The Mood and Temper of the Public: R v Lodhi *and the Principles of Sentencing in the War on Terror*

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Abstract

Following the decisions of the NSW Supreme Court and Court of Criminal Appeal in *R v Lodhi* and *Lodhi v The Queen*, offences against Division 101 of the *Criminal Code* (Cth) have resulted in very substantial sentences of imprisonment. This article considers why. It argues that four distinct factors influence the sentencing process. First, the justification for treating terrorism offences as outrageous, abhorrent crimes has changed. The focus has moved from the harm caused or threatened by terrorist acts to the challenge presented by terrorist ideology and, specifically, violent jihad. Second, courts have proven reluctant to mitigate punishment for offences against Division 101 based on the proximity of preparatory conduct to an actual terrorist act. Third, the principle of proportionality has not tempered the protection of society as a sentencing aim in punishing people for terrorism offences. Fourth, rehabilitation is given far less weight as a sentencing goal. The combination of these factors has lead to disproportionate sentences that may be counterproductive in the struggle to make Australia free from terrorist activity.

Introduction

Sentencing is one of the most difficult tasks in the criminal justice system. It involves a synthesis of a considerable number of competing principles (*AB v The Queen* at 120–1 (McHugh J); *Wong v The Queen*; *Markarian v The Queen*). Sentencing is an art, not a science (*R v Simpson* at 544 (Sully J)). The purposes for which sentences can be imposed — to punish, to deter, to denounce, to rehabilitate and to protect — each go to the heart of competing theories of justice. Terrorism prosecutions are political and high profile (see Lynch 2006a). Sentencing for terrorism offences presents a unique challenge. Thus, when Justice Anthony Whealy of the New South Wales (NSW) Supreme Court set about constructing his sentence in the landmark case of *R v Lodhi*, his Honour faced a difficult task. Lodhi had been found guilty of crimes against legislation that had never been tested.[1] He had taken the first steps towards what the evidence revealed was a plan to bomb the Australian electricity system. He did so with the intention to intimidate the Government and the public.[2] He had been found guilty only five years after the attacks of 11 September

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1 Lodhi was the first person to be found guilty of offences under Division 101 of the *Criminal Code Act 1995* (Cth) ('the *Criminal Code*').

2 The definition of 'terrorist act' is contained in s 100.1(1) of the *Criminal Code*. An action or threat of action (which is of sufficient magnitude and which is not 'advocacy, protest, dissent or industrial action') must be done 'with the intention of advancing a political, religious or ideological cause' and it must be with the

2001, four years after the Bali bombings of 12 October 2002, two years after the train bombings in Madrid on 11 March 2004 and one year after the London bombings on 7 July 2005. Many members of the public wanted vengeance.[3]

However, nobody had been hurt or harmed, no property had been damaged, no specific threat had been made and no specific plan had been agreed upon. Five years earlier, Lodhi's conduct would not have been criminal.[4] As was noted on appeal (*Lodhi v The Queen* at 490 (Spigelman CJ)), all Lodhi had done was collect materials for use in the future. He was a person who had no prior convictions and who had 'led a blameless life' (at 377). He had a supportive family. He was a professional with a 'prodigious work ethic' (at 375). Lodhi received a head sentence of 20 years' imprisonment, with a 15-year minimum term. This sentence was upheld on appeal. It is substantial, particularly in view of the fact that there was no harm to anybody or any damage to property.[5] Similar sentences have been handed down in subsequent cases.[6]

This article examines why sentences for terrorism offences are so substantial. It argues that these long sentences are the result of four distinct factors that influence the sentencing process. It concludes that those factors require re-evaluation. The first section examines the justification for treating terrorism offences as special, outrageous crimes. It argues that the focus of this justification has moved from the harm caused or threatened by terrorist acts to the challenge presented by radical ideology and, specifically, violent jihad. The second section considers 'proximity questions' and why courts are reluctant to mitigate punishment for preparatory offences because of their distance from an actual terrorist act. The third section examines the question of whether lengthy jail terms can be justified on the ground that they are necessary to protect society. Finally, the fourth considers the diminished weight given to rehabilitation in sentencing for terrorist offences.

'A seriousness all of its own': The re-mystification of terrorism

Criminalise, prosecute and punish: UN Security Council

Australia's new terrorism offences originate in international law and from the aftermath of the terrorist strikes on 11 September 2001 in the United States ('US'). Nine days after the attacks on New York, Washington DC and Pennsylvania, President Bush (2001) declared the US was in a 'war on terror' against 'every terrorist group of global reach'. Seventeen

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intention of 'coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or a foreign country, or part of a State, Territory or foreign country' or 'intimidating the public or a section of the public'.

3 In his judgment, Whealy J (at 379) extracted a portion of a *Daily Telegraph* editorial entitled 'Shed no tears for this terrorist' published on 30 June 2006. The extract read: 'Aligned with the world's worst butchers and psychopaths, Lodhi deserves only to be locked up for a very long time, away from the fellowship even of other prisoners, out of sight and out of mind. And if his gaol term is a torment for him, few will shed any tears for that.'

4 The offences created in Division 101 of the *Criminal Code* criminalise preparation to commit a terrorist act. In most criminal prosecutions, preparation to commit a crime is not illegal (*R v Eagleton*; *DPP v Stonehouse*).

5 By comparison, the average length of imprisonment for the crime of murder in NSW in the same year was 200.9 months, or approximately 16-and-a-half years (NSW Bureau of Crime Statistics and Research 2007:90).

6 The most prominent are *R v Benbrika* (where sentences ranged from 15 years with a 12-year minimum term to six years with a four-and-a-half-year minimum term) and *R v Elomar* (where sentences ranged from 28 years with a 21-year minimum term to 23 years with a 17-year-and-three-month minimum term). For a full examination see McGarrity (2010). For sentences by case, see the University of New South Wales Gilbert + Tobin Centre of Public Law (2011).

days after the strikes, the United Nations (UN) Security Council passed *Resolution 1373*. This Resolution was enacted under Chapter VII of the *Charter of the United Nations* ('*UN Charter*').[7] It is binding on all signatories, including Australia.[8] It requires all Member States to establish financing, planning, preparing or perpetrating terrorist acts as serious criminal offences (arts 1, 2). It also obliges them to ensure that the punishment for these crimes reflects this seriousness (art 2(e)).

Resolution 1373 is controversial. It does not refer to a particular crisis and there is no temporal limit on its provisions (see, generally, Giles-Carnero 2009). The Security Council is the organ of the UN system responsible for the maintenance of international peace and security. It is not a legislative body. It has its power because Member States confer responsibility on it and agree that it acts on their behalf when it exercises that responsibility (*UN Charter* art 24). It does not have the democratic legitimacy of the General Assembly.[9] Fifteen Member States make decisions and five powerful Member States have veto power.[10] Decisions are often made behind closed doors following agreement amongst the major powers, with little or no public debate (Johnstone 2008). For example, the 4385th meeting of the Security Council, at which *Resolution 1373* was passed, took place between 10:50PM and 10:53PM. There is no administrative review process (Dantiki 2009). However, *Resolution 1373* compels States to alter their national legislation. For some, this is a justified departure from the cumbersome multilateral process (Rosland 2005). For many, it is beyond the mandate of the Security Council (Happold 2003). It has been criticised as hegemonic international law (Vagts 2001; Alvarez 2009; Alvarez 2003).

This international law obligation contributed to a view in the Australian Government that new preventive laws were required to meet the contemporary threat of terrorism (see Ruddock 2007). Australia enthusiastically set about creating new offences in its domestic law, raising concerns that the legislation was rushed through without proper debate and scrutiny (Lynch 2006b; Reilly 2007). In 2002, the Commonwealth Parliament passed the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), not without controversy.[11] This introduced the terrorism offences in Division 101 of the *Criminal Code*. It created the primary offence of engaging in a 'terrorist act' and a series of ancillary offences connected to preparation and execution of such an act, including receiving training connected with a terrorist act, collecting or making a document in connection with a terrorist act, doing an act in preparation for a terrorist act or planning a terrorist act (*Criminal Code* Div 101; see also chapter 1 of Lynch and Williams 2006). The operation of the new offences was expanded in the *Anti-Terrorism Act 2005* (Cth). This amended the *Criminal Code* so that an offence

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7 Chapter VII gives the Security Council power to take action, including the use of force, to counter threats to 'international peace and security'. It has the power to determine the existence of any threat to peace, the power to decide what non-military measures are to be employed to counter a threat to the peace and, if those measures are inadequate, the power to use military measures as necessary (*UN Charter* arts 39, 41–42).

8 Australia is a founding member of the United Nations. It signed the *UN Charter* on 26 June 1945 and ratified it on 1 November 1945 (see United Nations Treaty Collection 2011).

9 The General Assembly consists of all Members of the United Nations. Decisions of the General Assembly are made by a simple majority, unless the decision is an important question, in which case a two-thirds majority is required (*UN Charter* arts 9, 18).

10 The Security Council consists of fifteen members: five permanent members (China, France, Russia, the UK and the US) and ten non-permanent members, elected by the General Assembly for two-year terms. Decisions on non-procedural matters are to be made by an affirmative vote of nine members, including all the permanent members (*UN Charter* arts 23, 27).

11 Hocking (2004:211), for example, calls the new laws a 'Trojan horse within our democracy'.

would be committed even if a terrorist act did not occur, or if the training undertaken, thing or document possessed, or act done in preparation was not connected to a specific act.[12]

The impact of existing national law

Terrorism has always been treated very seriously in national laws. Politically motivated killings or conspiracies to cause widespread destruction have always been met with significant sentences.[13] In Australia, early decisions, understandably, treated terrorism specially because of the harm that could be caused to people and property. This is reflected in the case of *R v Sakr*. In that case, the defendant placed explosives at a supermarket in Carlton that was competing with his café. He was found guilty of unlawfully and maliciously placing explosives with intent to cause an explosion likely to endanger life or cause serious injury to property[14] and was sentenced to five-and-a-half years' imprisonment, with a three-and-a-half year minimum term. The Victorian Court of Criminal Appeal increased this term to seven years with a five year minimum term. Crockett J, with whom Murray J and Hampel J agreed, remarked:

> The use of bombs and explosives is the trademark of the terrorist, whose acts of lawlessness have engendered special revulsion that is due not only to the fact that death is so often the intention of the perpetrator, but also because the recklessness with which the offence is, by its very nature, invested is so likely to lead to the loss of innocent lives and, less importantly, to the destruction of property of innocent third persons. It is an offence that is callous in its conception, wanton in its perpetration and, if the intent is given effect to, ruthlessly destructive in its aftermath. It is a crime that is relatively novel in this country, as I have already indicated, and yet it is plain that there is a community recognition that it is regarded with a particular repugnance because its commission represents a profound assault upon a stable society and the law and order that is necessary for that society's survival. Those responsible for such reprehensible conduct must expect to suffer condign punishment (at 451).

Sakr's motives were not political. The Court had to deal with a political motive in *R v Demirian*, which was decided a year later. Demirian placed a large bomb in a car that was parked near a building that contained the Turkish Consulate. The bomb exploded prematurely, killing a co-conspirator who was standing next to the car, causing extensive damage to the building and injuring somebody in it. Demirian was sentenced to ten years' imprisonment, also for conspiracy to cause an explosion likely to endanger life or cause serious injury. The sentence was upheld on appeal. McGarvie and O'Bryan JJ said in their joint judgment:

> The crime of which the appellant was convicted may be described as one of the most serious crimes of its nature this State has known over the past 150 years. The conspiracy was on foot for at least one week and probably longer and contemplated an act of terrorism hitherto unknown in this city against the Consulate of a friendly nation. The overt acts carried out in and pursuant to the conspiracy resulted in massive damage being caused to property of the Turkish Consulate and of many private persons. The learned sentencing judge correctly

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12 The amendments are reflected in ss 101.2(3), 101.4(3), 101.5(3) and 101.6(2) of the *Criminal Code*.

13 In the UK, for example, sentences of 30 and 35 years' imprisonment were upheld for men who planned a number of political assassinations, stockpiled weapons and attempted to assassinate the Israeli ambassador by shooting him at point blank rage, causing permanent grievous damage: *R v Al-Banna*. Sentences of 23 and 25 years were handed down for a conspiracy to cause widespread death, destruction and damage: *R v McGonagle and Heffernan*.

14 This offence is contrary to s 317 of the *Crimes Act 1958* (Vic). The maximum penalty is 15 years' imprisonment.

> described act of conspiracy to bomb the premises occupied by the Turkish Consulate in South Yarra as "an act of terrorism abhorrent to law-abiding citizens".
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> The type of activity engaged in by the applicant and others is rare in this country but terrorist acts are commonplace in the country from whence the applicant emigrated to Australia [Demirian was from Lebanon]. Unless courts in this country are vigilant in imposing condign sentences for such conduct evil-minded persons might seek to emulate this conduct. The conduct of the applicant […] brought shame to this country when the bomb exploded. The Turkish nation is a friendly power and members of the Turkish community now assimilated into Australian society were affronted by this evil deed. The heinousness of the crime is accentuated by the fact that the applicant abused the sanctuary this country offered him (at 473–4).

The harm or threat of harm to people and property features prominently in these decisions. The Court clearly considered the need for general deterrence. The political motive of the offence was also considered. However, the Court did not embark upon a lengthy examination of the ideology of the defendant. It is also significant to note that, despite a lower maximum penalty, a term of seven years' imprisonment with a five-year minimum term was imposed where bombs were actually planted. Ten years' imprisonment was upheld on appeal where the bomb actually exploded, with disastrous consequences.

The first person to be prosecuted for a terrorism offence (though not an offence against the new laws) after the events of 11 September 2001 was Jack Roche (*R v Roche*). Roche became involved in a conspiracy to attack Israeli diplomatic buildings in Australia. After contact with co-conspirators, he drove from Perth to the east where he took photographs and made a video of the Embassy in Canberra and the Consulate in Sydney to be sent back to Afghanistan. However, Roche did nothing more. He lost enthusiasm for the conspiracy and attempted to make contact with ASIO and other authorities. There was a period of approximately two years when he was inactive in the community. Roche ultimately pleaded guilty to the offence of conspiring to destroy or damage the premises or property of internationally protected persons, with intent to endanger their lives, by means of fire or explosive.[15] He was sentenced to nine years' imprisonment, with a non-parole period of four-and-a-half years. A majority of Murray ACJ and Templeman J upheld this sentence on appeal.[16] McKechnie J reviewed the principles applicable to sentencing for terrorism offences and reached the conclusion that Roche's sentence should have been increased to 15 years with a non-parole period of nine years (at 362). Murray ACJ adopted these principles, though he disagreed with the result (at 338). These principles have informed subsequent sentences for terrorist offences. They are reproduced below, listed as they appear in the judgment (at 360):

- A terrorism offence is an abnormal crime requiring consideration of a range of penalties which do not necessarily correlate with normal, though grave, crimes.
- Possession of an explosive device, which has as its primary purpose the endangerment of life, is the most serious type of offence for which is reserved the maximum penalty prescribed by statute.

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15 Section 8(3C)(a) of the *Crimes (Internationally Protected Persons) Act 1976* (Cth) creates the substantive offence. The maximum penalty is 25 years' imprisonment. Roche was charged with conspiring to commit an offence against the law of the Commonwealth, (namely, an offence against section 8(3C)(a)), contrary to section 86 of the *Crimes Act 1914* (Cth). Section 86(1) provided that the offence of conspiracy was punishable 'as if the offence to which the conspiracy relates had been committed'.

16 It is relevant to note Murray ACJ's view that '[n]o doubt a longer term of imprisonment and a longer non-parole period might have fallen within the general range of discretion appropriate to the case' (at 342).

- Conduct calculated to endanger life is more grave than conduct which is intended or likely to cause serious injury to property.
- Where the primary purpose of an explosive device is not to endanger life but to cause serious injury to property then a sentence less than the maximum may be appropriate.
- A settled intention to cause an explosion puts an offence high on the scale of gravity.
- For the most serious terrorist offences the sentence must be of a severity appropriate to the circumstances. The object of the sentence is to punish, deter and incapacitate.
- An offence which threatens the democratic government and security of the State has a seriousness all of its own.
- An offence which threatens the daily life and livelihood of millions of people has a seriousness all of its own.
- It is always necessary to look at the precise nature and circumstances of the offence.
- It is necessary to punish for the criminal agreement which constitutes the conspiracy, not the substantive offence.
- The degree of complicity in a conspiracy to use explosives against persons or property is of marginal importance.
- The matters summarised in the *Crimes Act* s 16A(1) and (2), including rehabilitation, must be taken into account for all offences including abnormal offences. The matters must be given appropriate weight.

Roche's case is significant because of this consolidation of principles and because of the sentence imposed for preparatory acts. The abnormality of terrorism offences is paramount on the list of factors to be considered in sentencing, the threat presented to democratic government and national security is specifically articulated and the object of the sentence is expressed as being to punish, deter and incapacitate.[17] Even when no specific plan to do anything to diplomatic buildings or persons could be identified, where Roche had resiled from his intention, had done nothing for two years and had cooperated with the police, he still received a sentence with a similar head term as Demirian, albeit for an offence with a greater maximum penalty.

Testing the new laws: R v Lodhi *and* Lodhi v The Queen

The first person to be convicted and sentenced for crimes against the new Division 101 laws was Faheem Lodhi. The decision and appeal judgment are the leading cases on sentencing for terrorism offences in Australia. The principles formulated have been applied internationally.[18] For these reasons, it is useful to examine the case in detail.

The facts and verdict

Lodhi was involved in a terrorist network with at least two other men: a French citizen, Willie Brigitte, and a person in Pakistan known to both men as 'Sajid'. Sajid was setting up the contact between Lodhi and Brigitte in Australia 'so that, in general terms, the prospect of terrorist actions in Australia could be explored' (*R v Lodhi* at 366). A number of phone calls were made between the three men and they met with a fourth. The association ended when French authorities contacted the Australian intelligence services and Brigitte was deported. A little under a week later, Lodhi went to the offices of an organisation called Energy

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17 The original expression of this is in *R v Martin*, per Lord Bingham CJ.

18 For example, they informed the Ontario Superior Court of Justice's decision in *R v Khawaja* at [24].

Supply in Sydney. He told an employee that he wished to obtain a wall map for a new business he was starting. He gave a name, company name and contact details, which the jury found to be false. The jury found that Lodhi obtained the map with the intention to bomb part of the Australian electricity supply system. However, the plan was at a 'very preliminary stage' (at 369).

Lodhi also made contact, again using false details, with an employee of a company called Deltrex Chemicals. A price list for certain chemicals was faxed to Lodhi at work, where his supervisor picked it up. He told her, and the jury, that it was a fax for a family business venture to export chemicals to Pakistan. The jury rejected that explanation. They found that it was information to assist in the proposal to bomb the electricity supply system. During the trial, a CD that was found at Lodhi's house was admitted into evidence. It was called the 'jihadi CD' in the trial and was described in the judgment as 'a virtual library containing exhortations to violent jihad, justifications for suicide bombings (called 'martyrdom' in the text of the material), […] which extolled the virtues of those who had given their lives to the murder of innocent civilians and others in the name of extremist Islam' (at 367). When a search warrant was executed at Lodhi's workstation, a 15-page document that Lodhi had handwritten in Urdu was found. Whealy J found that the Crown had fairly described this document as a 'terrorism manual' (at 368). It contained the recipes for poisons, explosives, detonators and incendiary devices. Lodhi was found guilty of collecting documents (the maps of the electricity system) connected with preparation for a terrorist act, intentionally doing an act (seeking information about the chemicals) in preparation for a terrorist act and possessing a thing (the Urdu document) connected with preparation for a terrorist act.[19]

The judgment at first instance

Whealy J delivered the judgment at first instance. His Honour had to determine the objective seriousness of each count. The Crown argument (reproduced at 371–2) was that the offences were at a very high level of seriousness: close to, but not necessarily at, the worst-case level. It argued that the conduct was deliberate and premeditated. It argued that when Lodhi collected the maps and made the enquiries about the chemicals he had in mind an act that would involve at least serious damage to property. The Crown conceded that because the explosion was aimed at property it was not in the worst possible category. The Court rejected a submission that the contents of the Urdu document reflected that Lodhi intended or contemplated administering poison to others. His Honour found that there was 'really one continuing uninterrupted course of conduct centring upon an enterprise to blow up a building or infrastructure' (at 372).

Senior Counsel for Lodhi argued (reproduced at 372) that the offences were at a low level of objective seriousness. He argued that Lodhi held the requisite intention for a very limited period of time: for ten days between when Lodhi collected the maps and when he sought information about the explosive materials, or for 24 days, until the Urdu document was seized. No criminal or terrorist activity was observed for six months after the seizure, until Lodhi was arrested. Whealy J rejected this submission, considering that Lodhi

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[19] Knowingly collecting documents connected with preparation for a terrorist act is contrary to s 101.5 of the *Criminal Code* and has a maximum penalty of 15 years' imprisonment. Intentionally doing an act in preparation for a terrorist act is contrary to s 101.6 of the *Criminal Code* and has a maximum penalty of life imprisonment. Knowingly possessing a thing connected with preparation for a terrorist act is contrary to s 101.4 of the *Criminal Code* and has a maximum penalty is 15 years' imprisonment.

'maintained a general intention relating to terrorist activities at least up until the time of his arrest' (at 372). More generally, Whealy J found:

> [T]here is not the slightest evidence to suggest that he had renounced his former intentions. They were, I am satisfied beyond reasonable doubt, intentions he held with great vigour and firmness. They were the consequence of a deeply fanatical, but sincerely held, religious and worldview based on his faith and his attitude to the extreme dictates of fundamentalist Islamic propositions. It is hardly likely that a handful of searches and bout of questioning, unnerving though they doubtless were, would have lead him to renounce the views, so deeply held by him (at 373).

His Honour reiterated that the jury's verdict meant that Lodhi intended to cause serious damage to property, to advance the cause of violent jihad and to intimidate the Australian Government and the public. His Honour reasoned (at 374) that 'the jury's verdicts must mean that the level of criminality is, as I have said, at a very high level'. His Honour then remarked:

> Australia is in general terms a very safe country. It is far removed, physically, from the rest of the world. It is far removed from the turmoil and gross disturbances that beset so many parts of the inhabited globe. It is a country in which Australians have been able in the past, with some exceptions no doubt, to congratulate themselves on their easy going and tolerant way of life. Although we have not escaped being drawn into world affairs and world conflicts, and although our citizens have not been free from attack in other countries, Australia has, to this time, not been a country where fundamentalist and extreme views have exposed our citizens to death and destruction within the sanctuary of our shores.
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> I venture to suggest that these observations, general though they may be, are not out of place in contemplating the seriousness of the offender's actions and, in particular, his intentions in relation to the offences which have been committed here. Those intentions were, of course, thwarted at a very early stage. The actions he took were, in themselves, ineffective enough. It may well be that there was a general lack of viability and sophistication about his actions. It may well be that there was a degree of impracticability as to whether he would be able to carry out his criminal intentions. On the other hand, even the most amateurish and ill-conceived plot to cause mayhem by the use of explosions would be capable of causing considerable damage and even death amongst our community (at 374).

Whealy J considered (at 376) that the following principles should inform the sentencing exercise: '[O]verall, there is a need to protect the community from the consequences of serious crime of the kind involved here. This in turn requires the Court to pay particular heed to deterrence, both general and particular; to rehabilitation and to retribution and denunciation.' His Honour found:

> The need for substantial sentences to reflect the principles of general deterrence are obvious in relation to crimes of this kind. […] One has only to consider the tragedy of the London bombings in 2005 to recognise this observation as a sad truism. Moreover, terrorism is an increasing evil in our world and a country like Australia, with its very openness and trusting nature is likely to fall easy prey to the horrors of terrorist activities.
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> In those circumstances, the obligation of the court is to denounce terrorism and voice its stern disapproval of activities such as those contemplated by the offender here. It may be argued that the imposition of stern penalties, in the context of firm denunciatory statements, will not in fact deter those whose religious and political ideologies are extreme and fanatical. But a stand must be taken. The community is owed this protection even if the obstinacy and madness of extreme views may mean that the protection is a fragile or uncertain one. In my view, the Courts must speak firmly and with conviction in matters of this kind. This does not of course mean that general sentencing principles are undervalued or that matters favourable to an

> offender are to be overlooked. It does mean, however, that in offences of this kind, as I have said, the principles of denunciation and deterrence are to pay a substantial role (at 381).

The judgment on appeal

Lodhi appealed against his conviction and the severity of his sentence. In the severity appeal, two grounds went to the seriousness of Lodhi's conduct. Counsel argued (reproduced at 529) that Whealy J erred in his assessment of the objective seriousness of the offence because the plan was at a very early stage. This was rejected for reasons that are considered in the second section of this article. It was also argued (reproduced at 537) that the sentence was manifestly excessive. Counsel drew the Court's attention to two cases, one from England and another from Northern Ireland. The first, *R v Mansha*, involved a person who was convicted of possessing information likely to be useful to a person committing or preparing an act of terrorism. The information was an address of a soldier who had been decorated for gallantry in Iraq. The person had also written away about two prominent Jewish men and a Hindu businessman. Extremist propaganda similar to the 'jihadi CD' was found in his flat. The second, *R v Boutrab*, involved a person found guilty of possessing articles for a purpose connected with terrorism and collecting information likely to be useful to terrorists. The information was downloaded to discs from a computer at the Belfast cental library and concerned making explosives for use on aircraft and silencers for firearms. Both men received six years' imprisonment and would be eligible for parole after three. Price J held that Whealy J was right to reject these cases as unhelpful, referring to the 'changed security environment after 11 September 2001' (at 538). His Honour ultimately upheld the sentence with the following remarks:

> Rehabilitation and personal circumstances should often be given very little weight in the case of an offender who is charged with a terrorism offence. A terrorism offence is an outrageous offence and greater weight is to be given to the protection of society, personal and general deterrence and retribution (at 539).

Outrageous and abnormal: The re-mystification of terrorism

These judgments reflect a view that terrorism offences are especially serious and, more relevantly, that they are especially serious in the new security environment.[20] Singling out terrorism offences before 11 September 2001 was justified largely because terrorist acts are dangerous and harmful to people and property. Both of those things are evident. However, in the environment after 11 September, where no actual harm or a specific threat to cause actual harm has been proven, taking even very preliminary steps with a particular mindset will, it appears, attract severe punishment. Some re-mystification of terrorism after 11 September 2011, at least in public discourse, was inevitable. We have witnessed a renewed emphasis on security in policy and policing. This has led to calls for restraint (Zedner 2010; Zedner 2006). This article argues that similar restraint is needed in sentencing for terrorism offences. The contemporary fear of terrorism should be subjected to greater scrutiny in sentencing if people are to be sent to jail for longer because of it. The refrain that this is because of the new laws and maximum penalties is not entirely convincing. The maximum

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[20] This is not unique to Australia. In *R v Barot*, a life sentence with a 30-year minimum term was imposed for leading a very serious conspiracy to cause explosions in the US and the UK. Phillips LCJ said in sentencing:

> The fanaticism that is demonstrated by the current terrorists is undoubtedly different in degree to that shown by sectarian terrorists […] IRA terrorists were not prepared to blow themselves up for their cause. It is this fanaticism that makes it appropriate to impose indeterminate sentences on today's terrorists, because it will often be impossible to say when, if ever, such terrorists will cease to pose a danger.

penalty is, of course, a relevant factor (*Markarian v The Queen*). However, the offences created by Division 101 may catch a great range of conduct. Sentences at or approaching the maximum are to be reserved for only the worst category of case (*Veen v The Queen (No 2)*). These are not, thankfully, offences where a fully developed plan was hatched and foiled, as has happened in some English and Canadian cases, such as *R v Ibrahim* and *R v Amara*. In the absence of any harm, in the absence of a concrete plan to cause it and in circumstances where the seriousness of the offence is gauged primarily by referring to the intent of the offender and where, in turn, that intent is discerned by reference to the ideological material found in a person's home, we have to ask if we are singling out terrorism as outrageous and worthy of condign punishment not based on the dangerousness of an offender's actual conduct, but because we disapprove of the ideas he or she holds.

The proximity problem

The treatment of proximity arguments in mitigation

Courts have proven reluctant to mitigate penalties for the new terrorism offences because the impugned conduct is far removed from any actual terrorist act. 'Proximity arguments', as this article calls them, have gained very little resonance. The justification for rejecting them is usually the nature of the offences and the state of mind of the offender. In *R v Lodhi*, senior counsel for Lodhi advanced a number of arguments (reproduced at 373) based on the proximity of Lodhi's conduct to an actual terrorist attack. These were mostly rejected. Whealy J accepted that Lodhi's actions were at a very early stage, but he did not consider that fact mitigated the offences to any significant degree. His Honour found:

> [T]he legislation under which these offences have been created was specifically set up to intercept and prevent a terrorist act at a very early or preparatory stage, long before it would be likely to culminate in the destruction of property and the death of innocent people. The very purpose of the legislation is to interrupt the preparatory stages leading to the engagement in a terrorist act so as to frustrate its ultimate commission. An evaluation of the criminal culpability involved in any particular offence requires an analysis not only of the act itself, which may be relatively innocuous, but as well an examination of the nature of the terrorist act contemplated, particularly in the light of the intentions or state of mind of the person found to have committed the offence (at 373).

On appeal, similar reasoning was used to reject a submission that the trial judge failed to give adequate weight to the fact that the plan was exploratory and that the Crown had not been able to prove when, how, where or by whom the terrorist act would be carried out. Price J found:

> The proximity of the offending act to the substantive offence is of relevance in the assessment of the culpability of an *attempt* to commit a crime.
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> […]
>
> The present offences, however, are not crimes of *attempt.* Sections 101.4, 101.5 and 101.6 of the *Criminal Code* (Cth) extend criminal liability to acts of preparation. The proximity between the criminal act and the commission of the substantive offence is necessarily more remote. These are *anticipatory* offences which enable intervention by law enforcement agencies to prevent a terrorist act at a much earlier time than would be the case if they were required to wait for the commission of the planned offence or for an unsuccessful attempt to commit it. The proximity between the preparatory act and the completion of the offence, although relevant, does not determine the objective seriousness of such an offence.

> […]
>
> An inevitable consequence of early intervention by the law into acts of preparation is that definitive conclusions might not be able to be reached about the viability, sophistication or indeed the offender's role in the ultimate offence. But that does not mean that the act which constitutes the offence charged will not be regarded as serious (at 530–1, emphasis in original).

Spigelman CJ was a little more sympathetic to proximity arguments, but ultimately he also rejected them, referring to the nature of the offences created:

> The sentence imposed is a substantial one, particularly in view of the fact that there was no actual injury to persons or property. Nevertheless, as Price J emphasises, the provisions creating the offence are directed to preparatory acts and the seriousness with which Parliament regards such acts is manifest in the maximum penalty. By the extended range of conduct which is subject to criminal sanction, going well beyond conduct hitherto generally regarded as criminal, and by the maximum penalties provided, the Parliament has indicated that, in contemporary circumstances, the threat of terrorist activity requires condign punishment.
>
> […]
>
> The objective acts of the appellant, which did not go beyond collecting materials for future use, did not give rise to any imminent, let alone actual, threat of personal injury or damage to property. Such preparatory acts, even though criminalised, would not at first appear to justify so substantial a penalty. However, the position is different in light of his Honour's clear and justifiable findings of fact that the appellant has not resiled from the extremist intention with which these acts were performed (at 489–90).

Why reject proximity arguments?

This article argues that the reasoning for the rejection of proximity arguments is not particularly compelling. The facts of the case should guide the court, not the statute that creates the offence. In *Ibbs v The Queen,* the High Court had to evaluate an argument that, where a statute specified a number of types of sexual penetration, any of those types was equally heinous. The Court rejected this, holding (at 452): 'When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case.' Preparatory conduct could be anything from enquiring about the availability of chemicals at one end of the spectrum to actually placing a bomb at the other (as counsel for Lodhi submitted on appeal). If it is proven facts that should guide a court in assessing objective seriousness, then the court should consider what those facts reveal about how advanced the preparations were at the time of the impugned conduct. This would ensure that the sentence is based on what the offender actually did, not what he or she might have done.

Referring to the intention that the offender had at the time of the conduct is also not a wholly convincing chain of reasoning. It is an element of the offences that the offender had a sinister intention. If this is a reference to his or her intention as it is reflected in the jury's verdict, then it suffers from the same inconsistency: it is judging objective seriousness by referring to the elements of the offence, not the facts of the case. If it is a reference to Lodhi's subjective intention on the evidence in the case, what Price J referred to as 'the intended destination' (at 533), then it is only an abstract intention, because there was no viable plan for the Court to analyse.[21] Further, it seems highly unlikely that any abstract plan

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[21] This might be contrasted to the English decision of *R v Martin*, where a term of 28 years' imprisonment was imposed for a highly sophisticated conspiracy to cause explosions at six electricity substations in southern

that leads to a conviction under Division 101 is likely to be deemed to be anything other than very serious. It is true that the definition of a 'terrorist act' is very broad. It is possible to envision small scale plans and steps to prepare for them. However, successful prosecutions do not require actual plans, only particular conduct with an abstract intent. If proximity arguments are rejected too easily when assessing objective seriousness, the scales will always tip against the accused.

There is also no compelling reason to confine proximity arguments to crimes of attempt. It is true that attempt is an inchoate crime and Division 101 criminalises preparatory acts. The Court clearly considered that Parliament has established various forms of preparatory conduct as substantive offences and placed them in a different category. However, this creates a sentencing vacuum for preparatory offences that does not reflect what we know about criminal enterprises. The way Division 101 is drafted reflects that Parliament considered conduct closer to the commission of a terrorist act more serious.[22] The offences are enacted in a Code and the plain meaning of the words used, in their context, is to be preferred (*R v Barlow* at 31–3 (Kirby J)). Sentencing for crimes of attempt involves many of the same considerations that are relevant to preparing for a crime. Assessing the seriousness of preparation in a vacuum is likely to lead to less principled responses (von Hirsch et al 2009:143). Proximity is frequently considered in attempt cases. The offender does not have to have taken the final, irrevocable step towards criminal conduct to be liable (*O'Connor v Killian*; Meehan 1984:89–134). Whether an attempt was complete or incomplete will tend to mitigate punishment, as will whether the offender had an opportunity to withdraw from the enterprise and how many opportunities he or she had (see Duff 1996:119–20). Whether an attempt was likely to succeed generally goes to mitigation (*R v Taouk* at 390 (Badgery-Parker J)). This article argues that the principles that apply to sentencing for conspiracy and attempts could inform the jurisprudence on preparation, rather than detract from it. Adopting these principles would lead to an analysis of objective seriousness that is more consistent with established sentencing practices and more sympathetic to the realities of criminal enterprises.

The role of incapacitation in sentencing for terrorism offences

The prominence of incapacitation

The need to protect society is a very prominent reason for imposing long prison sentences on people convicted of terrorist offences. This factor featured strongly in the judgment of Spigelman CJ in *Lodhi v The Queen*. His Honour considered that the Court had to be concerned with 'the possibility of perfection of the very crime for the preparation of which the offender has been found guilty' (at 494). Protecting society featured prominently in later expressions of the principles that apply to sentencing for terrorist offences. In *R v Touma*, for example, Whealy J expressed the principles as follows:

England, where many could have died and where, but for the authorities' intervention, the plan was likely to succeed.

22 Life imprisonment is the maximum penalty for engaging in a terrorist act contrary to s 101.1 of the *Criminal Code* and for doing acts in preparation for or planning a terrorist act, contrary to s 101.6 of the *Criminal Code*. Providing or receiving training in connected with a terrorist act, contrary to s 101.2 of the *Criminal Code*, attracts a maximum of 25 years' imprisonment or 15 years' imprisonment, depending on whether it was done knowingly or recklessly. Possessing things or collecting or making documents connected to a terrorist act, contrary to ss 101.4 and 101.5 of the *Criminal Code*, attracts a maximum penalty of 15 years' imprisonment or 10 years' imprisonment, depending on whether it was done knowingly or recklessly.

> The broad purpose of the creation of offences of the kind involved in this sentencing exercise is to deter the emergence of circumstances which may render more likely the carrying out of a terrorist act. It is to punish those who contemplate action of the prohibited kind. It is to denounce their activities and to incapacitate them so that the community will be protected from the horrific consequences contemplated by their actions. The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence (at [80]).

This sentencing aim has a similarly prominent place in subsequent leading judgments (*R v Elomar* at [78]; *R v Mulahalilovic* at [48]; *R v Benbrika* at [135]). In the high-profile case of *R v Benbrika,* Bongiorno J referred to protection of the community as the most important factor to be taken into account when dealing with one offender (at [173]). A clear position has emerged that people convicted of terrorist offences are dangerous and increasing prison sentences because of this danger is legitimate and appropriate.

Proportionality as a brake on protection of society

What the criminal justice system should do with people who may represent a danger to the community on release is a recurring issue for sentencing judges (Zimring and Hawkins 1995). In *Fardon v Attorney-General (Qld),* Gleeson CJ described it as 'an almost intractable problem' (at 589). The question goes to the heart of the sentencing process and the theories of justice that influence it: if justice lies in retribution for a wrong, then the severity of the punishment must not exceed the infraction committed; if justice is utilitarian, the greater good of society might lie in the safety created by incapacitating dangerous people (Mackenzie and Stobbs 2010:41). Practically, it may be very difficult to predict with any certainty if somebody will pose a danger when released.[23] Some suggest that incapacitation should be eliminated in sentencing because of the unreliability of this prediction (Bagaric 2000). There are also questions regarding whether imprisonment on the ground that it protects society is consistent with human rights standards or, indeed, is effective at all in preventing crime.[24]

As a result of these limitations, incapacitating sentences in Australia are subject to tight controls. The need to protect society is a factor that a court may take into account in sentencing, but it cannot be given undue weight so that a sentence that is disproportionate to the gravity of the crime is imposed. The authorities for this position are the decisions of the High Court in *Veen v The Queen (No 1)* and *Veen v The Queen (No 2)*. Both cases dealt with the same repeat violent offender and whether a life sentence was justified because he was a continuing danger to society. In the first case, Jacobs J emphasised that 'protection of the public does not alone justify an increase in the length of sentence' (at 478). In the second case, Mason CJ, Brennan, Dawson and Toohey JJ reaffirmed this principle, when their Honours held:

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence.

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[23] Morris (2009:94) concludes: 'Let me put the point curtly and again. Clinical predictions of dangerousness unsupported by actuarial studies should never be relied on. Clinical judgments firmly grounded on well-established base expectancy rates are a precondition, rarely fulfilled, to the just invocation of prediction of dangerousness as a ground for intensifying punishment.'

[24] The 'modernising' *Criminal Justice Act 2003* (UK) introduced a number of risk-based reforms to the criminal justice system. These have been criticised as being inconsistent with human rights principles and ineffective (Ashworth 2004).

> The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible (at 473).

The Court held, by majority, that the sentence of life imprisonment imposed on Veen did not offend the principle of proportionality (at 478).[25] Spigelman CJ considered the application of the principle in *Lodhi v The Queen,* but held that the Court was entitled to consider protection of society as an independent factor and the sentence imposed for Lodhi's conduct was not disproportionate to the objective criminality of his actions:

> [T]he issue is not merely one of punishing an offender for something s/he may do in the future. It is the recognition that the protection of society requires the offender to be prevented from perpetrating the offences which s/he was preparing to commit. Giving the element of protection of society substantial weight, particularly in a context where personal deterrence and rehabilitation are, given the nature of the offence and the findings of fact, entitled to little weight, is consistent with the principle of proportionality laid down in *Veen (No 2)* (at 494).

Are the sentences disproportionate?

This article argues that the way protection of society is considered in terrorism cases leads to an unfair result. Proportionality does not operate the way that it usually does in sentencing for terrorism offences. Division 101 criminalises preparatory acts, far removed from the realisation of the criminal enterprise. We have seen that submissions concerning remoteness have gained little traction in the assessment of objective seriousness. Taking steps to obtain materials alone, where there is no plan and no harm, will still be considered very serious. In these circumstances, proportionality has a very limited effect in reining in the need to impose a sentence to protect society. The implicit assumption is that the terrorist act that might have been contemplated could have been of considerable magnitude if it had eventuated. The uncertainty of the ultimate act, the secretive nature of terrorism and the 'force multiplier effect', as it has been called (Goldsmith 2007), available through easy access to highly destructive technologies curtail the effect of proportionality because what might have been is almost always very serious. This factor, coupled with the conclusion that the jury's verdict necessarily reflects a sinister intention, means that the proportionality principle has little effect in restraining long prison terms.

Consideration should also be given to the existence of control orders as a reason not to impose long prison terms to incapacitate would-be terrorists. Control orders have been upheld as a valid exercise of constitutional power (*Thomas v Mowbray*). They are, it appears, here to stay. The terms of these orders can be very stringent.[26] The High Court has considered the possibility of a statutory regime to manage dangerous offenders in the community. In *Veen v The Queen (No 1),* Murphy J found that 'if the protection of society requires the applicant to be confined when his imprisonment ends, because he is dangerous,

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[25] Wilson J (dissenting) considered that the sentence was disproportionate and would have remitted the matter to the NSW Court of Criminal Appeal for reconsideration (at 489). Wilson J reached the same conclusion at 490. Deane J also reached this conclusion, holding that the finding of diminished responsibility meant that the case '[did] not even approach the rare case in which a sentence of life imprisonment for a single offence of manslaughter could conceivably be justified' (at 494). Gaudron J also would have allowed the appeal and remitted the matter (at 499).

[26] Common terms include a curfew, heavily restricted access to telecommunications, non-association conditions, submission to various types of monitoring, restriction from travelling, reporting conditions and restriction on access to firearms, explosive devices or associated materials. See, to take one high-profile example, *Jabbour v Hicks* at [38]–[55].

it should only be done (if it can be done lawfully) by methods outside the criminal justice system' (at 496). In *Veen v The Queen (No 2),* Deane J referred to a similar statutory system of preventive restraint (at 495). In *Fardon v Attorney-General (Qld)*, such a system was upheld for serious sex offenders. Control orders have been considered in one terrorist case, but were disregarded (*R v Benbrika* at [243]). The existence of control orders is a statutory system of preventive restraint and should be given due weight as a reason to decrease the severity of sentences based on a need to protect society.

Rehabilitation

The diminished weight given to rehabilitation

Ordinarily, very little weight is given to the offender's prospects of rehabilitation in sentencing for terrorist offences. This is especially true if there is no concrete evidence that a person has resiled from his or her extremist beliefs. This is often despite the fact that many of the other positive indicators may be present. Faheem Lodhi was a qualified architect in Pakistan and in Australia, who had undertaken postgraduate studies at various tertiary institutions in Sydney. Whealy J remarked (at 375): 'It is clear that the offender has, throughout his life, demonstrated and maintained a solid and prodigious work ethic'. He had a supportive family. His wife was a qualified medial practitioner. The psychologist who assessed him, though he found it difficult to predict whether he would pose a risk on release, said that he had no previous involvement with the police, he was hard working and had a supportive environment to return to, which were all 'positive prognostic indicators' (at 375). In relation to his personal circumstances, his Honour noted:

> [T]here is the undoubted fact that he is, by all accounts, a person who has hitherto led a blameless life. He is a person who has no criminal background or antecedents whatsoever. These features of the offender's life and circumstances are clearly matters that may be brought into account in his favour for the purposes of the sentencing process. But I have to say that these favourable circumstances make it difficult to understand why a young man of excellent personal background, with a considerable professional work ethic, would have contemplated and carried out the very serious criminal actions that have brought him to his present position in these proceedings (at 377).

However, his Honour considered that Lodhi's prospects of rehabilitation were poor while he held the beliefs that the Court found Lodhi had embraced. His Honour said:

> It has always been my understanding that Islam does not enjoin the killing of innocent people. […] The term 'jihad' literally means 'struggle'. The greatest form of 'jihad' is the inner struggle of the soul, which is to be waged against selfish desires for the concepts of inner peace. Indeed, these concepts were the very concepts of jihad espoused by the offender during his trial. But it is clear from the jury's verdict and the findings I have made that they are not the true reflection of this man's inner thoughts and beliefs. The extremist views, which he must in truth be taken to have espoused, are not representative of the true nature of his Islamic religion. Rather they are a distortion of it (at 377).

His Honour then considered that his positive subjective circumstances and family background 'entitle the Court to express some cautious hope that, in time, the offender's extreme views may dissipate and that rehabilitation may not be beyond him' (at 378). In other cases, it has been very hard for counsel to establish that an offender has resiled from extremism. In *R v Touma,* statements Touma made to his psychologist to the effect that he was 'over it' were not accepted (at [96]). In *R v Sharrouf,* evidence that Sharrouf (who, it

was common ground, was suffering from acute schizophrenia at the time of the offence) had resiled from extremist beliefs was cautiously accepted and his prospects of rehabilitation were assessed as 'reasonable' (at [49]). Roche was found to have genuinely resiled (*R v Roche* at 360), but he was not arrested until two years after the impugned conduct and he had made attempts to contact the authorities. In general, the position appears to be that those who have embraced extremist Islam are, essentially, beyond rehabilitation.

Are terrorists too far gone?

As the psychology of radicalisation becomes more greatly understood, we are also coming to understand how people move away from extremism to embrace a version of Islam that does not involve violence. Screening out insincere participants in militant groups, influencing their values and behaviour, monitoring them after release and providing reintegration support when they are released into society have been identified as strategies in this process (Horgan and Bjørgo 2009). Lengthy imprisonment may be counterproductive when, in the case of suicide bombers, they perceive that they have no option but death or life in prison. This has been recognised in case law from the UK.[27] In *R v Mallah,* Wood CJ at CL adopted a rehabilitation plan that incorporated some of these elements.[28] Successful rehabilitation is another way to protect the community and is especially important in cases of first offenders (*Yardley v Betts*). It is not currently in favour in penal sentencing (see Allen 2009:11). However, there are compelling judicial pronouncements endorsing the concept and linking it specifically to those with personal circumstances similar to many convicted of terrorist offences. In *Vartozokas v Zanker*, King CJ of the Supreme Court of South Australia considered rehabilitation in the following terms:

> The object of the courts is to fashion sentencing measures designed to reclaim [individuals who have lapsed into wrongdoing] wherever such measures are consistent with the primary object of the criminal law which is the protection of the community. Very often a person who is not disadvantaged and whose character has been formed by a good upbringing, but who has lapsed into criminal behaviour, will be a good subject for rehabilitative measures precisely because he possesses the physical and mental qualities and, by reason of his upbringing, the potential moral fibre to provide a sound basis for rehabilitation. It would be a great mistake to put considerations of rehabilitation aside in fashioning a sentence for such a person (at 279).

This article suggests that the pessimism expressed in judgments for terrorism offences approaches this kind of mistake. Not every person convicted of a terrorist offence should receive a fully suspended sentence. However, the courts need to rethink whether strong deterrent sentences with little rehabilitative component at all are of greatest net benefit to society and represent an appropriate synthesis of all the purposes of sentencing.

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[27] In *R v Rahman and Mohammed*, it was held in sentencing for disseminating a terrorist publication that if disproportionate sentences were imposed it would be more likely to inflame extremism than deter it.

[28] Mallah was sentenced to two years and six months' imprisonment, to be released on a recognisance after one year and nine months. A Muslim counsellor, Keysar Trad, and the Mufti Sheik Hilaly offered to find him accommodation and mentors after his release 'to persuade him to a more rational and acceptable view of life'. It is important to note that Mallah was found not guilty of terrorism offences. He pleaded guilty to recklessly making a threat to cause serious harm to a Commonwealth public official.

Conclusion

The new terrorism offences represent a dramatic expansion of the scope of the criminal law. Whether this is desirable (or, in the case of some orders, permissible) is still being tested. A great deal of debate has rightly taken place about whether this expansion of criminal liability is necessary and justified. Less debate has taken place about how and why we punish once a crime against the new laws has been committed. Enemies fight wars; people commit crimes. It is time to reconsider the reasons why we imprison people for such a long time for preparatory terrorism offences and to consider whether the terms we impose are an expression of individualised punishment or an expression of the fear that terrorists create.

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