, Bali, 28 June 1999) <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_crimin.htm> at 15 November 2004.

consideration of the legislative package of terrorism offences and the bypassing of the usual MCCOC process may explain why the terrorism offences in many instances do not adequately reflect the established general principles of criminal law.

Andrew Ashworth has made the point that much law-making in the criminal law arena is 'unprincipled and chaotic'.⁸¹ It is unfortunate that the enactment of the terrorism offences in the *Criminal Code* exemplifies this view.

81 Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 225.