SOME ISSUES ARISING FROM TERRORISM TRIALS AND SENTENCING*

Justice Peter Johnson**

Background

1 Shortly after the attacks in the United States of America on 11 September 2001, the Security Council of the United Nations unanimously adopted a resolution which required states to take *"necessary steps to prevent the commission of terrorist acts"*.[1]

2 Before the enactment of a range of terrorist offences in the *Criminal Code* (Cth) ("**the Code**") in and after 2002, there were no State or Federal laws dealing specifically with terrorism. Conduct which may be characterised as terrorism fell to be determined under the general criminal law.[2]

3 Part 5.3 of the Code was introduced in 2002 by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) with later amendments being made by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) and the *Anti-Terrorism Act 2005* (Cth). The context in which Parliament enacted this legislation included the terrorist attacks on 11 September 2001 and subsequent major terrorist attacks in Bali, Madrid, Jakarta and London.[3]

Provisions in the Code

4 There are four broad types of terrorism offences contained in the Code:

(1) Terrorist act and preparatory offences contained in Division 101 of Part 5.3 (ss.101.1-101.6);

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[1] *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33 at [86]

[2] The Hon. M McHugh QC "Constitutional implications of terrorism legislation" (2007) 8(2) *The Judicial Review* 189, 189; Hardy and Williams, *"Strategies for Countering Terrorism: An Australian Perspective"*, a chapter in Lennon, King and McCartney, *"Counter-Terrorism, Constitutionalism and Miscarriages of Justice"*, Hart, 2019 at 66-67

[3] *Thomas v Mowbray* at [83]-[87], [166]; *The Queen v Khazaal* (2012) 246 CLR 601; [2012] HCA 26 at [45]

(2) Terrorist organisation offences contained in Division 102 of Part 5.3 (ss.102.1-102.10);

(3) Financing terrorism offences contained in Division 103 of Part 5.3 (ss.103.1-103.3); and

(4) Foreign incursion and recruitment and hostile engagement offences contained in Division 119 of Part 5.5 (ss.119.1-119.12) – the offences in Division 119 took the place of offences contained in the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) repealed in 2014.[4]

Some Procedural Provisions

5 A special provision exists for bail applications concerning terrorism offences. A bail authority must not grant bail to a person charged with or convicted of a terrorism offence (other than an offence against s.102.8 of the Code) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.[5]

6 Section 15AA *Crimes Act 1914* (Cth) ("**Crimes Act**") was amended by the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth) ("**2019 Act**") which commenced on 12 December 2019.[6] The amendments in s.15AA(2) expand the application of s.15AA to persons who are the subject of a control order and persons who have made statements or carried out activities supporting or advocating support for terrorist acts within the meaning of Part 5.3 of the Code. In addition, the 2019 Act inserts s.15AA(3AA) to provide that if the accused person is a child when a bail authority is determining whether exceptional circumstances exist to justify the

[4] *R v Alqudsi* [2016] NSWSC 1227 (sentencing for offences under the 1978 Act); see *Dacre and Ors v The Queen* (2018) 52 VR 255; [2018] VSCA 150 for an examination of offences in Division 119

[5] ss.3(1), 15AA(2)(a) *Crimes Act 1914* (Cth); *R v Naizmand* [2016] NSWSC 836; and *R v Khayat (No 11)* [2019] NSWSC 1320

[6] The Attorney-General stated that the amendments to the bail and parole regime were introduced in response to the terrorist incident that occurred on 5 June 2017 in Brighton, Victoria. Yacub Khayre shot and killed a man and held a woman hostage before being fatally shot by Victorian Police. Mr Khayre was on parole for Victorian offences and had "*a long history of violence and was previously acquitted of a terrorism offence":* Explanatory Memorandum, Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (Cth) at [2]

grant of bail, the bail authority must have regard to the protection of the community as the paramount consideration and best interests of the person as a primary consideration.

7 Trial on indictment for Commonwealth offences must proceed before a jury with trial by Judge alone not being available.[7] A majority verdict is not permissible in a trial for a Commonwealth offence.[8]

8 It is the present practice in New South Wales that indictments charging offences under Part 5.3 or Part 5.5 of the Code may be presented in the Supreme Court.[9]

Some Significant Features of the Scheme for Terrorism Offences

9 Several aspects of the scheme for terrorism offences in the Code have been emphasised.[10]

10 Firstly, a broad and detailed definition of *"terrorist act"* is contained in s.100.1 of the Code. In *Lodhi v R* (2006),[11] McClellan CJ at CL described the definition as *"complex"*.[12] In *Thomas v Mowbray*, Gleeson CJ summarised the elements of the definition as follows:[13]

> … The definition of terrorist act (s 100.1) requires three elements for an action or threat of action to be a terrorist act. First, the action must fall within a certain description, and must not be of a kind excluded by another description. The inclusory aspect of the definition is that the action must (to put it briefly) cause death, serious physical harm, or serious damage to property, endanger life, create a serious risk to public health or safety, or seriously interfere with or disrupt certain vital systems. The exclusory aspect of the definition excludes advocacy, protest, dissent or industrial action that is (to put it briefly) not intended to cause death or serious injury, or endanger life or public safety. The second necessary element is that the action is done, or the threat of action is made, with the intention of advancing a political, religious or ideological cause. The third necessary element is that the action

[7] *Alqudsi v The Queen* (2016) 258 CLR 203; [2016] HCA 24
[8] ss.55F(4) *Jury Act 1977* (NSW); *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44
[9] s.128 *Criminal Procedure Act 1986* (NSW); cl 16 of Practice Note SC CL 2 "Supreme Court Common Law Division – Criminal Proceedings" (issued on 15 December 2016)
[10] For a more comprehensive summary, see: Troy Anderson, *Commonwealth Criminal Law* (The Federation Press, 2nd ed, 2018) 163-194
[11] *Lodhi v R* (2006) 199 FLR 303; [2006] NSWCCA 121
[12] *Lodhi v R* (2006) at [106]
[13] *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33 at [8]

> is done, or the threat of action is made, with the intention of coercing, or influencing by intimidation (to put it briefly), a government, or of intimidating the public or a section of the public (my emphasis).

11 Secondly, emphasis has been placed upon the legislative policy underlying the creation of a range of preparatory offences which serve to criminalise conduct which would not be caught by the general law of criminal attempt. In *Lodhi v R* (2006), Spigelman CJ (McClellan CJ at CL and Sully J agreeing) said:[14]

> [66] Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, e.g. well before an agreement has been reached for a conspiracy charge. The courts must respect that legislative policy.

These principles have been emphasised and applied in later decisions. In *Lodhi v R* (2007)[15], Barr J observed that sections 101.4, 101.5 and 101.6 of the Code *"make offensive acts of a preliminary nature falling short, some well short, of attempt"*.[16] In the same case, Price J emphasised that offences under ss.101.4, 101.5 and 101.6 are not crimes of attempt but *"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".*[17] Price J observed as well that acts done in preparation for, or planning, a terrorist act undoubtedly can embrace a wide range of conduct.[18]

12 Thirdly, sentencing principles have developed for terrorism offences under the Code arising from Australian and United Kingdom case law and application of

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[14] *Lodhi v R* (2006) at [66]
[15] *Lodhi v R* (2007) 179 A Crim R 470; [2007] NSWCCA 360
[16] *Lodhi v R* (2007) at [211]
[17] *Lodhi v R* (2007) at [229]; see also: *Dacre and Ors v The Queen* at [6]-[7] and [23]-[31]
[18] *Lodhi v R* (2007) at [242]

s.16A Crimes Act.[19] Further, s.19AG Crimes Act provides for a non-parole period to be set for a terrorist offence which is at least three quarters of the full sentence. Section 19AG imposes a *"statutory fetter upon the exercise of judicial discretion"* concerning the fixing of a non-parole period for a terrorist offence.[20] A challenge to the validity of s.19AG has been rejected.[21]

13 These principles and concepts have been picked up and applied repeatedly in terrorism cases in Australia including recent authorities to be considered in this paper.

14 It should be noted that s.19AG Crimes Act was amended by the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth) which commenced on 12 December 2019. Section 19AG(4A) and (4B) were inserted and state:

> **Fixing non-parole periods for persons under 18 years of age**
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> (4A) In imposing a sentence for an offence covered by this section on a person who is under 18 years of age, the court must comply with subsection (2) unless the court is satisfied that exceptional circumstances exist to justify fixing a shorter single non-parole period.
>
> (4B) In determining whether exceptional circumstances exist to justify fixing a shorter single non-parole period in relation to the person, without limiting the matters the court may have regard to, the court must have regard to:
>
> (a) the protection of the community as the paramount consideration; and
>
> (b) the best interests of the person as a primary consideration.

15 Also introduced by the 2019 Act was s.19ALB Crimes Act, which confines the circumstances in which persons convicted of terrorism offences or who are subject to a control order may be released on parole. Section 19ALB provides:

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[19] *R v Alou (No. 4)* (2018) 330 FLR 402; [2018] NSWSC 221 at [163]-[171]; *Alou v R* (2019) 373 ALR 347; [2019] NSWCCA 231 at [47]-[49]
[20] *Lodhi v R* (2007) at [261]
[21] *Alou v R* at [181]-[195]; see below at [146]-[150] of this paper

19ALB Decisions about parole orders—terrorism and control orders

(1) Despite any law of the Commonwealth, the Attorney-General must not make a parole order in relation to a person covered by subsection (2) unless the Attorney-General is satisfied that exceptional circumstances exist to justify making a parole order.

(2) This subsection covers the following persons:

(a) a person who has been convicted of a terrorism offence, including a person currently serving a sentence for a terrorism offence;

(b) a person who is subject to a control order within the meaning of Part 5.3 of the *Criminal Code* (terrorism);

(c) a person who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of that Part.

Determining exceptional circumstances in relation to persons under 18 years of age

(3) In determining whether exceptional circumstances exist to justify making a parole order in relation to a person who is under 18 years of age, without limiting the matters the Attorney-General may have regard to, the Attorney-General must have regard to:

(a) the protection of the community as the paramount consideration; and

(b) the best interests of the person as a primary consideration.

Different Phases of Terrorism Offences in Australia

16 Prosecutions for terrorism offences under the Code up to 2010 related to preparatory and planning offences and charges of conspiracy.[22] Fortunately, no terrorism offence committed in this period involved the commission of a terrorist act, let alone one which caused death or physical injury to any member of the community.

17 From 2010, the activities of the so-called Islamic State have provided impetus for terrorism offences committed in Australia and foreign incursion and recruitment offences which have seen Australians travelling to Iraq and Syria to act in support of Islamic State. Islamic State is a proscribed terrorist organisation[23] which follows an extreme Salafist interpretation of Islam. It is

[22] See, for example, *Lodhi v R* (2006); *Lodhi v R* (2007); *The Queen v Khazaal; Benbrika and Ors v R* (2010) 29 VR 593; [2010] VSCA 281; *Elomar and Ors v R* (2014) 300 FLR 323; [2014] NSWCCA 303

[23] The *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* (Cth) proscribed Islamic State as a "*terrorist organisation"* for the purpose of s.102.1(1) of the Code

anti-Western and promotes violence against those who do not agree with its views. In *R v Shoma*,[24] Taylor J outlined further features of Islamic State[25]:

> [8] On 29 June 2014, IS declared a caliphate in northern Syria and northern Iraq with Abu Bakr Al-Baghdadi as its caliph. IS called upon all Muslims to declare their allegiance to the new caliphate. IS uses social media platforms to denounce the west and recruit members, particularly through its online publications Dabiq and Rumiyah.
>
> [9] On 22 September 2014, Shaykh Abu Muhummad Al-Adnani Ash-Shami ('Al-Adnani') issued a widely publicised fatwa ordering IS followers to make hijrah to Syria or, if that was not possible, to target (amongst others) the Australian government or community due to Australia's involvement in the conflict in Syria and northern Iraq. Al-Adnani said:
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> > 'If you can kill a disbelieving American or European – especially the spiteful and filthy French or an Australian, or a Canadian, or any other disbeliever from the disbelievers waging war, including the countries that entered into a coalition against the Islamic State, then rely upon Allah, and kill them in any manner or way however it may be. Smash his head with a rock, or slaughter him with a knife, or run him over with your car, or throw him down from a high place, or choke him or poison him.'

18 The activities of Islamic State have provided the context for foreign incursion and recruitment offences committed in 2013[26] and a range of offences under the Code involving the commission of terrorist acts or preparation for the commission of terrorist acts as well as financing terrorism offences and terrorist organisation offences.

19 Although almost all terrorism prosecutions since 2010 have involved jihadist offenders, there has been a successful prosecution of a far-right extremist who was found guilty in December 2019 of offences under ss.101.5(1) and 101.6 of the Code concerning planned violent acts against Muslims and leftists. [27]

20 Two features of prosecutions for terrorism offences committed in Australia since 2013 are especially noteworthy.

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[24] *R v Shoma* [2019] VSC 367
[25] *R v Shoma* at [8]-[9]; see also *R v Alou (No. 4)* at [21]
[26] *R v Alqudsi* [2016] NSWSC 1227
[27] Phillip Michael Galea was found guilty of terrorist offences in December 2019 following a trial before Hollingworth J and a jury in the Victorian Supreme Court. An earlier judgment of the Court related to his fitness to stand trial: *Director of Public Prosecutions (Cth) v Galea* [2018] VSC 30

21 Firstly, terrorist acts (for which offenders survived to be prosecuted[28]) have been committed causing death[29] or serious injury[30] to members of the community. Sentencing decisions have been made in cases where terrorist acts have killed or seriously injured persons so that a grave additional dimension was to be reflected on sentence.

22 The distinction between terrorism offences and offences under the general law has been emphasised, in particular where offenders were to be sentenced for terrorist acts causing death or serious injury. Reference has been made to *Thomas v Mowbray,* where Gummow and Crennan JJ said[31]:

> … it is the political, religious or ideological motivation and the intention to intimidate governments or the public (ie elements of the body politic) which distinguishes the acts in question from acts in pursuit of private ends, which come within established offences against the person or property …

23 In *R v Shoma,* Taylor J stated[32]:

> It must always be borne in mind that terrorist offences concern not only acts of a shocking nature, but the multiple intentions which accompany them. It is those intentions that transform heinous enough criminal acts – murder for example – into offences that do much more than disregard the sanctity of human life. Done in the name of a political, religious or ideological cause, and done to intimidate or coerce government or the public, those acts also attack the fundamental assumptions of Australian society, seeking not only to disrupt it but to materially and permanently change it.

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[28] Two persons who committed terrorist acts in 2014 were killed. On 23 September 2014, Numan Haider, a Melbourne man whose passport had been confiscated because of plans to join Islamic State, was shot and killed by police after he stabbed two members of the Victorian Police. On 16 December 2014, Man Haron Monis was shot dead by police after he committed terrorist acts involving the killing of a man and the detention of persons during the Lindt Café siege in Sydney.

[29] Curtis Cheng was killed at Parramatta on 2 October 2015 by a 15 year old supporter of Islamic State who was shot dead by special constables. Persons who were criminally involved in this terrorist act have been sentenced for their offences: *R v Alou (No. 4)* at [7]; *R v Alameddine (No. 3)* (2018) 333 FLR 81; [2018] NSWSC 681; *R v Atai (No. 2)* [2018] NSWSC 1797; *R v Dirani (No. 34)* [2019] NSWSC 1005

[30] On 10 September 2016, a male assailant engaged in a terrorist attack in Sydney which involved stabbing the victim multiple times with a knife causing very serious injury: *R v Khan (No. 11*) [2019] NSWSC 594. On 9 February 2018, a 24 year old female assailant engaged in a terrorist act in Melbourne involving a knife attack upon the victim causing very serious injury: *R v Shoma* [2019] VSC 367

[31] *Thomas v Mowbray* at [45]

[32] *R v Shoma* at [56]

24 In *R v Khan (No. 11)*,[33] Bellew J said:[34]

> Further, and whilst I accept that the offender is to be sentenced for what he did, to divorce his conduct from the violent ideology which underpinned it would be both artificial in the extreme, and fundamentally wrong in principle. The authorities to which I have referred make it clear that the depth and extent of an offender's radicalisation is relevant to an assessment of the objective seriousness of offending of this kind. It would also be wrong in principle to sentence the offender by seeking to draw some comparison between the present offence and an offence of attempted murder. This is because it is the offender's religious and ideological motivation, and his intention to intimidate the Government, which distinguishes his acts from those which might be committed in pursuit of private ends, and which come within established offences against the person.

25 The evil of terrorism offences was echoed by Price J in *Alou v R*, where his Honour said:[35]

> A terrorist attack when successfully implemented can result in the deaths and serious injuries to many innocent persons. One only has to consider the death and destruction caused by the truck driver in Nice on 19 August 2016 or by the gunman in Christchurch on 15 March 2019. The potential for such terrible consequences will not usually be the case in a single count of murder.

26 Secondly, evidence adduced at trials and sentencing proceedings has demonstrated the sophisticated use of social media by Islamic State[36] as a means of attracting supporters and encouraging them to plan or carry out terrorist acts in Australia or to travel to Syria and Iraq to provide direct support for Islamic State in that region.

27 Decisions of Courts, principally in New South Wales and Victoria, have considered a wide range of pre-trial and trial issues arising in those prosecutions as well as sentencing of persons for terrorism offences. This paper seeks to focus attention on decisions in recent terrorism cases, a developing class of criminal litigation in Australian Courts. An Appendix to this paper contains a more detailed account of a number of recent sentencing decisions.

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[33] *R v Khan (No. 11*) [2019] NSWSC 594
[34] *R v Khan (No. 11)* at [78]
[35] *Alou v R* at [199]
[36] See, for example: *R v Dirani (No. 33)* [2019] NSWSC 288 at [60] and [73]; *R v Shoma* at [10]

SOME PRE-TRIAL AND TRIAL ISSUES

Measures to protect sensitive information in the interests of national security

28 In *R v Khayat (No. 2)*[37], the co-accused were charged with conspiracy to do acts in preparation for a terrorist act. The relevant acts alleged against the accused involved the use of an improvised explosive device and an improvised chemical dispersal device. The Commissioner of the Australian Federal Police (AFP) sought orders suppressing the release of sensitive information, which included techniques allegedly used to make the weapons, and the qualities and efficacy of such weapons. The orders sought were not opposed by any party.[38]

29 Adamson J accepted the evidence of the Assistant Commissioner of the AFP, who deposed *"that the intricacies of the plot and its precise methodology could not be classified as a 'simple attack' such as would not warrant suppression"*.[39] Her Honour was satisfied that it was necessary to *"protect information relevant to the manufacture and use of such weapons, particularly where, as here, the evidence might fill in gaps in the knowledge or expertise of prospective terrorists"*.[40] Her Honour also accepted that there would be a *"very real and substantial risk to public safety"* if the sensitive information were obtained by prospective terrorists.[41]

30 Adamson J turned to the power of the Court to make the orders sought under the *Court Suppression and Non-publication Orders Act 2010* (NSW). ss.8(1)-(2) of that Act relevantly provide:

> **8 Grounds for making an order**
>
> (1) A court may make a suppression order or non-publication order on one or more of the following grounds:
>
> …
>
> (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,

[37] *R v Khayat (No. 2)* [2019] NSWSC 1315
[38] *R v Khayat (No. 2)* at [1]-[5]
[39] *R v Khayat (No. 2)* at [6]
[40] *R v Khayat (No. 2)* at [7]
[41] *R v Khayat (No. 2)* at [8]

(c) the order is necessary to protect the safety of any person,

…

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

31 Her Honour was satisfied that the order was necessary to avoid compromising national security under s.8(1)(b); and that it was necessary to protect members of the public under s.8(1)(c). With respect to the latter ground, her Honour noted that the *"calculus of risk approach"* has been endorsed by the High Court and various appellate courts.[42] Once her Honour concluded that the order was necessary, then no discretion existed to refuse making the order.[43]

32 Additionally, the AFP Commissioner sought an order that the evidence of three witnesses be heard in camera, pursuant to s.93.2 of the Code. That section provides:

93.2 Hearing in camera etc.

(1) This section applies to a hearing of an application or other proceedings before . . . a court exercising federal jurisdiction . . .

(2) At any time before or during the hearing, the judge . . . may, if satisfied that it is in the interests of Australia's national security:

(a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or

(b) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or

(c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.

(3) A person commits an offence if the person contravenes an order made or direction given under this section.

Penalty: Imprisonment for five years.

33 The Crown proposed to lead evidence from a forensic chemist, a crime scene investigator with expertise in the testing and analysis of the weapons, and a special agent with the FBI in the Explosives Unit, who was a bomb technician.

[42] *R v Khayat (No. 2)* at [20]
[43] *R v Khayat (No. 2)* at [23]

It was argued that although this was an extreme step, the sensitive information was *"likely to be concentrated"* within the evidence of these witnesses, and closing the Court for their evidence (but not for the balance of the proceedings) would not be inimical to the interests of open justice.[44] In granting the orders sought, her Honour said:[45]

> The closure of a court is a very serious step which compromises the principle of open justice to a marked degree. As is plain from the wording of s 93.2(2) of the *Criminal Code*, such a step may only be taken if I am "satisfied that it is in the interests of Australia's national security" to do so. The foreseeable danger is that someone will piece together the evidence of the three witnesses referred to above to obtain reliable information about bomb-making and seek to use that information to make a bomb to harm particular individuals or members of the general public. While it may be assumed that there is a plethora of recipes on the internet for making bombs, it is in the nature of the internet that accurate, authoritative information cannot readily be distinguished from inaccurate, unreliable dross. Thus potential terrorists may encounter difficulties identifying accurate information on the internet. By contrast, the evidence to be given by experts in a criminal trial is generally (subject to concessions during cross-examination and matters of weight) likely to be reliable and detailed. In the particular circumstances of the present case, I am satisfied that it is in the interests of Australia's national security that members of the public be excluded from the court while evidence from [the three witnesses] is adduced. For these reasons, I am satisfied that it is in the interests of Australia's national security to make an order in terms of draft order 3.

34 In *R v Elmir*,[46] Davies J considered an application brought by the AFP Commissioner for a series of non-publication and suppression orders. The orders sought related to, inter alia, sensitive material and evidence to be given by an undercover officer from the AFP, and another undercover officer from the FBI. The FBI officer also sought to give evidence via an encrypted audio visual link from a remote location[47], and during the giving of his evidence, that the accused would not be able to observe him give evidence.[48] Counsel for the AFP Commissioner noted that, similar to *R v Khaja (No. 1),*[49] a blank monitor could be placed in front of the accused in the courtroom, so as to avoid the position where the jury became aware that the accused was

[44] *R v Khayat (No. 2)* at [11]
[45] *R v Khayat (No. 2)* at [26]
[46] *R v Elmir* [2018] NSWSC 308
[47] *R v Elmir* at [7]-[8]
[48] *R v Elmir* at [14]
[49] *R v Khaja (No. 1)* [2017] NSWSC 1578

prevented from seeing the witness give evidence.[50] None of the orders sought were opposed by the accused or the Crown.

35 Davies J made all the orders sought.[51] In the course of the judgment, his Honour considered s.15MK Crimes Act, and its relevance to the operation of the encrypted audio-visual link and use of a blank monitor. That section relevantly provides:

> **15MK Orders to protect operative's identity etc.**
>
> (1) The court in which a witness identity protection certificate is filed may make any order it considers necessary or desirable to protect the identity of the operative for whom the certificate is given or to prevent the disclosure of where the operative lives.
>
> (4) The court must make an order suppressing the publication of anything said when an order is made as mentioned in subsection (1).
>
> (5) To avoid doubt, subsection (4) does not prevent the taking of a transcript of court proceedings, but the court may make an order for how the transcript is to be dealt with, including an order suppressing its publication.

36 His Honour stated:[52]

> [28] The test under this section is that the order is necessary or desirable to protect the identity of the witness. I accept the submission of the Commissioner that this is a lower threshold than the test of necessity. However, in the light of the material in Mr McCartney's affidavit I would have considered that the need to protect the identity of the witnesses would have satisfied the test of necessity under s 8 of the Court Suppression Act and the test at common law as discussed in *BUSB v R* [2011] NSWCCA 39.[53]
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> [29] The Court has the power under s 5B of the *Evidence (Audio and Audio Visual Links) Act 1998 (*NSW) to order that a witness give evidence by video link unless the Court is satisfied that the making of such an order would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing. In the present case that section must be seen in the light of, and be considered with, the witness protection orders that have been made, and s 15MK of the *Crimes Act 1914*. Moreover, the inherent jurisdiction of the Court, as discussed in *BUSB*, enables the Court to make orders that

[50] *R v Elmir* at [14]
[51] *R v Elmir* at [15] and [36]
[52] *R v Elmir* at [28]-[29] and [33]
[53] The decision in *R v Elmir* pre-dated the Court of Criminal Appeal's decisions in various cases where the Court has held that the correct approach to s.8(1)(c) *Court Suppression and Non-publication Orders Act 2010* is the "*calculus of risk"* approach: *AB (A Pseudonym) v R (No. 3)* (2019) 97 NSWLR 1046; [2019] NSWCCA 46; and *Darren Brown (A Pseudonym) v R* [2019] NSWCCA 69. See also: *AB (A Pseudonym) v CD (A Pseudonym)* (2019) 364 ALR 202; [2019] HCA 6 at [14] (Nettle J)

> would entitle the evidence of the witness to be given by AVL and in way that protects the identity of that witness.
>
> …
>
> [33] In my opinion, the [FBI undercover operative] should be entitled to give evidence by AVL and be screened from view of the accused. I note that the arrangement in that regard will be that the accused will have a monitor in front of him in the same way that the jury, counsel and the Court will, but the jury will not be apprised of the fact that the monitor in front of accused does not transmit the image of the witnesses to the accused. In that way, any unfairness to the accused is minimised or eliminated as far as the jury is concerned.

Failing to stand for the Judge and/or jury and whether the accused should remain in the dock during the proceedings

37 In *R v Dirani (No. 7)*[54], the accused made pre-trial applications: (1) to sit in the body of the Court during his trial for a terrorism offence, and not in the dock; and (2) to be excused from complying with his obligation to stand for both the Judge and/or the jury during the trial.

38 On the first application, the accused submitted that it would be prejudicial for him to sit in the dock in the Sydney West Trial Courts Complex given the structure and layout of the courtroom. The risk of prejudice to the accused, it was said, arose from jurors perceiving the accused to be a *"dangerous person"* and this would operate adversely to his interests in the trial.[55] The Crown opposed the application on the basis that the location of the accused in the dock did not give rise to any risk of prejudice.[56] In support of the second application, the Court was informed that the accused objected to standing for the Judge or jury on the basis of his religious beliefs but no oral or documentary evidence of those beliefs was adduced in support of the application.[57]

39 The Court observed that the starting point is s.34 *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) which states that the presiding Judge

[54] *R v Dirani* (2018) 346 FLR 375; *(No. 7)* [2018] NSWSC 945
[55] *R v Dirani (No. 7)* at [11]-[14]
[56] *R v Dirani (No. 7)* at [15]-[17]
[57] *R v Dirani (No. 7)* at [58]-[60]

may order the accused to enter the dock, or to remain on the floor of the Court, and in either case to sit down, as the Judge considers appropriate.[58]

40 After referring to the decisions of Dunford J in *R v Baartman (No. 2)*[59] and Button J in *R v Stephen (No. 2)*[60], Johnson J said:[61]

> [34] In my experience, it is the usual practice (as noted by Dunford J and Button J) that an accused person on trial in the Supreme Court will sit in the dock, whether the person is on bail or not. There is a discretion in that respect, as s.34 makes clear, but the usual location for an accused person on trial in the Supreme Court is the dock …
>
> [38] Docks in courtrooms take a variety of forms, partly affected by the vintage of the architecture of the courtroom in question. There are old timber docks in courtrooms located at Darlinghurst and in the King Street Court Complex which separate the accused person clearly from the rest of the Court. A courtroom of this type was the venue for the trial proceeding before Dunford J in *R v Baartman (No. 2)* (Court 5 King Street). In more modern courthouses, such as the Downing Centre Complex in Sydney or the SWTC at Parramatta, there are different configurations used for docks.
>
> [39] As the judgments of Dunford J and Button J illustrate, it is usual that accused persons standing trial in the Supreme Court will sit in the dock even if the person is on bail. I do not accept that the location of an accused person in the dock during a trial, is of itself prejudicial. It may be taken (as Dunford J and Button J observed) that juries understand there is a level of formality surrounding a criminal trial so that the location of the accused person in a designated location within the courtroom during the trial is unsurprising. This point was made as well by Ambrose J in *R v Burke* (1993) 1 QdR 166 at 174.
>
> [40] Further, the jury will be told at the commencement of the trial that the Accused is presumed innocent of the charges and that this presumption will only be removed if the Crown proves his guilt of an offence beyond reasonable doubt. In *R v Hoang* (2007) 16 VR 369; [2007] VSCA 117, Neave JA (Maxwell P and Eames JA agreeing) observed at 382 [67] that there was no danger that the jury would assume that an unrepresented accused was guilty of the offence charged simply because he conducted his case from the dock, with the trial Judge having reminded the jury of the presumption of innocence.

[58] *R v Dirani (No. 7)* at [19]
[59] *R v Baartman (No. 2)* (Supreme Court of New South Wales, Dunford J, 23 October 1998)
[60] *R v Stephen (No. 2)* [2018] NSWSC 167
[61] *R v Dirani (No. 7)* at [34] and [38]-[40]

41 Factors relevant to the exercise of discretion included the nature of the charges, and the accused's custodial status and his behaviour in custody. Johnson J said:[62]

> [41] The nature of the charges against the Accused are relevant to the exercise of discretion under s.34. To adopt this approach is not to undermine the Accused's presumption of innocence any more than having regard to the nature of the charge for the purpose of a bail determination under the Bail Act 2013. The Accused is charged with a serious terrorist offence which is punishable by life imprisonment. The Crown allegations against the Accused are serious: *R v Dirani (No. 6)* at [8]-[15].
>
> [42] Also relevant to the s.34 discretion is evidence concerning the Accused's custodial classification and his behaviour whilst in custody …

42 With respect to decisions in earlier terrorism trials concerning the use of the dock for the accused, his Honour observed:[63]

> [45] In *R v Benbrika and Ors (No. 12)* and *R v Baladjam and Ors (No. 41)*, the trial Judges were concerned with the use of fixed glass or perspex panels which operated to diminish the accused person's right to the presumption of innocence. Hamill J referred to these decisions, in a different context, when directing that a perspex barrier (in a courtroom at the Downing Centre) be removed while the jury was present during the trial of several accused persons: *R v Qaumi and Ors (No. 55)* [2016] NSWSC 1068 at [39]-[47] and [52].
>
> [46] It is important to note that the dock in the present configuration of Court 5 of the SWTC is significantly different from that considered in *R v Baladjam and Ors (No. 41)*. The present Court 5 in the SWTC was modified after the pretrial judgment of Whealy J in *R v Baladjam and Ors (No. 41)* so that it no longer has a fixed glass screen. I am satisfied that the insertion of a movable glass panel addressed what was said to be the prejudicial appearance which caused Whealy J to order the removal of that panel in *R v Baladjam and Ors (No. 41)*.
>
> [47] There is no fixed perspex screen which constitutes a barrier between the Accused and all other persons in the courtroom. There is a sliding glass partition which has been opened, and will remain open, so that the Accused and his legal representatives may speak to each other freely, quietly and directly throughout the proceedings. Senior and junior counsel appearing for the Accused, and their instructing solicitor, are located at the bar table immediately adjacent to the dock so that communications between them are unimpeded.
>
> [48] The dock in Court 5 of the SWTC is a large dock which is capable of accommodating multiple accused persons during a trial. This aspect does not

[62] *R v Dirani (No. 7)* at [41]-[42]
[63] *R v Dirani (No. 7)* at [45]-[48]; and [54]-[56]

carry with it any prejudicial feature when there is a single accused person as in this trial …

[54] The dock in Court 5 at the SWTC area is a large one, so that the Accused is able to sit on one side with correctional officers sitting some distance from him. The glass partition will be open throughout the trial and the Accused will have ready access to his legal team who are sitting at the bar table which is adjacent to the dock. The Accused will have constant and confidential access to his lawyers throughout the trial. At the commencement of the trial, I will inform the selected jury of a number of matters including the presumption of innocence and the onus and standard of proof at a criminal trial.

[55] I have considered all factors raised which bear upon the exercise of discretion under s.34 Criminal Procedure Act 1986.

[56] I am satisfied that it is appropriate for the Accused to sit in the dock, and not in the body of the courtroom, for the duration of the trial. I am not persuaded that this arrangement is prejudicial to the Accused.

43 In opposition to the application to remain seated throughout the trial, the Crown relied on a document entitled *"Explanatory Note on the Judicial Process and Participation of Muslims"* published by the Australian National Imams Council with the assistance of the Judicial Commission of NSW in 2017.[64] Johnson J had previously described this note as a *"powerful statement by the leadership of Islam in Australia concerning the approach to judicial proceedings"*.[65] In the Explanatory Memorandum[66], the Council states:

3 Court protocols

3.1 Standing up for the Magistrate or Judge

There is no prohibition or restraint on a Muslim standing up for the Magistrate or Judge as a sign of respect to the Magistrate or Judge and to the court.

Courts are very formal places. Everyone in court, including lawyers, police, witnesses, defendants and members of the public must follow the court's procedures. The Judge or Magistrate is in charge of the court. They should be

[64] The Australian National Imams Council, "Explanatory Note on the Judicial Process and Participation of Muslims", *The Australian National Imams Council* (Web Page, originally published on 16 December 2017 and updated in February 2018) < https://www.anic.org.au/wp-content/uploads/2018/02/Explanatory-Note-on-the-Judicial-Process-and-Muslims.pdf>; see also: The Hon Justice Francois Kunc, "Current Issues", 92 *Australian Law Journal* 659, 662-659

[65] *R v Alou (No. 4)* at [237]-[238]; and *Elzahed v State of New South Wales* (2018) 97 NSWLR 898; [2018] NSWCA 103 at [7]

[66] The Australian National Imams Council, "Explanatory Note on the Judicial Process and Participation of Muslims", *The Australian National Imams Council* (Web Page, February 2018) < https://www.anic.org.au/wp-content/uploads/2018/02/Explanatory-Note-on-the-Judicial-Process-and-Muslims.pdf> at 3.1-3.2

shown respect by everyone in the courtroom. Standing up for the Magistrate or Judge is a sign of respect to the court.

This sign of respect is also reflected in the teaching of Islam. The Prophet (peace be upon him) commended his companion to stand up for one of the chief companions by the name of Sa'ad ibn Muath in which he said, 'stand up for your chief.'

In the famous Hadith collection, Al-Bukhari states that a funeral procession passed before the Prophet (peace and blessings be upon him), and when he saw it he stood up (showing respect to it). Then it was said, it is a funeral of a non believer. The Prophet replied, 'Isn't it a soul!'

3.2 Bowing to the Magistrate or Judge

As is the position above, there is also no prohibition or restraint on a Muslim, when entering or leaving a courtroom, to stand and lower their head in a mark of respect. To do so is also consistent with the established custom of the court room.

During court proceedings, it is customary to lower one's head to the Magistrate or Judge whenever one enters or leaves a court room. This is a custom of respect to the court. In the Muslim faith, there are two types of lowering of the head:

1. Lowering of the head, or bowing, to the creator as a form of worship; and

2. Lowering of the head to the creation as a form of respect.

In this regard, examples are given in the Holy Quran when persons were directed to lower their heads to creation: for instance, see Chapter 2 at [34]; Chapter 12 at [100]. These examples relate to the angels being directed to prostrate to Prophet Adam, and the parents of Prophet Joseph bowing to him as he sat on the throne.

One can also find such customs of respect in ordinary interactions, for instance, in practices pertaining to certain martial arts.

44 The Explanatory Note was the *"only evidence before the Court on this issue"*, and accordingly, Johnson J accepted that there was no prohibition for Muslims against standing for judicial officers (and juries).[67]

45 His Honour also took into account that in early 2016, the *Courts Legislation Amendment (Disrespectful Behaviour) Act 2016* (NSW) introduced the offence of *"Disrespectful behaviour in Court"* in s.131 *Supreme Court Act 1970* (NSW) and other provisions applicable to the Local and District Courts. In the course of introducing that Act, the Attorney-General stated in the Second Reading

[67] *R v Dirani (No. 7)* at [71]-[72]

Speech that the offence would apply *"even if the person did not cause or intend to cause disrespect by remaining seated".* [68] In refusing the accused's application, his Honour concluded:[69]

> [78] It may be seen from the terms of s.131 *Supreme Act 1970* (and the corresponding provisions for the District and Local Courts), and these extracts from the second reading speech, that an intention to be disrespectful is not an element of a s.131 offence. The second reading speech is extrinsic material which assists in the construction of the section: ss.33 and *34 Interpretation Act 1987* …
>
> [79] I approach this application as being one by the Accused seeking to be excused from what was his prima facie obligation to stand at times during the trial when all other accused persons are required to stand. The Court was informed that the Accused did not propose to stand at times when the jury and the judge entered the courtroom and departed from it. The Court was informed that the Accused would stand when arraigned before the jury panel and when a verdict was taken from the jury at the conclusion of the trial.
>
> [80] In circumstances where there is simply no evidence whatsoever to support the approach adopted by the Accused, it is necessary for the Court to have regard to the terms of s.34, together with statutory requirements which now apply to accused persons and published material which serves to explain the practice for Muslims appearing before Courts.
>
> [81] The requirement that an accused person should stand on the usual occasions arising in a criminal trial is not an optional extra to be dispensed with at the whim or election of the accused person. A proper and substantial basis must be demonstrated before a court would excuse an accused person from compliance with this obligation during the course of the trial.

46 As will be discussed below (at [209]-[211]), an offender's failure to stand has been taken into account on sentence when assessing an offender's prospects of rehabilitation.

47 As noted in *R v Dirani (No. 7),* a similar issue arose in the context of a murder trial in *R v Stephen (No. 2)*, where it was submitted that the accused suffered from post-traumatic stress disorder and had applied to sit behind her counsel. That application was refused by Button J on the basis that no prejudice would be occasioned to the accused, and that there was *"nothing exceptional"* in that

[68] *R v Dirani (No. 7)* at [73]-[78]. The offence withstood a constitutional challenge in early 2018, and an appeal against conviction and sentence was dismissed in 2019: see *R v Moutiaa Elzahed (No 2)* [2018] NSWLC 13 (Huntsman LCM); *Elzahed v Kaban* [2019] NSWSC 670 (Harrison J); and *Elzahed v Kaban* [2019] NSWSC 1466 (Harrison J)

[69] *R v Dirani (No. 7)* at [78]-[82]

case, either individually or in combination such that it warranted a departure from the *"usual approach".*[70]

48 The decision in *R v Stephen (No. 2)* may be contrasted with *R v Lelikan (No. 1),*[71] where McCallum J (as her Honour then was) disagreed with the approach taken by Button J (although her Honour did not suggest that it was not open to his Honour to reach the decision to refuse the application). In her Honour's view, s 34 Criminal Procedure Act conferred an unfettered discretion on the trial Judge to determine the way the trial will be conducted, including the placement of the accused person.[72]

49 It should be noted that in *R v Lelikan (No. 1)* (as in *R v Stephen (No. 2)* but in contrast to *R v Dirani (No. 7)*) the Crown did not raise any objection to the accused (who was on bail) sitting behind Counsel in the body of the Court. Further, it does not appear that her Honour in *R v Lelikan (No. 1)* was taken to the decision in *R v Dirani (No. 7)*.

50 In *R v Lelikan (No. 1),* her Honour was sitting in Court 5.8 in the Downing Centre where *"there is a large column which stands between the Bench and the Bar and indeed between the Bar and the dock".* Her Honour noted that *"*[t]*he dock itself is a secure dock with a glass wall which can be opened to some extent but it is one of the more inconvenient docks for an accused person amongst the courts in which I have sat"*.[73]

Objection to the Crown tendering extremist ideology material

51 In *R v Dirani (No. 6)*,[74] the Crown sought to rely on extremist material found in the possession of and/or communicated by the accused to demonstrate that the accused, and other co-conspirators had shared extremist views and ideology. In addition, the Crown submitted that the material was relevant to establishing that the accused had an intention of doing acts in preparation or

[70] *R v Stephen (No. 2)* [2018] NSWSC 167 at [15]
[71] *R v Lelikan (No. 1)* [2018] NSWSC 1933
[72] *R v Lelikan (No. 1)* at [22]-[24]
[73] *R v Lelikan (No. 1)* at [15]
[74] *R v Dirani (No. 6)* [2018] NSWSC 891

planning for a terrorist act pursuant to a conspiratorial agreement. Such material was also said to be directly relevant to establishing the accused's state of mind at the time of the offending.[75]

52 The accused had proffered admissions that such material was found in his possession, and that it demonstrated his *"interest"* in the events occurring in the Middle East, radical Islam, jihad and other extremist material.[76] The accused submitted that alongside that admission, a written description of the material would suffice to illustrate the nature of the material. The accused submitted that the material would distract the jury from what was said to be the key issue in the trial (whether the Crown could establish an overt act) and its highly prejudicial effect on the jury warranted its exclusion under s.137 *Evidence Act 1995* (NSW).[77] The Crown submitted that the admission, combined with a written summary of the content, would not allow the jury to understand the content and nature of the material.[78]

53 In determining to allow the evidence, particular reliance was placed upon the decision of the Court of Criminal Appeal in *Elomar and Ors v R*. His Honour found that the evidence was *"highly probative"* with respect to the elements of conspiracy and the accused's statement of mind.[79]

54 Johnson J said:[80]

> [76] I do not accept the defence submission that the Crown case can be properly and fairly advanced before the jury by a combination of bare admissions as proffered for the Accused (see [50] above) and short word descriptions of some of the material. The Crown asserts that the Accused not only possessed this material because of an "interest" in it, but that he held extremist beliefs and that he was prepared to act on them by preparing to commit a terrorist act. The Crown is entitled to have the primary evidence before the jury to support these contentions.
>
> [77] Consideration of the summary prepared by Detective Senior Constable Eljarrar, in conjunction with the extremist material in electronic form, assists the process of understanding the evidence sought to be tendered by the

[75] *R v Dirani (No. 6)* at [43]-[46]
[76] *R v Dirani (No. 6)* at [50]
[77] *R v Dirani (No. 6)* at [49]-[51]
[78] *R v Dirani (No. 6)* at [47]
[79] *R v Dirani (No. 6)* at [75]
[80] *R v Dirani (No. 6)* at [76]-[82]; and [87]-[92]

Crown and the purpose for the tender. I do not consider that the 232-page summary is an appropriate or adequate substitute for the primary visual evidence contained in the images and films at times communicated by the Accused to other persons. It is fair to say that the material which the Crown seeks to tender supports the assertion that the Accused held views at relevant times including the following:

> (a) anti-establishment sentiments directed particularly at the police and the military;
>
> (b) that Islam throughout the world was under attack and there was a religious obligation to come to the defence of Islam and other Muslims;
>
> (c) that the killing of non-Muslims or "infidels" was religiously justifiable;
>
> (d) sentiments in favour of the attainment of martyrdom through violent jihad;
>
> (e) justification of extreme religious violence;
>
> (f) a view supporting and promulgating Islamic State propaganda; and
>
> (g) a view supporting and promulgating extremist Islamic preachers.

[78] An understanding of the material, and its suggested connection to Islamic State, will provide the jury with a clear and more direct understanding of what the Accused was thinking and intending at relevant times.

[79] I accept that the extremist material includes content which, through its imagery and tone, justifies, advocates or incites violent jihad. As the Crown notes, the material includes images designed to invoke both sympathy and anger in the Muslim viewer and is designed as well to create anger and hatred towards Australia and its allies.

[80] I accept the Crown submission that the extremist material may be used to rebut any defence advanced by the Accused that his views expressed in certain videos were not seriously held, but were merely philosophical, religious or political discussions concerning aspects of the doctrine of Islam: *Benbrika v R* at 654 [278].

[81] There is a close similarity between reasons for admitting material of this sort at other trials, and the reasons relied upon the Crown in the present trial. As Whealy J observed in *R v Baladjam (No. 50)* at [95]-[96], the jury is entitled to see a selected number of images to appreciate the full flavour of the way in which they would have been viewed by the Accused, with a written or verbal description of the images and their content not conveying effectively the exaltation displayed, and intended to be displayed, by the images themselves. Appropriate directions may be fashioned, as Whealy J observed, to explain the relevance of this material when it came to be tendered.

[82] The decision of Whealy J in *R v Baladjam (No. 50)* was upheld by the Court of Criminal Appeal in *Elomar v R* with the analysis undertaken by that

Court (at 406-417 [404]-[475]) having considerable utility on the present objection.

…

[87] The reasoning in *Elomar v R* and *Benbrika v R* applies, as well, to the extremist material in the present case and a conclusion that it should not be excluded under s.137 *Evidence Act 1995* (NSW).

[88] In *R v Ibrahim and Ors*, Fulford J (at [62]) rejected the suggestion that juries are incapable of approaching trials of alleged Muslim terrorists or evidence of this kind objectively and dispassionately. With respect, I agree with Fulford J as did Bongiorno J in *R v Benbrika (No. 15)* at [12].

[89] Whilst care is required with respect to evidence of this type, it would be a mistake to underestimate the capacity of a jury to view and assess responsibly evidence of this kind. Once again, as Fulford J observed at [61], introduction of this evidence *"is a necessary and proportionate step to enable the prosecution to set out all of the available, probative material"* which tends to prove the necessary mental state with respect to the Accused.

[90] Applying the relevant principles, I am satisfied that the extremist material is relevant to issues in the trial and that it has very substantial probative value. Its probative value relates in particular to the first and second elements of the first count. I am not satisfied that there is a real risk of unfair prejudice to the Accused by reason of the admission of the evidence. I am not satisfied that there is a real risk that the evidence would be misused by the jury, or be given more weight than it deserves or would divert the jury from its task or give rise to some illegitimate form of reasoning or be used in a way which is irrational or illogical: *Papakosmas v The Queen* at 327-328 [98]; *BJS v R* at 549-550 [51].

[91] I will direct the jury to view the material dispassionately, without emotion and without bias and that they should not reason that because the Accused may have possessed or published this material that he, for that reason, is guilty of the offences charged. I will give consideration as well to further directions to be given to the jury before the extremist material is tendered, with the directions referred to by Whealy J in *R v Baladjam and Ors (No. 50)* at [77]-[80] and by the Court of Criminal Appeal in *Elomar v R* at 409-411 [424]-[431] being of assistance in this respect.

[92] As indicated in my ruling on 5 June 2018, it is appropriate that the Crown limit the number of items to be tendered, in particular with respect to the Nasheeds. These items involve a level of sophisticated propaganda using verse, music and images. The material appears to have been professionally made by persons intent upon disseminating propaganda to be absorbed by those who may be susceptible to recruitment material of this type. The images are accompanied by chants and music which are no doubt designed to capture the attention of viewers, albeit in a constantly repetitive way. A few examples only of this class of material will suffice to give the jury a reasonable understanding of this evidence.

55 In accordance with the approach adopted in other trials, the Crown edited execution videos so that the executions were not depicted and the Court endorsed this approach.[81]

56 Similar evidence was led by the Crown in *R v Abbas, Chaarani & Mohamed*,[82] and as in *R v Dirani (No. 6)*, the defence objected to its tender. The Crown contended that the material was highly probative of the accused's state of mind and that viewing the content was necessary to fully appreciate the material as the accused would have seen and absorbed it.[83] Beale J ruled that the evidence was admissible, and that there was no unfair prejudice that could not be cured by direction.[84] Beale J took the same approach to the execution videos[85] as was adopted in *R v Dirani (No. 6)*:

> In relation to the danger of unfair prejudice, intermediate appeal courts in *Elomar* and *Benbrika* were of the view that if properly directed and cautioned against emotive responses, juries are robust enough to receive such material and use it for a proper purpose. Whilst I acknowledge that these videos were very confronting, I shared the confidence of these higher courts in the capacity of jurors to cope with this kind of material, especially if the most brutal parts of the videos are redacted. To that end I ruled that P's permission to play the videos to the jury was conditional on P redacting, inter alia, images and audio of actual executions and their aftermath …

57 In *R v Taleb*,[86] Hamill J allowed the Crown to adduce evidence of extremist material in the possession of the accused (who was charged with doing acts preparatory to engaging in a hostile activity in a foreign country contrary to ss.119.1 and 119.4 of the Code).[87] However, his Honour declined to allow the Crown to play any execution video even with the execution itself being edited out.[88]

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[81] *R v Dirani (No. 6)* at [71]; *Elomar v R* at [404]ff
[82] *R v Abbas, Chaarani & Mohamed* [2019] VSC 855
[83] *R v Abbas, Chaarani & Mohamed* at [42]
[84] *R v Abbas, Chaarani & Mohamed* at [49]-[62]
[85] *R v Abbas, Chaarani & Mohamed* at [62] and [81]
[86] *R v Taleb* (2019) 344 FLR 82; [2019] NSWSC 241
[87] *R v Taleb* at [141]-[161]
[88] *R v Taleb* at [154]-[159]

Whether members of the public may be required to have their faces uncovered when sitting in the public gallery in a terrorism trial

58 In *The Queen v Chaarani (Ruling 1)*,[89] Beale J held that spectators in the public gallery were required to have their faces uncovered. The wife of a co-accused, Ms Al Qattan, wanted to attend Court to support her husband, but wished to wear a nikab (or *niqab*), a veil that *"completely covers the head and face except for an opening for the eyes"*. Her husband, Mr Chaarani, was one of three accused charged with conspiring to detonate an improvised explosive device(s) and/or using weapons or firearms at Federation Square and other landmarks in the Melbourne CBD.[90]

59 Beale J had previously indicated that spectators *"must have their faces uncovered, chiefly for security reasons"*.[91] His Honour was invited to reconsider an application to allow the co-accused's wife to observe the trial whilst wearing a nikab.

60 It should be noted that in Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) applies, which founded a submission from the co-accused's wife that her right of religious freedom and her right to participate in public life had been breached.[92]

61 Central to her argument was that she did not pose a security risk, and was willing to undergo routine scanning as well as removing her face covering to security staff so that they could ascertain her identity. Further, she undertook to abide by any directions given by the Court to *"uphold the good order and management of the proceedings"*.[93] His Honour stated:[94]

> [8] I accept that by revealing her face to security staff at the entrance of the court building, and presumably showing photograph identification at the same time, her identity can be determined before she takes her place in the public gallery. This goes some way to addressing security concerns, but security is more than just a matter of identification, as will be discussed later. Further,

[89] *The Queen v Chaarani (Ruling 1)* [2018] VSC 387
[90] *The Queen v Chaarani (Ruling 1)* at [1]
[91] *The Queen v Chaarani (Ruling 1)* at [2]
[92] *The Queen v Chaarani (Ruling 1)* at [3]-[4]
[93] *The Queen v Chaarani (Ruling 1)* at [4]
[94] *The Queen v Chaarani (Ruling 1)* at [8]-[9] and [11]

> this is a joint trial of three Muslim accused. It is my understanding that Ms Al Qattan is not the only person who wishes to attend court with her face covered by a nikab: if Ms Al Qattan is permitted to do so, it is likely that permission would have to be extended to others. Once there are multiple spectators in the public gallery wearing nikabs and traditional Islamic dress, working out who was who if something happened in court might not be a simple matter, especially as such dress tends to be very similar. As for the weapon scanners, which every spectator passes through, they do not eliminate all security concerns: serious misconduct can occur in a court room without the need for a weapon.
>
> [9] … while Ms Al Qattan professes a willingness to abide by any directions given "to uphold the good order and management of the proceedings," no particular directions or measures are suggested by the applicants in their written submissions. In my view, it would be undesirable and discriminatory to segregate spectators wearing nikabs and/or arrange for extra security staff to sit near them to monitor them. Nor would it be an appropriate use of limited court security resources, especially in a lengthy trial. Such measures would, in my view, be more restrictive of rights than a requirement that spectators have their faces uncovered.
>
> …
>
> [11] … it is asserted that Ms Al Qattan is not a security risk. But persons closely associated with an accused have a larger stake in the proceedings than the casual observer and will be subjected to considerable stress where the charges are serious, as is the case here. Ms Al Qattan, and other supporters of the accused men who also wish to wear nikabs in court, may be able to handle the stress and act with restraint. But they may not. I consider that there is a risk that should not be ignored.

62 His Honour did not find the cases relied on by counsel to be of any great assistance, as none *"directly address the issues with which* [he was] *concerned"*.[95] After conducting a short review of the case law, his Honour said:[96]

> [17] In summary, these cases suggest that witnesses may wear a nikab if they are not giving contested evidence and that an accused, where identity is not in issue, may wear a nikab except when testifying. If participants in court proceedings may wear nikabs in certain circumstances, then it follows, so the argument goes, that spectators in the public gallery may do so. But there is at least one point of distinction. An accused is compelled to be present in court and, more often than not, witnesses for the prosecution are subpoenaed to attend court. Ms Al Qattan is under no legal compulsion to attend court.

63 Beale J went on to observe that because of the very character of this trial, incidents may *"happen from time to time"* which, although rare, could erupt in

[95] *The Queen v Chaarani (Ruling 1)* at [12]
[96] *The Queen v Chaarani (Ruling 1)* at [17]

physical violence. Further, *"things said or done by spectators may necessitate the discharge of a jury"*.[97] His Honour stated that *"deterrence, identification and proof"* of misbehaviour in Court was *"served by a requirement that spectators in the public gallery have their faces uncovered"*, especially where there may be multiple spectators wearing similar clothing.[98]

64 His Honour concluded that it was a reasonable limitation, taking into consideration the provisions in the Charter, to require spectators in the public gallery to have their faces uncovered. His Honour stated:[99]

> [23] It is not good court management, in my view, to adopt a reactive approach, that is, to allow spectators to have their faces covered but eject them, and refuse them re-entry, if they are detected misbehaving. First, prevention is better than cure. Second, it is naïve to think that misbehaviour will always be immediately detected by court security staff. A person to whom something improper is said or done may be too stunned or frightened to raise the alarm immediately, enabling the culprit to get away. Or there may not be sufficient court security staff on hand. Court security resources are limited and one cannot always predict which cases will generate problems in the public gallery.
>
> [24] A requirement that spectators have their faces uncovered is not to force anyone to act immodestly. First, the exposure of one's face in a court room cannot reasonably be viewed as an immodest act: subjective views to the contrary cannot rule the day, or the management of a court room. Second, if someone feels strongly that it would be improper for them to uncover their face in court, they can choose not to attend. If that is Ms Al Qattan's choice, arrangements will be made for live streaming of the proceedings to a remote facility within the court building so that she can still view the trial.
>
> [25] Open justice, religious freedom and the right to participate in public life are fundamental values which must be accorded full respect in our society and in this court. But no one could sensibly claim that these principles and rights brook no limitations.

65 In support of his conclusion, his Honour directly cited the *Explanatory Note on the Judicial Process and Participation of Muslims* by the Australian National Imams Council, which has previously been mentioned above at [43]-[44].

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[97] *The Queen v Chaarani (Ruling 1)* at [19]
[98] *The Queen v Chaarani (Ruling 1)* at [20]-[22]
[99] *The Queen v Chaarani (Ruling 1)* at [23]-[25]

Whether charges exposed the accused to double jeopardy – the Crown put to an election of charges

66 In *R v Azari (No. 1),*[100] the accused was charged with two offences, arising out of a lawfully intercepted telephone conversation with Mohammad Ali Baryalei, a senior Australian figure in Islamic State. In that call, it was alleged that the accused and Mr Baryalei discussed a plan for the murder of a random member or members of the public. The accused was charged with an offence under s.101.6(1) of the Code and a State offence of conspiracy to murder under s.26 *Crimes Act 1900* (NSW). The indictment read:

> **Count 1:** On 15 September 2014, at Parramatta, in the State of New South Wales, [the accused] did an act in preparation for, or planning, a terrorist act or acts, namely did participate in a telephone conversation with another person, namely Mohammad Ali Baryalei or another unknown person, in preparation for, or planning, a terrorist act or acts.
>
> **Count 2:** On 15 September 2014, at Parramatta, in the State of New South Wales, [the accused] did conspire and agree with another person, namely Mohammad Ali Baryalei or another unknown person, to murder a person or persons unknown.

67 These counts were not brought in the alternative, and the Crown submitted that it would be open to the jury to convict on both counts. On a pre-trial application, the accused argued that the indictment ought be temporarily stayed until such a time that the Crown elects upon which of the two counts it wished to proceed because in its present form, it would expose the accused to double jeopardy.[101] It was submitted, *inter alia,* that each count was an allegation that he entered into an agreement to commit murder, notwithstanding that the elements of the offences were not identical.[102] Further, it was submitted that all of the evidence that the Crown intended to lead to prove the conspiracy to murder charge was identical to that being led to prove the terrorism offence; and that all of the criminality in the conspiracy to murder charge was subsumed in the criminality of the terrorism offence.[103]

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[100] *R v Azari (No. 1)* (2017) 274 A Crim R 450; [2017] NSWSC 404
[101] *R v Azari (No. 1)* at [4]-[8]
[102] *R v Azari (No. 1)* at [66]
[103] *R v Azari (No. 1)* at [68]-[71]

68 The Crown submitted that there was *"extra criminality"* in the conspiracy to murder count because it required an actual intention to murder, whereas the terrorism count only required an intention to do an act in planning or preparation for a terrorist act – *"that is, Count 1 does not require an actual intention that a terrorist act be committed".*[104]

69 N. Adams J noted the Crown concession that the particular act of terrorism relied on was murder, and the act done in preparation or planning of that act was the telephone call, which included an agreement to murder.[105]

70 Her Honour adopted the question posed in *Nahlous v R*,[106] namely whether the agreement to kill one or more persons contemplated by the conspiracy to murder charge was a *"separate act of criminality that warrant*[s] *a separate charge and a separate penalty"* from the criminality covered by the Crown brought the terrorism charge.[107]

71 After referring to *Nahlous v R,* her Honour concluded that the Crown must elect which of the two counts it wished to proceed on, and that the indictment would be temporarily stayed to allow for that to occur. Her Honour said:[108]

> [93] … On the particular facts of this case, I can see no practical difference between comparing the relevant *"elements"* of each count and comparing the relevant *"criminality"* of each count for the purposes of determining whether the accused faces double jeopardy …
>
> [97] Having regard to the relevant principles and applying them to the particular facts of this case, I am satisfied that Count 1 (which carries life imprisonment) covers such broad conduct that it is capable of encompassing an agreement to kill and thus encompasses the criminality inherent in count 2. I make this finding on the basis that, although the elements of the offences are different, the way in which the Crown brings its case in respect of Count 1 leaves no actual additional criminality to be punished by that count.
>
> [98] The grant of a stay is an *"exceptional remedy",* yet the Court should not hesitate to grant it should a proper foundation for such relief be made out: per Johnson J in *R (Cth) v Milne* at [120] … Implicit in my conclusion that the current indictment exposes the accused to double jeopardy is a conclusion that the inherent power of this Court to stay the indictment should be

[104] *R v Azari (No. 1)* at [74]
[105] *R v Azari (No. 1)* at [75]-[78]
[106] *Nahlous v R* (2010) 77 NSWLR 463; [2010] NSWCCA 58 at [17]
[107] *R v Azari (No. 1)* at [82]
[108] *R v Azari (No. 1)* at [93]-[98]

> exercised until such time as the Crown elects upon which count it wishes to proceed. Given the way in which the Crown puts its case, it would be unsurprising if the election is made to proceed solely on Count 1, which, as I have found, encompasses all of the criminality of Count 2. That decision is nonetheless obviously one for the Crown.

72 Following this judgment, the Crown elected to proceed on the terrorism offence under s.101.6(1) of the Code.

Application for dismissal of conspiracy charge

73 Sections 11.5(6) and (8) of the Code provide:

> **11.5 Conspiracy**
> (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
> …
> (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

74 In *R v Dirani (No. 22)*,[109] the accused was charged with an offence of conspiring with Raban Alou, Milad Atai and divers others to do acts in preparation for a terrorist act(s) contrary to s.11.5(1) and 101.6(1) of the Code. In short, it was said that the accused was a co-conspirator in the events leading up to the terrorist killing of Mr Curtis Cheng outside NSW Police Headquarters in Parramatta, NSW, and that he had assisted in sourcing the supply of a firearm and conducting counter-surveillance.

75 At the conclusion of the Crown case,[110] the accused made two applications to the Court, the first to dismiss the conspiracy charge pursuant to s.11.5(6), and the second, to direct the jury to return verdict of not guilty. Only the former application will be discussed in this paper.

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[109] *R v Dirani (No. 22)* [2018] NSWSC 1155

[110] Immediately before the trial, the accused foreshadowed an application for dismissal of the conspiracy charge at the conclusion of the Crown's opening address. The Court determined that such an application, if pressed, could be made at the close of the Crown case: *R v Dirani (No. 1)* [2018] NSWSC 880. The Court also observed that such an application ought to have been made well in advance of the trial, as this may have allowed the Crown, if the application was successful, to consider whether to proceed on a substantive charge: *R v Dirani (No. 22)* at [21]-[25]

76 The accused argued that a substantive charge would be able to *"properly capture the scope of the Accused's conduct in the form of a charge of aiding and abetting the commission of an act in preparation for a terrorist act contrary to ss.11.2 and 101.6 Criminal Code (Cth)"* and that the Crown had gained an unfair advantage by charging a conspiracy offence as the evidence of the actions of his alleged co-conspirators would be admissible in his trial.[111] It was also argued that *"the vast bulk of the extremist material would not have been admissible"* had the accused been prosecuted under ss.11.2 and 101.6.[112]

77 The Crown argued that the criticisms by the High Court of the use of conspiracy charges in *The Queen v Hoar*[113] did not arise in this case; and that there was no other *"sufficient and effective substantive charge to accommodate the circumstances of the accused's case …"*.[114]

78 Johnson J referred to the *"interests of justice"* test in s.11.5(6), and said:[115]

> [17] The background to s.11.5(6) and the operation of the provision have been considered in a number of decisions including, in the context of terrorist prosecutions, *R v Baladjam and Ors (No. 4)* (2008) 270 ALR 106; [2008] NSWSC 726 (Whealy J) and *Elomar and Ors v R* (2014) 300 FLR 323; [2014] NSWCCA 303. Further reference will be made to these decisions later in this judgment.
>
> [18] In *The Queen v LK* (2010) 241 CLR 177; [2010] HCA 17, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed at 223 [103] that, according to the Report of the Model Criminal Code Officers Committee, the draft clauses which corresponded to s.11.5(6) and (8) *"were intended to provide procedural restrictions in the light of a concern that prosecutions for the crime of conspiracy under the pre-existing law had been susceptible of abuse"*, with reference being made as well to *The Queen v Hoar* (1981) 148 CLR 32; [1981] HCA 67 at 38.
>
> [19] The provision requires the application of an *"interests of justice"* test. Statutory provisions which require a court to have regard to the *"interests of justice"* are found in a range of different contexts. It has been said that the words *"in the interests of justice"* are words of the widest possible reference and that "there could scarcely be a wider judicial remit": *Herron v Attorney*

[111] *R v Dirani (No. 22)* at [32]
[112] *R v Dirani (No. 22)* at [33]
[113] *The Queen v Hoar* (1981) 148 CLR 32; [1981] HCA 67
[114] *R v Dirani (No. 22)* at [40]
[115] *R v Dirani (No. 22)* at [17]-[20]

> *General for NSW* (1987) 8 NSWLR 601 at 613; *Chapman v Gentle* (1987) 28 A Crim R 29 at 32-33.
>
> [20] It is clear that the "interests of justice" extend beyond the interests of an accused person: cf *B v Gould and Director of Public Prosecutions* (1993) 67 A Crim R 297 at 303; *Osman v R* [2006] NSWCCA 196 at [22]. Where the interests of justice were to be considered in the context of a discretionary power to extend a time limit to appeal against sentence, the High Court of Australia observed that the interests of justice will often pull in different directions, involving consideration of the interests of the appellant as well as the interests of the Crown and the community including the adverse effect on victims: *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37 at 614 [32].

79 His Honour recited parts of the decision of Whealy J (as his Honour then was) in *R v Baladjam and Ors (No. 4)*,[116] where a similar application under s.11.5(6) had been refused, and referred to the decision of the Court of Criminal Appeal in *Elomar and Ors v R,*[117] where Whealy J's decision was endorsed as being correct.

80 Johnson J said:[118]

> [50] The interests of justice involve a wide range of considerations including the community interest in the prosecution of persons for alleged serious crimes and the proper use by prosecutors of the charge of conspiracy. The fact that an independent statutory prosecutor such as the Commonwealth Director of Public Prosecutions has elected to prosecute the Accused for conspiracy, and has given express consent under s.11.5(8) *Criminal Code* (Cth), are significant factors to be taken into account.
>
> [51] The principal criticism of the use (or overuse) of conspiracy charges under the Hoar principles arises where a conspiracy charge is brought in conjunction with substantive offences prosecuted either in the same or a different indictment. In cases of that type, it may be said more readily that a prosecutor may be seeking to obtain a form of prosecutorial advantage because of the different rules which operate with respect to a conspiracy charge concerning the admissibility of evidence of the conduct of co-conspirators.
>
> [52] The present case is not an example of a prosecution of that type. Here, the Accused is charged with conspiracy with an alternative substantive charge under s.51(1A) *Firearms Act 1996* (NSW). There is no other substantive charge brought against the Accused, and certainly not a substantive charge under the *Criminal Code* (Cth).

[116] *R v Baladjam and Ors (No. 4)* (2008) 270 ALR 106; [2008] NSWSC 726
[117] *Elomar and Ors v R* at [492]-[495] and [500]
[118] *R v Dirani (No. 22)* at [50]-[53]

> [53] In approaching the s.11.5(6) application in this case, it should be kept in mind that the Accused accepts that a conspiracy to commit acts in preparation for a terrorist act or acts had occurred with Raban Alou, Milad Atai and Farhad Mohammad being parties to it. The issue in the trial, in effect, is whether the Crown can prove to the requisite standard that the Accused was a party to this conspiracy.

81 Johnson J distinguished the facts in *The Queen v Hoar* from the charges which confronted the accused, and observed that the evidence against the accused and the alleged co-conspirators *"lends itself to the appropriate use of a conspiracy charge"*.[119]

82 In the course of refusing the application, Johnson J said:[120]

> [58] I am not persuaded that prosecution for a substantive offence would be a sufficient and effective charge in the circumstances of this case, let alone that the formation of such a view ought lead the Court to reach the discretionary determination that the interests of justice require the Court to dismiss the conspiracy charge contained in the first count on the indictment.
>
> [59] I do not accept the submission for the Accused that the vast bulk of the extremist material would not have been admissible in a prosecution of the Accused for a substantive offence of aiding and abetting an act in preparation of a terrorist offence. One of the main purposes for admitting this material in the present trial related to the element of the first count involving the state of mind of the Accused (*R v Dirani (No. 6)* at [73]-[75], [80]) as well as the "terrorist act" component of a substantive offence as defined in s.100.1 *Criminal Code* (Cth). This evidence would have been admissible in a prosecution of the Accused for a substantive offence of the type identified in the submissions for the Accused.
>
> [60] I do not accept the submission for the Accused that the fact that a terrorist act was carried out with the murder of Mr Cheng operates to render the prosecution of a conspiracy count inappropriate … The prosecution of persons for conspiracy may be both open and appropriate despite the fact that a complete offence has been committed.
>
> [61] I do not accept that the Crown has obtained any unfair advantage in prosecuting the Accused for conspiracy as opposed to a substantive offence. The use of a conspiracy charge is clearly appropriate in this case.

[119] *R v Dirani (No. 22)* at [57]
[120] *R v Dirani (No. 22)* at [58]-[61]

No rule that a husband and wife cannot be guilty of conspiring with each other alone

83 In *R v Bayda; R v Namoa (No. 3)*,[121] the accused applied for an order to permanently stay the charge of conspiracy. The accused argued that at the time of the alleged conspiracy, they were married, and at common law, and under s.11.5 of the Code, the crime of conspiracy cannot be committed by a husband and wife alone.[122]

84 Fagan J stated that where the immunity applied in common law jurisdictions, it would only be engaged if a marriage between the alleged conspirators had been solemnised before the conspiracy was entered into.[123] The Crown did not concede that the accused were married at the relevant time.[124] The accused led unchallenged evidence of a marriage ceremony conducted on 30 December 2015, which was said to be *"effective to constitute them man and wife according to the beliefs of Sunni Islam"*.[125]

85 In the result, his Honour did not determine the question whether the marriage had been solemnised, instead, holding that if it was necessary to do so, it would have been a question for the jury, with detailed directions on the law (as to what would constitute such a marriage).[126]

86 Fagan J proceeded to determine the substantive question of whether a common law immunity of spouses from charges of conspiracy existed in Australia. His Honour held that the immunity did not exist in the common law of Australia.[127]

87 In the event that he was wrong, his Honour went on to consider whether s.11.5(6) of the Code provided any scope for the application of the immunity.

[121] *R v Bayda; R v Namoa (No. 3)* (2018) 274 A Crim R 1; [2018] NSWSC 1381
[122] *R v Bayda; R v Namoa (No. 3)* at [1] and [17]
[123] *R v Bayda; R v Namoa (No. 3)* at [18]-[19]
[124] *R v Bayda; R v Namoa (No. 3)* at [20]
[125] *R v Bayda; R v Namoa (No. 3)* at [21]
[126] *R v Bayda; R v Namoa (No. 3)* at [18]-[20]
[127] *R v Bayda; R v Namoa (No. 3)* at [78]

His Honour concluded that such a rule, if it existed, was not incorporated in the codification of the law of criminal conspiracy in s.11.5(6) of the Code.[128]

The Crown does not need to establish all the particularised acts alleged in the indictment

88 In *R v Taleb (No. 4)*,[129] Hamill J refused an application for a directed verdict of acquittal made on the basis that the jury needed to be satisfied of all seven particularised acts in the indictment said to have constituted the acts preparatory to a foreign incursion offence under s.119.4 of the Code. His Honour held, consistent with *Pratten v R*,[130] that the case would be put to the jury on the basis that it must be satisfied of at least one act, but not all, of the particulars in the indictment.[131] His Honour continued:[132]

> [2] … It will be emphasised that the jury needs to be unanimous with respect to the act (or acts) relied on, and this includes being satisfied that it was a preparatory act, and that the accused intended it to be so. In respect of each of those three matters – the two physical elements and the fault element – the jury will be required to be unanimous in relation to the same act or acts.
>
> [3] In spite of the use of the conjunctive "and" in the indictment, which is unfortunate, the acts nominated are really particulars of the "conduct" said to contravene s 119.4 of the *Criminal Code Act 1995* (Cth). Accordingly, the case will not be put to the jury on the basis that the prosecution needs to prove all seven of the acts. Rather, the prosecution is required to prove that there was conduct, that the conduct was preparatory to committing an offence under s 119.1 of the *Criminal Code*, and that the preparatory conduct was done with the requisite fault element (that is, following an amendment to the indictment, intention).

[128] *R v Bayda; R v Namoa (No. 3)* at [78]
[129] *R v Taleb (No. 4)* [2019] NSWSC 398
[130] *Pratten v R* [2014] NSWCCA 117 at [37]-[40]
[131] *R v Taleb (No. 4)* at [2]
[132] *R v Taleb (No. 4)* at [2]-[3]

Application for a Shepherd direction

89 In *R v Dirani (No. 20),*[133] the accused made an application that the jury be given a direction in accordance with *Shepherd v The Queen*.[134] It was asserted that there was an indispensable intermediate fact which the Crown needed to establish beyond reasonable doubt in order to convict the accused of the conspiracy charge, namely that the Crown must prove that the accused was acting as a *"lookout"* or *"conducting counter surveillance activities for Raban Alou"*.[135] As part of the Crown case, video evidence was played to the jury which showed the accused and Alou travelling together, although in separate vehicles, to various locations in South Western Sydney, with Alou meeting Talal Alameddine on several occasions on the afternoon of 2 October 2015.[136]

90 Johnson J concluded that even without the *"lookout"* or counter-surveillance aspects, there was a case to go to the jury in the sense described by Simpson J (as her Honour then was) in *R v Davidson*.[137] His Honour accepted that the Crown case was a *"strands in the cable case"* and not a *"link in the chain case"* which called for a Shepherd direction.[138]

91 It was noted that the Crown case was largely circumstantial, and *"operate*[d] *in overlapping ways"*:[139]

> [16] A live issue in the trial is why the Accused would accompany Alou, travelling in separate vehicles, to different locations in western Sydney on the afternoon of 2 October 2015, in what appears, on its face, to be an odd and unusual course of conduct.
>
> [17] The Crown's case operates in overlapping ways. For example, if the Accused himself believed in violent jihad, this may shed light on why he was accompanying Alou during critical events, as Alou prepared for the commission of a terrorist act by use of a firearm to advance his own belief in violent jihad.

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[133] *R v Dirani (No. 20)* [2018] NSWSC 1153
[134] *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56
[135] *R v Dirani (No. 20)* at [2]-[5]
[136] *R v Dirani (No. 20)* at [13]-[15]
[137] *R v Davidson* (2009) 75 NSWLR 150; [2009] NSWCCA 150 at [74]; and *R v Dirani (No. 20)* at [9]
[138] *R v Dirani (No. 20)* at [7]-[8]
[139] *R v Dirani (No. 20)* at [16]-[20]

> [18] This is a case where the jury will be directed to consider the circumstantial evidence as a whole and not piecemeal, in accordance with the principles of *The Queen v Hillier* (2007) 228 CLR 618; [2007] HCA 13 at 638 [48] and *The Queen v Baden-Clay* (2016) 258 CLR 308; [2016] HCA 35 at 333 [77].
>
> [19] The jury will be directed that it is not necessary to consider whether any particular fact or circumstance is proved beyond reasonable doubt. Rather, the jury will be directed to consider whether the elements of the relevant offence have been proved beyond reasonable doubt, by reference to the totality of the evidence.
>
> [20] This is not a case where a *Shepherd* direction is appropriate …

Application for alternative charges to terrorism to be left to the jury

92 In *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9),*[140] counsel for each accused made applications to leave State offences of arson and attempted arson to the jury in the alternative to the Code offences of engaging in an act of terrorism, and attempting to engage in an act of terrorism.[141] The terrorism charges flowed from an alleged attempt to burn down a Shia mosque and the later successful accomplishment of that task.

93 Tinney J had originally raised this issue with the Crown at a pre-trial hearing and the Crown indicated that a decision had been made not to include arson on the indictment. At that point, no accused applied for such offences to be included as a statutory alternative.[142]

94 The defence relied ss.239 and 240 *Criminal Procedure Act 2009* (Vic) which relevantly provided:

> **239 Alternative verdicts on charges other than treason or murder**
> (1) On a trial on indictment for an offence other than treason or murder, if the jury finds the accused not guilty of the offence charged but the allegations in the indictment amount to or include, whether expressly or impliedly, an allegation of another offence that is within the jurisdiction of the court, the jury may find the accused guilty of that other offence.

[140] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* [2019] VSC 520
[141] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [2]
[142] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [5]

> **240 Judge may order that guilt in respect of alternative offences is not to be determined**
> Despite section 421(1) of the *Crimes Act 1958* and section 239, if the trial judge considers that it is in the interests of justice to do so, the judge may order that the guilt of the accused in respect of all or any of the other offences of which the accused may be found guilty is not to be determined at the trial.

95 Counsel for Chaarani conceded that the only issue in the trial was whether his client's actions amounted to a terrorist act with his case being that the acts were committed for *"advocacy, protest, dissent or industrial action"* (s.100.1(3)(a) of the Code). His client had admitted to being the person involved in setting fire to the Shia mosque on both occasions, that such acts were committed to advance a political, and/or religious cause and to intimidate a section of the community.[143] The submission advanced was that the accused had committed the offences of attempted arson and arson, and this should be left to the jury so as to prevent the jury from making an *"all-or-nothing decision"* which *"plac*[ed] *them between a rock and a hard place, as the accused's admitted conduct showed him to have committed serious offences"*.[144] In resisting the application, the Crown pointed out that there was in fact, *"significant discontinuity"* between the elements of the terrorist offences and the proposed, alternative, arson offences.[145]

96 Tinney J refused the defence applications, holding that arson could not be an *"included offence"* under s.239.[146] In reaching this conclusion, his Honour said:[147]

> [51] Under the law which applies in this State, arson could not be left as an alternative under s 239 unless it is a crime which is 'necessarily included' in the offence of engaging in a terrorist act. The Court of Appeal in *Reid* stated that:
>
> > ...an offence is not an included offence unless one can say of it that the elements of every instance of the charged offence necessarily include all the elements of the included offence.
>
> [52] It is perfectly plain, looked at in this way, that there is no way that arson could be considered to be an included offence in respect of the crime of

[143] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [6]
[144] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [18]
[145] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [50]
[146] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [55]
[147] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [51]-[53]

> engaging in a terrorist act. To name just two fundamental differences, not every terrorist act involves the causing of damage, less still, the doing so by the use of fire, and in a terrorist act involving damage to property, there is no requirement that the property 'belong to another' as required in the case of arson.
>
> [53] The reality is that these are entirely different offences, consisting of entirely different elements. [The Crown] colourfully described Federal offences on the one hand and State offences on the other as 'children of different legislatures'. That is an apt description, and it can readily be seen that the focus and structure of the crimes of engaging in a terrorist act and arson are entirely different (citations omitted).

97 For completeness, Tinney J considered the exercise of discretion under s.240. His Honour considered the lateness of the timing of the applications, the real prospect of the Crown case *"suffer*[ing] *in the eyes of the jury"*, and the undesirability of giving the jury additional directions *"with completely different elements"*.[148] His Honour then considered the defence submission that the jurors were being forced to make an *"all-or-nothing decision*, and said:[149]

> [71] The main justification … in support of the alternatives being left was to avoid the prospect of the jury being put in the invidious position of being confronted with material showing that the accused Chaarani was a potentially dangerous person who had admittedly committed a serious criminal offence, being unenthusiastic about acquitting him, and wrongly convicting him of the terrorist crimes …
>
> [72] To my mind, these submissions credited the jury with no integrity, and no intelligence. I believe that the jurors would be well capable of carrying out their duty consistent with the oaths they had sworn or affirmations they had made to give true verdicts according to the evidence. Particularly in light of the obvious seriousness, to their minds, of the crimes alleged, there is no reason whatsoever to suppose that any of them would have been willing to join in a verdict of guilty in respect of any accused unless satisfied beyond reasonable doubt that the accused in question was guilty.

98 This, alongside the absence of any prejudice to any of the accused, militated against the exercise of discretion under s.240.[150]

[148] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [59]-[70]
[149] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [71]-[72]
[150] *R v Mohamed, Chaarani & Moukhaiber (Ruling No. 9)* at [73]-[75]

Application to discharge jury on the basis of adverse publicity arising from other proceedings for terrorism offences

99 In *R v Azari (No. 2),*[151] the accused pleaded not guilty to a charge that he did an act in preparation for, or planning, a terrorist act or acts. During the course of his trial, counsel for the accused made an application for the discharge of the jury by reason of the prejudicial media coverage of the committal proceedings of the three men charged with terrorism offences in relation to the shooting of Curtis Cheng.[152]

100 The Crown case against Azari was that he had participated in an intercepted conversation with Mohammad Ali Barylaei, where they discussed a plan to kill a random member or members of the public. Mr Barylaei was a senior Australian figure in Islamic State.[153] It was part of the Crown case that the accused was a member of a group – *"Shura"* (Arabic for *"consultative council"*) – sympathetic to Islamic State, and willing to be involved in terrorist activity in Australia.[154] Two of the four men charged in relation to the murder of Mr Cheng were said to be members of this Shura.[155]

101 The accused relied upon various news clippings which showed extensive coverage of the committal proceedings. The clippings reported the attempts to secure a firearm by the various alleged co-conspirators, and showed images and footage of events in the Parramatta Mosque and in locations in Western Sydney where the supply of a firearm was said to have taken place, as well as that of a letter found on Farhad Jabar (Mr Cheng's killer) when he himself was killed.[156] The Crown opposed the application for discharge,[157] but conceded that there was *"some factual connections"* between the material reported and the facts in dispute in the trial, and that there would be a *"potential for slight prejudice"* to the accused.[158]

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[151] *R v Azari (No. 2)* [2017] NSWSC 515
[152] *R v Azari (No. 2)* at [1]-[2]
[153] *R v Azari (No. 2)* at [3]
[154] *R v Azari (No. 2)* at [4]-[5]
[155] *R v Azari (No. 2)* at [14]
[156] *R v Azari (No. 2)* at [17]-[21]
[157] *R v Azari (No. 2)* at [16]
[158] *R v Azari (No. 2)* at [28]-[30]

102 N. Adams J accepted that the correct test to be applied was to be found in *R v Elomar & Ors [No. 12]*.[159]

103 Her Honour concluded that there was a *"reasonably strong connection"* and *"significant link"* between the reporting and the issues in the trial, given the *"features common to both"*.[160] Her Honour referred to the involvement in the Shura; the meetings at Parramatta Mosque which involved members of the Shura; intercepted calls which referred to the Shura and the possibility that the jury may infer that the accused was somehow involved in the Curtis Cheng shooting as he was part of the same Shura (even though this was not the case). Her Honour also noted that members of the Shura were later involved in the murder of Mr Cheng which was similar to that planned in the intercepted phone call. This was particularly damaging in the context of the key issue in the present trial, being the accused's assertion that there was no intention that any terrorist act would in fact take place.[161]

104 Her Honour considered whether there was a real and not fanciful risk that the accused could not receive a fair trial because of the publicity, and said:[162]

> [42] It is to be accepted that during any trial for terrorism offences there will be frequent publicity of terrorist acts committed by persons sympathetic to the cause of Islamic State or some other terrorist organisation, whether in Australia or around the world. It is also to be accepted that such general publicity would not usually prejudice the accused's trial. There are further terrorist trials to be prosecuted by the Commonwealth in the coming year. I have already ruled that evidence that the alleged terrorist Agim Kruezi was arrested in Brisbane shortly before the 15 September 2014 conversation is admissible, as is the fact that he was found with a weapon at the time of his arrest. That is relevant because the accused referred to it in the 15 September 2014 conversation. It is to be anticipated that there will be intense coverage of that trial as well.
>
> [43] The mere fact of publicity of other terrorism trials would be insufficient to lead me to conclude that there would be a real risk of prejudice to the accused's trial. Nor would pre-trial publicity of this case be of itself prejudicial. The recent reportage of the committal will still be able to be seen online well into the foreseeable future and that does not mean that there would be any prejudice associated with a trial held in the future. I have given the jury strong directions about ignoring media coverage at the beginning of the trial and I

[159] *R v Azari (No. 2)* at [33]; and *R v Elomar & Ors [No. 12]* [2008] NSWSC 448 at [75]-[77]
[160] *R v Azari (No. 2)* at [34] and [40]
[161] *R v Azari (No. 2)* at [35]-[39]
[162] *R v Azari (No. 2)* at [42]-[45]

have also provided written directions to that effect. I would have given further direction at the end of the trial.

[44] I have had regard to the fact that I must proceed on the basis that juries follow legal directions given to them. In a different context, in *Gilbert v The Queen* (citation omitted), Gleeson CJ and Gummow J qualified that rule to some extent when their Honours observed:

> "The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice".

[45] I have paid close attention to the jury throughout the trial. They appear to be an attentive jury who have followed the trial and the particular directions that I have given them thus far …

105 Her Honour concluded:[163]

[48] I have had regard to the observations of Johnson J in *R (Cth) v Petroulias (No. 19)* (citation omitted) concerning an application for a discharge of the jury based on pre-trial publicity directed at persons in another trial involving similar issues. His Honour observed:

> "…A question remains in each case whether the intensity, proximity and nature of the media coverage of the particular accused, or the particular circumstances, is such as to occasion the risk of unfairness to the accused so as to prejudice the accused's right to a fair trial for a time after the publicity. A judgment is called upon in each case having regard to the particular facts which are proved."

[49] I am of the view that the intensity, proximity and nature of the relevant media coverage are highly problematic in this matter …

[51] Overall, having regard to the significance of the reported material to the facts in issue in this trial, the dramatic nature of the relevant coverage, and the timing of the coverage vis-a-vis the provision to the jury of copies of Exhibit L, I am satisfied that no direction could cure the prejudice of the extensive reporting. Thus, I am satisfied that there is a real risk, as opposed to a fanciful risk, that the accused will be unable to have a fair trial. Accordingly, I propose to discharge the jury.

[163] *R v Azari (No. 2)* at [48]-[49] and [51]

Being a "member" of a terrorist organisation

106 In both *R v Lelikan*[164] and *R v Atai (No. 2),*[165] the offender admitted that he was a member of the proscribed terrorist organisation of which each was charged (the PKK and Islamic State respectively). This was not so in *Abdirahman-Khalif v The Queen*.[166]

107 In *Abdirahman-Khalif v The Queen*, the Appellant had been convicted by a jury of an offence contrary to s.102.3(1) of the Code, intentionally being a member of a terrorist organisation, namely Islamic State. The Appellant appealed against her conviction to the South Australian Court of Criminal Appeal, arguing, amongst other things, that her conviction was not supported by the evidence because there was no evidence of the organisational structure of Islamic State explaining the nature of its membership or how a person may become a member of that organisation. It was submitted that there was no evidence that the Appellant had taken a step towards becoming a member, and that the conviction could not be sustained.[167]

108 Kourakis CJ and Parker J allowed the appeal, and directed an acquittal, holding that the verdict of guilty was not supported by the evidence. Kelly J dissented and concluded that there was ample evidence to support the verdict and that the appeal should be dismissed.

109 The relevant provisions of the Code were:

> **102.1 Definitions**
> (1) In this Division:
> "member" of an organisation includes:
> (a) a person who is an informal member of the organisation; and
> (b) a person who has taken steps to become a member of the organisation …
>
> "terrorist organisation" means:
> (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or

[164] *R v Lelikan* [2019] NSWCCA 316; see below at [244]-[253] of this paper
[165] *R v Atai (No. 2)* [2018] NSWSC 1797
[166] *Abdirahman-Khalif v The Queen* [2019] SASCFC 133
[167] *Abdirahman-Khalif v The Queen* at [1]-[4]

(b) an organisation specified by the regulations for the purposes of this paragraph ….

102.3 Membership of a terrorist organisation

(1) A person commits an offence if:

(a) the person intentionally is a member of an organisation; and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

The *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* ("**the 2014 Regulation**") had proscribed Islamic State as a terrorist organisation (for the purposes of s. 102.1(1) of the Code).

110 The Crown case at trial, and on appeal, was that membership of Islamic State might be achieved by swearing allegiance to Islamic State, and otherwise agreeing with the objects, aims, and methods of Islamic State whilst living within its territory, and either marrying one of its fighters, and/or providing medical assistance to them and others.[168] The Crown relied on s.102.1(b), the extended definition of membership, in that the Appellant had taken steps to become a member of Islamic State.[169] Kourakis CJ summarised the evidence in the following way:[170]

> [5] The appellant was detained at the Adelaide Airport on 14 July 2016 en route to Turkey. Her mobile phone was seized but she was released without charge on the following morning. An analysis of the contents of her phone showed that it contained hundreds of images of Islamic State propaganda and extremist material. It also showed a video clip of the appellant with a nasheed that was a religious verse associated with the Salafist views of Islamic State playing in the background. Another image showed her using a symbolic hand gesture commonly used by Islamic State jihadists.
>
> [6] In the period after her release, and the return to her of her mobile phone, the appellant communicated with young women in Mombasa, Kenya, who subsequently bombed the Mombasa police station on 11 September 2016. The appellant's phone was again seized and additional Islamic State material was found on it. So too with her MacBook computer. In particular, it contained records of on-line discussion with others about travel to Islamic State controlled regions for the purposes of working as a paramedic or marrying an Islamic State fighter. The appellant had continued to access lectures and sermons relating to extremist Islamic teaching, but had also deleted references to extremist material from her Facebook pages and search history in her web browser.

[168] *Abdirahman-Khalif v The Queen* at [11]
[169] *Abdirahman-Khalif v The Queen* at [48]
[170] *Abdirahman-Khalif v The Queen* at [5]-[8]

> [7] On 2 October 2016, a listening device placed in the appellant's bedroom captured her reciting a pledge of allegiance to the leader of Islamic State, Abu Bakr al‑Baghdadi. In November 2016, the appellant was heard to sing a nasheed commonly sung by followers of Islamic State.
>
> [8] The totality of the evidence which I set out in greater detail below, and which was not contradicted at trial, was capable of supporting an inference that the appellant was a supporter of Islamic State, its extremist ideology and its terrorist activities. It also supported the inference that she intended to travel to Turkey to make contact with members or supporters of Islamic State in Turkey, with the intention of travelling into the areas of Syria, Iraq and Turkey controlled by it for the purposes of either providing medical assistance to fighters and others or to marry an Islamic State fighter.

111 Kourakis CJ held that the prosecution failed to adduce any evidence that *"informal membership was accorded by Islamic State in the loose way suggested* [by the Crown]*…"*[171] Kourakis CJ held that there was no evidence against which to evaluate any connection between the proved conduct of the Appellant with membership of Islamic State.[172]

112 The Chief Justice was not prepared to accept that living in Islamic State territory, in and of itself, was sufficient to prove the offence. His Honour held that the 2014 Regulation proscribed the organisation Islamic State, in a narrow sense, and not the residents of the territory it controlled. His Honour said:[173]

> … for the purposes of Part 5.3 of the Criminal Code, the meaning of an organisation does not extend to the population or individuals governed by an organisation, even if they are supporters of its aims and objectives. It follows that the regulations made pursuant to s 102.1 of the Criminal Code cannot proclaim as a terrorist organisation an entire society or a population which is governed by a particular organisation. In any event, even if an organisation might be so widely defined, the regulation proclaiming Islamic State did not purport to do so. On a proper construction of the regulation, it prescribes the organisation, in a narrow sense, known as Islamic State and not the residents, even supportive residents, of the territory it controls.

[171] *Abdirahman-Khalif v The Queen* at [11]-[12]
[172] *Abdirahman-Khalif v The Queen* at [9]-[10]
[173] *Abdirahman-Khalif v The Queen* at [13]

113 His Honour did not find any support for a wider construction in the Explanatory Memorandum to the *Security Legislation Amendment (Terrorism) Bill 2002* (Cth), which had sought to define the term *"organisation"*.[174]

114 The Chief Justice emphasised the distinction between being a *"member"* (as is required by the Code) and being a *supporter* of an organisation.[175] His Honour said that the Crown had *"conflated Islamic State, the organisation, with either the population it controlled in Syria or Iraq, or its supporters and sympathisers, wherever they lived"*.[176]

115 Because of the way in which the Crown framed its case against the Appellant, Kourakis CJ found that it was bound to fail. The Crown had equated the membership of Islamic State as an organisation, *"with supporting its aims whilst living in the territories it controlled"*.[177]

116 Kourakis CJ noted that the only evidence that allowed the jury to draw conclusions about the structure of Islamic State, the organisation and the nature of its membership was adduced from Dr Rodger Shanahan, with his Honour observing:[178]

> Even though the prosecution adduced evidence from Dr Shanahan, an expert on Middle Eastern extremist Islamic groups about the ideology, aims and territory controlled by Islamic State, it adduced no evidence about Islamic State's organisational structure, and no evidence about its membership, other than to identify several of its leaders and commanders. No evidence was adduced about how members, other than fighters, participated in the organisation. No evidence was adduced on how members were recruited or selected, or of any process by which they were inducted and finally accepted into its organisation. Other than references to al-Baghdadi's autocratic rule and to several of his immediate subordinates, there was no evidence about Islamic State's decision-making processes or command structure.

117 In particular, the Chief Justice pointed to a suggested deficiency in the evidence of Dr Shanahan concerning the role of women in Islamic State:[179]

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[174] *Abdirahman-Khalif v The Queen* at [29]-[31]
[175] *Abdirahman-Khalif v The Queen* at [32]
[176] *Abdirahman-Khalif v The Queen* at [44]; and [51]-[54]
[177] *Abdirahman-Khalif v The Queen* at [79]-[81]
[178] *Abdirahman-Khalif v The Queen* at [9]
[179] *Abdirahman-Khalif v The Queen* at [67]-[68]

> [67] Dr Shanahan has there described the traditional role of women as homemakers. Dr Shanahan's testimony was admitted as his expert opinion; it was not merely an assumption. The omission from his evidence of any reference to the organisational involvement of women in Islamic State is telling.
>
> [68] In the absence of evidence specifically addressing the role of women in Islamic State, the organisation, within its territory in Iraq and Syria, it is unsafe to infer that wives and female nurses sufficiently participated in the organisational structure of this radically conservative Islamic organisation, so as to be, even informal, members. To be clear, I make no assumption that women are precluded from membership. Nor do I assume that female supporters of Islamic State were precluded from fighting or engaging in terrorist activities. The points I make are twofold. First, Dr Shanahan did not give any evidence that Islamic State viewed the role of women in the Levant as members or fighters for its organisation. The second point I make is that the prosecution case was that the appellant intended to travel to Iraq to be the wife of a fighter or a nurse.

118 The Chief Justice noted that the Crown case was that Islamic State, the organisation, had, as formal or informal members, the wives of the fighters who fought on its side and the nurses who tended to the fighters who embraced and supported its ideals.[180] His Honour said:[181]

> The organisation so described by the prosecutor is an amorphous body of people. The prosecution case so framed was bound to fail for two reasons. First, the dearth of evidence adduced on this issue was incapable of establishing that all persons with those attributes were, even informal, members of Islamic State. Secondly, and even if all such persons, together presumably with all fighters, engineers, doctors and others who contributed useful skills to the insurgency, were members of some entity, that entity was an unstructured mass of people and not an organisation.

119 Kourakis CJ relied on the paucity of evidence to hold that the evidence did not prove that the informal membership of Islamic State included the wives of its fighters or the persons who nursed them.[182] Further, even if it was accepted that wives and nurses (who supported its rule) were a part of the population governed by Islamic State, they were not captured by the extended definition of being a member of an *"organisation"* as required by the Code.[183]

120 In a separate judgment, Parker J agreed generally with Kourakis CJ, and gave further reasons for allowing the appeal. His Honour agreed that the

[180] *Abdirahman-Khalif v The Queen* at [81]
[181] *Abdirahman-Khalif v The Queen* at [82]
[182] *Abdirahman-Khalif v The Queen* at [68]
[183] *Abdirahman-Khalif v The Queen* at [90]

evidence led at the trial was capable of supporting an inference that the Appellant was a supporter of Islamic State; that the Appellant sought to travel to Turkey with the intention of travelling into territory controlled by Islamic State, and that she had sought to enter that territory to use her training to provide assistance to fighters and/or to marry an Islamic State fighter.[184]

121 Parker J said with respect to Dr Shanahan's evidence:[185]

> Dr Shanahan did not give any evidence as to whether the action of a person who supported the ideology of [Islamic State] moving into territory under its control so as assist in building the State, whether as a worker, traditional wife or otherwise, would be sufficient for that person to be recognised by [Islamic State] as a member. Dr Shanahan also did not give any evidence as to whether the conduct of the appellant referred to in the six particulars relied upon by the Crown would be recognised by [Islamic State] as the taking of steps towards membership.

122 His Honour accepted that it was open to conclude that the Appellant was a supporter of Islamic State, and was *"strongly committed to its cause",* but this was not the subject of the charge.[186] Fundamentally, like Kourakis CJ, his Honour rejected the contention that it was axiomatic that supporters of Islamic State would also be members of Islamic State. His Honour held that to accept such an assertion would *"strain"* the meaning of the term *"'organisation' beyond the meaning found in Kibby and Benbrika* (citations omitted)*"*.[187]

123 In a dissenting judgment, Kelly J concluded that it was open to the jury to convict the Appellant and that the appeal should be dismissed. Her Honour commenced by analysing the evidence led in the Crown case, including the evidence adduced from Dr Shanahan, and concluded that *"Islamic State is an organisation with many tentacles. The varied roles anticipated for its supporters and members were many-faceted, ever expanding and developing".*[188]

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[184] *Abdirahman-Khalif v The Queen* at [240]
[185] *Abdirahman-Khalif v The Queen* at [264]
[186] *Abdirahman-Khalif v The Queen* at [271]
[187] *Abdirahman-Khalif v The Queen* at [266] and [271]
[188] *Abdirahman-Khalif v The Queen* at [170]

124 Unlike the majority, Kelly J accepted that the term *"organisation"* was *"sufficiently broad so as to capture the entirety of the organisation's operation, recruitment, membership and engagement, in the doing of, or advocating for the doing of, terrorist acts".*[189] Her Honour observed that the Explanatory Memoranda which had introduced the term *"organisation"* in 2002 had been defined to *"defeat any argument that a group of persons is not an organisation because it does not have a particular formal attribute or structure"* and there was nothing in the Code or any extrinsic material which supported a contention that Parliament had intended to place a ceiling or upper limit on the scale or size of a terrorist organisation.[190]

125 Critical to her Honour's reasoning on this aspect was acceptance of Dr Shanahan's evidence that Islamic State had engaged in *"global jihad"*, and that it was *"in a constant state of development, growth and potential expansion"*.[191] As such, her Honour did not find analogies between Islamic State and incorporated or unincorporated associations such as political parties, cricket clubs or other associations to be *"particularly helpful"* and said:[192]

> … A terrorist organisation such as Islamic State is *sui generis*, more in the nature of the mythological hydra. In reality, as the material on the appellant's phone and MacBook so starkly demonstrated, members of Islamic State come and go. In the pursuit of global jihad, they die, they blow themselves up, they engage in extreme attacks of violence, they are killed by drones, they are shot, they are arrested – however, the organisation endures.

126 Her Honour rejected the Appellant's restrictive approach to the construction of relevant provisions of the Code and the 2014 Regulation. Her Honour said:[193]

> [186] The appellant's restrictive approach to these provisions derives no support from the authorities, limited as they are, to which the Court was referred [*Benbrika v The Queen* [2010] VSCA 281; (2010) 29 VR 593; *R v Lelikan (No 5)* [2019] NSWSC 494; *Lodhi v The Queen* [2006] NSWCCA 121; (2006) 199 FLR 303] nor from the approach taken by the High Court in the recently decided *The Queen v A2; The Queen v Magennis; The Queen v*

[189] *Abdirahman-Khalif v The Queen* at [187]
[190] *Abdirahman-Khalif v The Queen* at [183]-[184] (Kelly J) cf. [29]-[31] (Kourakis CJ) and [270] (Parker J)
[191] *Abdirahman-Khalif v The Queen* at [180]-[181]
[192] *Abdirahman-Khalif v The Queen* at [182]
[193] *Abdirahman-Khalif v The Queen* at [186]-[187]

> *Vaziri* [[2019] HCA 35, [52], [54]-[55], [58] (Kiefel CJ and Keane J) (with whom Nettle and Gordon JJ generally agreed), [164]-[165], [169] (Edelman J)].
>
> [187] For this reason, I accept the respondent's submission that the 2014 regulation should be interpreted as specifying the organisation of Islamic State in a manner sufficiently broad so as to capture the entirety of the organisation's operation, recruitment, membership and engagement, in the doing of, or advocating for the doing of, terrorist acts..

127 Kelly J considered what it meant to be a *"member"* of an organisation in the context of a person who *"has taken steps* [to become a member]*"* and found it useful to contrast it with *"attempt"* offences.[194] Her Honour said:[195]

> [195] In Division 102 of the *Criminal Code*, there is no such requirement for proximity between the preparatory conduct and the completed offence. The preparatory conduct is the completed offence. By virtue of the extended definition of member, a person who has taken steps to become a member has engaged in the relevant conduct of being a member. The fault element of intention applies to that extended definition of member in s 102.1(1) by requiring proof that, when the person did the subject act or acts in question, they meant to take steps to become a member of a terrorist organisation.
>
> [196] As other intermediate courts of appeal have observed, in enacting Division 102 of the *Criminal Code*, Parliament has made a legislative choice to criminalise certain forms of preparatory conduct in order to deal with the unique challenges posed by terrorism. The courts must respect that legislative policy.

128 Her Honour then cited, in the context of discussing the meaning of *"organisation"*, the decision of *Benbrika v R*,[196] where the Court observed:[197]

> Axiomatically, the context within which a particular word in a statute must be understood includes not just the surrounding words, or the surrounding provisions, or even the Act as a whole. It also includes the historical circumstances that existed at the time of its enactment, and which might be thought to explain why the provision was introduced. Moreover, the court is required by s 15AA of the *Acts Interpretation Act 1901* (Cth) to adopt a purposive construction.

129 Kelly J held that the observations in *Benbrika v R* were *"equally apt when construing the extended definition of a member in s 102.1(1)"*, and that the term *"member"* used in ss.102.1 and 102.3(1) should not be given *"any*

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[194] *Abdirahman-Khalif v The Queen* at [188]-[193]
[195] *Abdirahman-Khalif v The Queen* at [195]-[196]
[196] *Benbrika v R* (2010) 29 VR 593; [2010] VSCA 281
[197] *Benbrika v R* at [94]

technical or legal meaning".[198] Her Honour went on to observe that a *"terrorist organisation such as Islamic State, given its very nature, is unlikely to have a membership process capable of objective verification"*.[199]

130 Her Honour concluded that *"there is no absolute means by which the status of membership of Islamic State may be proven"*.[200] Ultimately, the answer to whether or not the conduct of the Appellant amounted to taking steps to become a member was *"a question of fact to be decided by the jury after undertaking its own evaluative exercise".*[201]

131 Kelly J found that there was *"a significant amount of evidence before the jury as to the nature of Islamic State, the terrorist organisation"*[202] which allowed the jury to *"undertake its own evaluative exercise"*.[203]

132 Kelly J went on to consider what the Crown needed to prove beyond reasonable doubt to establish the offence. Her Honour set out the relevant provisions in Part 2.2 of the Code, before observing that *"the elements of the offence are not to be confused with the evidence which is led to prove those elements"*[204] and that there was *"no reason why, in determining whether the physical element of the offence* [taking steps to become a member] *is proved, the jury cannot have regard to the appellant's state of mind".*[205] The Appellant's state of mind was *"relevant to proof of both the physical and fault elements".*[206] Her Honour stated:[207]

> [211] The offence in s 102.3(1) has the same rationale as other preparatory terrorist offences prescribed in the legislation which also criminalise preparatory acts, namely the commission of terrorist acts.
>
> [212] Thus, it does not matter if the appellant would have succeeded in becoming a member. The prosecution does not have to prove that the steps

[198] *Abdirahman-Khalif v The Queen* at [198]-[199]
[199] *Abdirahman-Khalif v The Queen* at [200]
[200] *Abdirahman-Khalif v The Queen* at [201]
[201] *Abdirahman-Khalif v The Queen* at [202]
[202] *Abdirahman-Khalif v The Queen* at [161]-[169]
[203] *Abdirahman-Khalif v The Queen* at [202]
[204] *Abdirahman-Khalif v The Queen* at [207]
[205] *Abdirahman-Khalif v The Queen* at [208]
[206] *Abdirahman-Khalif v The Queen* at [209]-[210]
[207] *Abdirahman-Khalif v The Queen* at [211]-[213]

> she took to become a member were apt to achieve that end or that the organisation would necessarily have accepted her.
>
> [213] It does not matter that there may well be, and undoubtedly is, a fluctuating group of individuals at any time on the planet who may be sympathisers, associates, fighters, members, or somewhere else on the continuum who engage with Islamic State.

133 Her Honour returned to what she called the *"critical issue"* in the appeal namely: *What was the Appellant's intention when she booked her one-way flight to Turkey, went down to Adelaide Airport and attempted to board that plane with nothing but her carry-on bag and insufficient funds to get back to Australia?* In answering this question, her Honour said that the jury was entitled to have regard to the totality of the evidence before them, in what was a circumstantial case.[208] The trial Judge was, accordingly, correct to direct the jury that they could only return a verdict of guilt if they were satisfied beyond reasonable doubt that the Appellant had intended to travel to Turkey in order to engage with Islamic State – this went to proving the fault element of the offence. However, proof of that intention could also be used by the jury to prove the physical element, whether that conduct amounted to having *"taken steps to become a member".*[209]

134 Her Honour held that regardless of what role a woman took in Islamic State, it was *her intention* in doing so that may or may not bring her within the ambit of the Code, and therefore, it was important to view the intention and conduct of the particular individual, on a case-by-case basis. Although lengthy, it is appropriate to set out, in full, her Honour's reasoning in dissent on this point:[210]

> [220] So, in my view, regardless of what role a woman takes in or on behalf of the Islamic State, whether it is as a fighter, a nurse, a wife, a recruiter or all of the above, it is her intention in doing so that may or may not bring her within the provisions of the Criminal Code; not solely the act of becoming a nurse, wife, fighter or recruiter. To suggest that every wife of every Islamic State soldier must also be a member of Islamic State is both an unhelpful and a dangerous line of thought. However, it is the specific actions and, crucially, the specific intentions of each of those women that will be determinative of membership. It may be accepted that members of Islamic State commit

[208] *Abdirahman-Khalif v The Queen* at [215] and [230]-[231]
[209] *Abdirahman-Khalif v The Queen* at [216]
[210] *Abdirahman-Khalif v The Queen* at [220]-[223]

> themselves to work together with other Islamic State members to achieve the goals of Islamic State. A female supporter of Islamic State the organisation, who relocates to Islamic State the territory, marries a soldier, and raises her children in that State is demonstrating a commitment to one of the goals of Islamic State, namely to consolidate a physical population stronghold over land. Providing that she had the requisite fault element, that woman would be no less a member of Islamic State than a woman who makes a commitment to further a different goal of Islamic State, namely to engage in jihadist acts of violence. And, of course, female members of Islamic State may occupy both such roles simultaneously.
>
> [221] For the purposes of s 102.3(1) the physical element of conduct that a person is a member of an organisation may also be proven by considering matters such as the nature, character and purpose of Islamic State, the aims, objectives and goals of Islamic State, the nature and circumstances of the appellant's proven conduct and the extent to which the appellant demonstrated through her proven conduct the pursuit of, and alignment with, the organisation and goals and objectives of Islamic State.
>
> [222] With respect to the fault element, the question of whether she had taken steps within the meaning of s 102.1(b) is to be answered by reference to her subjective intention at the time.
>
> [223] Therefore, it is not a question of whether all women who migrate to Islamic State territory fall within the definition of member, it is a question of whether this appellant was proved to be a member, by reference to the extended definition. The facts of this matter demonstrate that each case needs to be dealt with on its own particular facts. Context is indeed everything.

135 Kelly J concluded that the evidence at the trial was capable of proving the Appellant's guilt.[211] The whole of the evidence, viewed in combination, pointed *"overwhelmingly to the Appellant's guilt of the charge"* and it was *"open to the jury to convict the Appellant"*. Accordingly, her Honour would have dismissed the appeal.[212]

136 On 16 December 2019, the Commonwealth Director of Public Prosecutions lodged an application for special leave to appeal to the High Court against the decision of the South Australian Court of Criminal Appeal.[213]

137 It is noteworthy that, after the Court of Criminal Appeal allowed the appeal on 31 October 2019, Charlesworth J imposed an interim control order against Ms

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[211] *Abdirahman-Khalif v The Queen* at [224]
[212] *Abdirahman-Khalif v The Queen* at [232]-[237]
[213] Meagan Dillon, "Appeal lodged against acquittal of Adelaide woman who was cleared of being an IS member", *ABC News* (online), 16 December 2019 < https://www.abc.net.au/news/2019-12-16/woman-acquitted-of-being-is-member-could-have-it-overturned/11802350>

Abdirahman-Khalif in proceedings brought by the Commonwealth in the Federal Court of Australia. The reasons for that decision have not yet been published,[214] with the final hearing of the application to take place in the Federal Court in April 2020.[215]

[214] ABC News, "Federal Court imposes interim control order on former Islamic State suspect", *ABC News* (online), 22 November 2019 <https://www.abc.net.au/news/2019-11-22/interim-control-order-in-place-for-former-is-suspect/11729032>

[215] Meagan Dillon, "Appeal lodged against acquittal of Adelaide woman who was cleared of being an IS member", *ABC News* (online), 16 December 2019 < https://www.abc.net.au/news/2019-12-16/woman-acquitted-of-being-is-member-could-have-it-overturned/11802350>

SOME SENTENCING ISSUES

138 This section of the paper will refer to a variety of topics which have arisen in sentencing decisions for terrorism offences. A separate Appendix contains more detailed summaries of a number of recent sentencing cases.

139 In July 2019, the Commonwealth Sentencing Database published a new page entitled: *"Sentencing Terrorism Offenders"* which is available on the website of the National Judicial College of Australia.[216] The site is updated periodically and contains a helpful summary of sentencing principles applicable to terrorism offences and references to sentencing decisions.[217]

140 Dr Rodger Shanahan, a Lowy Institute scholar, and an expert frequently qualified by the Crown in terrorism matters, has produced a working paper which has examined data concerning sentenced Australian Islamic terrorists, and sought to determine *"how likely they are to be rehabilitated"*. Dr Shanahan concluded:

> The question of whether jihadis are repentant for their actions and to what degree, is, like the issue of mental health, for the courts to determine. This is also the case for their prospects for rehabilitation. From the available data, however, it is apparent that Australian courts have been unimpressed by the level of contrition shown by those convicted of terrorist offences and are generally pessimistic about their prospects for rehabilitation.
>
> Indeed, less than 10 per cent of offenders in the data set have been found to be truly contrite for their crimes, and around 29 per cent have been judged to have good prospects for rehabilitation. This illustrates the problems that correctional services and government face in attempting to de-radicalise incarcerated jihadis who see little wrong with their actions and who show meagre prospects of rehabilitation.[218]

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[216] National Judicial College of Australia, "Sentencing Terrorism Offenders", *National Judicial College of Australia – Commonwealth Sentencing Database* (Web Page, 3 July 2019) <https://csd.njca.com.au/principles-practice-categories-of-federal-offenders-sentencing-terrorism-offenders/>

[217] See also: Commonwealth Director of Public Prosecutions, "Sentencing of federal offenders in Australia: A Guide for Practitioners (Second edition)", *Commonwealth Director of Public Prosecutions* (Web Page, 26 February 2020) <https://www.cdpp.gov.au/publications/federal-sentencing-victoria>

[218] Dr Rodger Shanahan, *Typology of Terror – the background of Australian jihadis* (Working Paper, 21 November 2019) < https://www.lowyinstitute.org/publications/typology-terror-background-australian-jihadis>

Extremist beliefs have no place in the Australian community

141 In *R v Al-Kutobi; R v Kiad,*[219] in considering the nature and circumstances of the offence of conspiring to commit an act or acts in preparation for or planning a terrorist act, Garling J stated:[220]

> [184] In considering the nature of the offence committed by each offender, it is relevant to observe that Australia is a country which prides itself on its pluralism and multiculturalism, features which are underpinned by broadly shared democratic values of acceptance, tolerance, and mutual respect. Australia's status as an advanced, peaceful, and culturally rich democracy owes much to the contributions of people of diverse faiths, cultures, and racial and ethnic backgrounds. Australia's pluralism and multiculturalism are features of our polity of which we can all be proud and which lie at the core of our national identity.
>
> [185] It is in this context that extremist beliefs and ideologies which preach intolerance, hatefulness and violence towards other members or sections of the Australian community are to be most strongly deprecated. Such beliefs and ideologies run utterly counter to what this country stands for. The extremist views held by the offenders in this case, which cast non-Muslims as an enemy that need to be destroyed, simply cannot be tolerated. Not only are these views incompatible with Australian values and ideals, but they also pose a real risk of significant harm to the Australian community where, as here, they are sought to be acted upon through the use of violence.
>
> [186] In making these observations, I wish to emphasise that they apply not only to the particular views which have fallen for consideration in this case, but to any extremist ideology or belief which encourages harm or violence to others in the community. It cannot sensibly be suggested that the beliefs of the offenders in this case are at all representative of those held by the nearly half a million Muslims presently living in Australia, the vast majority of whom respect this country's values and ideals and who make a valuable contribution to its economy and society.
>
> [187] In light of these observations, it is incumbent upon the courts, when sentencing for offences of this kind, to make it absolutely plain that extremist ideologies and beliefs have no place in Australian society, and that violent conduct engaged in pursuant to such ideologies and beliefs will be taken extremely seriously.

[219] *R v Al-Kutobi; R v Kiad* [2016] NSWSC 1760
[220] *R v Al-Kutobi; R v Kiad* at [184]-[187]

Terrorists are not martyrs or beacons of Islam

142 In *R v Shoma*, the 24 year old offender pleaded guilty to intentionally engaging in a terrorist act, namely stabbing her victim in the neck with a knife. The offender had arrived in Australia on a student visa and had organised accommodation through a host family which supported international students.[221] After eight days in Australia, she attacked the victim while he was asleep. The offender used a knife that she had intentionally brought into the country and plunged it into her victim's neck with both hands, whilst yelling: *"Allah Akbar"*. The force of the attack caused the tip of the blade to be embedded in the victim's neck, and fractured the victim's spine. At the time of the attack, the victim's five year old daughter was lying asleep next to him. The offender admitted that she performed the terrorist act for Islamic State, in pursuit of violent jihad, and had only expressed regret that she did not succeed in taking the victim's life.[222]

143 Taylor J stated:[223]

> [6] Your deeds and words, and the intentions accompanying them, are chilling. They have sent ripples of horror throughout the Australian community. But they do not make you a martyr. They do not make you a beacon of Islam. They do not guarantee you green wings to ascend to *Jannah*. They make you an undistinguished criminal. You should not mistake your passing notoriety for importance, nor equate it with achievement.
>
> …
>
> [35] No doubt you thought that his death would add to your achievement. But, you have achieved nothing except, as I have said, to make yourself an insignificant criminal of transitory notoriety, notwithstanding your adherence to a now defunct caliphate and its unmasked falsehoods.

These remarks were endorsed in *R v Hraichie (No. 3)*.[224]

144 Similarly, in *R v Dirani (No. 34)*[225] in relation to the terrorist killing of Curtis Cheng, Johnson J stated:[226]

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[221] *R v Shoma* at [18]-[21]
[222] *R v Shoma* at [2]; [4]; [21]; [31]-[34] and [85]
[223] *R v Shoma* at [6] and [35]
[224] *R v Hraichie (No. 3)* [2019] NSWSC 973 at [360]-[361]

> [275] Right-minded members of the community would be puzzled and disturbed at how a 15-year old youth such as Farhad Mohammad ended up in the position where he became radicalised and was selected or volunteered to carry out a terrorist attack. At a time when most 15-year old youths in our community are at school, Farhad Mohammad was inside Parramatta Mosque preparing himself to murder an innocent man on the streets of Parramatta. Farhad Mohammad is not a martyr. He is not a *"green bird"*, a term used to eulogise jihadist killers who have themselves been killed. He died as a murderer, having killed an innocent man in the street before he was himself shot dead whilst attacking law enforcement officers. Farhad Mohammad is a pitiful figure. He died as a result of his own murderous actions, thereby depriving himself of a useful life in Australia, a country in which he would have had an opportunity to live peacefully and prosper if he wished to do so.
>
> [276] Shadi Mohammad was the 20-year old sister of Farhad Mohammad. Having played a significant role in radicalising her younger brother, she departed Australia on 1 October 2015, leaving behind her teenage brother to kill and likely be killed. Once again, right-minded members of the community can only wonder at what twisted minds were at work to lead a young woman to consign her brother to such a fate. It is said that Shadi Mohammad herself died with her Islamic State husband as a result of a United States air strike in Syria in 2016. Like her younger brother, Shadi Mohammad is no martyr or *"green bird"*. Her involvement in the events which culminated in the death of Mr Cheng was criminal and cowardly and entirely inconsistent with all ordinary standards of human decency in a civilised society.

General principles relevant to the sentencing of a terrorist offender

145 A summary of the relevant principles which, together with s.16A Crimes Act, apply when sentencing a terrorist offender can be found in *R v Alou (No. 4)*, where Johnson J stated:[227]

> [165] The primary considerations on sentence for terrorist offences are the protection of the community, the punishment of the offender, the denunciation of the offending and both specific and general deterrence: *R v Lodhi* (2006) 199 FLR 364; [2006] NSWSC 691 at [92]; *Lodhi v R* (2007) 179 A Crim R 470; [2007] NSWCCA 360 at [274]; *R v Khazaal* [2009] NSWSC 1015 at [47].
>
> [166] Subjective circumstances and mitigating factors, including considerations of rehabilitation, are to be given less weight: *R v Lodhi* at [89]; *Lodhi v R* at [274]; *R v Khazaal* at [41]; *DPP (Cth) v Besim* [2017] VSCA 158 at [112]-[113].

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[225] *R v Dirani (No. 34)*
[226] *R v Dirani (No. 34)* at [275]-[276]
[227] *R v Alou (No. 4)* at [165]-[171]; *Alou v R* at [47]-[49] (on appeal). Johnson J repeated these principles in *R v Atai (No. 2)* at [216]-[217] and in *R v Dirani (No. 34)* at [157]. In *R v Shoma* at [52]-[55], Taylor J held that the legal principles derived from other terrorism related offences (doing an act or acts in preparation for or planning a terrorist act, and aiding, abetting, counselling or procuring the commission of a terrorist act) were also applicable to an offence of intentionally engaging in a terrorist act. See also: *R v Mohamed, Chaarani & Moukhaiber* at [181]-[182] (Tinney J); *R v Azari (No. 12)* [2019] NSWSC 314 at [118] (N. Adams J)

[167] The religious and ideological motivation of an offender is relevant to the issue of community protection, as well as to the assessment of the objective gravity of the offence: *R v Kahar* [2016] 1 WLR 3156; [2016] EWCA Crim 568 at [19].

[168] Where it is not established that an offender has resiled from previously held extremist views, the element of community protection will assume even greater importance: *R v Lodhi* at [82]-[83], [88]; *R v Elomar and Ors* (2010) 264 ALR 759; [2010] NSWSC 10 at [93]; *Benbrika v R* (2010) 29 VR 593; [2010] VSCA 281 at [591].

[169] Weight must be given to the need for general deterrence even if the force of ideological or religious motivations are such that deterrence may not be effective: *R v Lodhi* at [91]-[92]; *Lodhi v R* at [87]-[88]; *R v Barot* [2007] EWCA Crim 1119 at [45]; *DPP (Cth) v Fattal* [2013] VSCA 276 at [169]; *DPP (Cth) v MHK* [2017] VSCA 157 at [52]-[53].

[170] Whilst youth is relevant to determining the weight to be given to general deterrence and denunciation in the sentencing equation, its weight is diminished quite measurably in terrorist cases where the offender participates in, plans or carries out actions of extreme violence. The protection of society, and the upholding of its most fundamental values, necessitates that in terrorist cases, the sentencing considerations of general deterrence and denunciation must be given primacy above the ameliorating effect of youth: *DPP (Cth) v MHK* at [66]; *R v Khalid and Ors* [2017] NSWSC 1365 at [109]-[113], [270].

[171] In considering the nature and gravity of terrorist offences, courts in Australia have utilised a number of factors referred to by the UK Court of Appeal in *R v Kahar* at [19]: *R v Elomar* at [62]; *R v Benbrika* at [564]; *R v Khalid and Ors* at [25]. The factors referred to in *R v Kahar* are:

> (a) the degree of planning, research, complexity and sophistication involved, together with the extent of the offender's commitment to carry out the act(s) of terrorism;
>
> (b) the period of time involved, including the duration of the involvement of the particular offender;
>
> (c) the depth and extent of the radicalisation of the offender as demonstrated (inter alia) by the possession of extremist material and/or the communication of such views to others; and
>
> (d) the extent to which the offender has been responsible, by whatever means, for indoctrinating or attempting to indoctrinate others, and the vulnerability or otherwise of the target(s) of the indoctrination, be it actual or intended.

Section 19AG Crimes Act 1914 (Cth) although "incongruous", is constitutionally valid

146 In *Alou v R*, the offender contended that s.19AG Crimes Act was not constitutionally valid because it impairs *"the institutional integrity of a State court exercising federal jurisdiction"* as the Court *"is required to dispense injustice".* It was argued that s.19AG provided that where a sentencing Judge concluded that a non-parole period ought be less than three-quarters of the sentence, the Court is *"not permitted to fix* [that lower] *non-parole period but must fix a higher non-parole period determined by the statutory formula"*. In support of this proposition, the offender relied on *Hili v The Queen*[228] and argued that every case had to be determined by reference to its own facts and circumstances and the non-parole period had to be determined on that same basis.[229]

147 In an interrelated ground, the appellant had complained that there was an incongruity that arose when a comparison is made between a life sentence, which the Act states, carries a non-parole period of 22 years and six months, and that in the appellant's case, being a head, sentence of 44 years with a non-parole period of 33 years.[230]

148 Bathurst CJ (Price and N. Adams JJ agreeing) accepted that there was an incongruity when a comparison is made with the imposition of a life sentence on any putative offender, but his Honour stated that this did not affect the *"clear meaning and effect of the provision".*[231] His Honour held:[232]

> [186] Section 19AG(3)(a) applies for the purpose of s 19AG(2). Although perhaps infelicitously worded, the section requires a court which imposes a life sentence to impose at least the minimum non-parole period prescribed by s 19AG(3) which as a matter of mathematics is 22 years and six months. It does not prevent a greater non-parole period being fixed.
>
> [187] There are sensible reasons for such a provision. The actual effect of a life sentence may well depend on the age or health of a person on whom it is imposed. The ratio in s 19AG(3) gives a court flexibility to take account of such circumstances in fixing the non-parole period.

[228] *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45
[229] *Alou v R* at [170]-[174]
[230] *Alou v R* at [168]
[231] *Alou v R* at [188]
[232] *Alou v R* at [186]-[188]

> [188] There is an incongruity. The section does allow the Court in fixing a life sentence to impose a minimum non-parole period which is less than that required to be imposed for a determinate sentence greater than 30 years. However, this potential incongruity does not affect what, in my view, is the clear meaning and effect of the provision. Further, the imposition of a life sentence simply for the purpose of attracting the minimum non-parole period of 22 and a half years would be an error of sentencing discretion.

149 The Chief Justice continued:[233]

> [192] The argument supporting invalidity was based upon the statements in *Hili* that in the case of Commonwealth sentencing, the determination of a non-parole period does not depend on an a priori norm. The remarks in *Hili* were in reference to a so-called "judicially determined norm" having as was said in that case at [37] as no "statutory root". The statement said nothing about the introduction of a statutory norm providing the minimum period of a sentence that an offender must serve in prison.
>
> [193] A legislative fetter on a court's discretion of this nature is not constitutionally invalid as being inconsistent with "the essential character of a court or with the nature of judicial power" ….
>
> [194] I do not think the incongruity to which I referred at [188] above affects the position. As I have indicated, the function of the Court is to determine the head sentence and determine the non-parole period having regard to the statutory fetter. If a non-parole period greater than the statutory minimum is thought appropriate in respect of the life sentence imposed, that should be set, otherwise it is necessary to set the statutory minimum. There is nothing incompatible with the exercise of judicial power for a court to carry out its functions in this manner.

150 Similarly, with respect to the incongruity argument, N. Adams J observed in a separate judgment:[234]

> I also agree with Bathurst CJ that the applicant has failed to establish that s 19AG of the *Crimes Act*) is invalid. … the provision clearly creates an incongruity. If Johnson J had imposed a life sentence on the applicant, he would have had the statutory power to fix a non-parole period as low as 22 years and six months' imprisonment, whereas his Honour had no such statutory power in circumstances where he imposed a determinate sentence greater than 30 years imprisonment. Despite this, I am nonetheless satisfied, for the reasons provided by Bathurst CJ, that this significant incongruity does not render the provision invalid.

[233] *Alou v R* at [192]-[194]
[234] *Alou v R* at [202]

The precise act or acts of terrorism or their timing is not relevant to the assessment of objective seriousness of the offence of conspiracy to commit an act of terrorism

151 In *IM v R*,[235] the offender and his co-offenders had been sentenced by Bellew J.[236] IM pleaded guilty to conspiring to commit a terrorist act, contrary to ss.11.5 and 101.6 of the Code. In short, IM was involved in a conspiracy to engage in a religiously inspired terrorist act, attacking members of either the NSW Police Force, the AFP, or attacking a government building(s), with firearms. As part of this conspiracy, IM located and secured four firearms from his uncle,[237] and in intercepted telephone calls to co-conspirators, expressed a *"desire that he and* [a co-conspirator] *would die as martyrs together".*[238]

152 In *IM v R*, it was said *"the nature of the acts or acts and the proposed target or targets were not finally resolved"*.[239] All that was known was that the foiled attack would have involved firearms. Meagher JA (with whom R A Hulme and Button JJ agreed) held that it was *"not to the point that the precise act or acts of terrorism and their timing had not been resolved"* and concluded that it was *not* a relevant factor in assessing the objective seriousness of the offence.[240] Meagher JA endorsed the remarks of Whealy J (as his Honour then was) in *R v Lodhi*[241] where his Honour stated:[242]

> … the legislation under which these offences has 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.[243]

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[235] *IM v R* [2019] NSWCCA 107
[236] *R v Sulayman Khalid; R v Jibryl Almaouie; R v IM; R v Mohamed Rashad Al Mouie; R v Farhad Said* [2017] NSWSC 1365
[237] *IM v R* at [25] and [46]
[238] *IM v R* at [57]
[239] *IM v R* at [46]
[240] *IM v R* at [48]
[241] *R v Lodhi* (2006) 199 FLR 364; [2006] NSWSC 691
[242] *R v Lodhi* at [51]
[243] Meagher JA also noted in *IM v R* at [49], that similar observations have been made by the Victorian Court of Appeal in *Director of Public Prosecutions (Cth) v MHK* (2017) 52 VR 272; [2017] VSCA 157 at [48]; and *Fattal v The Queen* [2013] VSCA 276 at [165]

Relevance of the offender's youth

153 Following on from the discussion at [151]-[152] above, the Court in *IM v R* turned to the relevance of the offender's youth on sentence. At the time of the offence, IM was aged 14 years and two months, and was the youngest offender amongst the group of co-conspirators.[244] Meagher JA observed:[245]

> [53] Because of the significance given to punishment, general deterrence and protection of the community in cases involving terrorist offences, mitigating factors such as the youth of the offender and prospects of rehabilitation are given much less weight in the face of those other factors, and especially the often overwhelming need for general deterrence and the protection of the community. In *Lodhi v The Queen*, Price J stated at [274] in a passage agreed in by Spigelman CJ at [109] and cited with approval in *MHK* at [55]:
>
> > 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.
>
> [54] The position is similar in relation to the youth of an offender, which in general is an important mitigating circumstance. As the Court observed in *MHK* at [56], an offender's youth is "relevant to an assessment of the moral culpability of the offender, as the law recognises that the immaturity and impressionability of youth may be, and commonly is, an important contributing factor to the involvement of a young offender in the crime for which that offender is to be sentenced". However the Court then acknowledged that these principles "need to be appropriately moderated where, as in a case such as this, the offender has been involved in serious and dangerous offending" at [57].

154 Although not of any direct application to that case, the Court noted that in New South Wales, s.6 *Children (Criminal Proceedings) Act 1987* (NSW) operated, and as had been explained in *IE v The Queen*,[246] the *"greater the objective gravity of an offence, the less likely it is that retribution and general deterrence will cede to the interests of rehabilitation"*.[247]

155 In *IM v R,* the Crown conceded that the sentencing Judge had erred by following the reasoning in *Tyler v R*[248] (concerning a discount for a guilty plea)

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[244] *IM v R* at [8]-[9]
[245] *IM v R* at [53]-[54]
[246] *IE v The Queen* (2008) 183 A Crim R 150; [2008] NSWCCA 70
[247] *IM v R* at [55]-[56]
[248] *Tyler v R* (2007) 173 A Crim R 458; [2007] NSWCCA 247

which had been overturned in *Xiao v R*[249] after IM had been sentenced. It followed that the Court had to re-sentence the offender.[250] The sentencing judge had originally sentenced IM to a term of imprisonment, comprising a non-parole period of 10 years and one month, with a head sentence of 13 years and six months. On appeal, the Court of Criminal Appeal re-sentenced IM to a term of imprisonment comprising a non-parole period of eight years, with a head sentence of 10 years and nine months.[251]

156 With respect to sentencing decisions made after 12 December 2019, the amendment to s.19AG Crimes Act referred to earlier (at [14] above) now has application.

157 In *Alou v R*, the offender, aged 18 years at the time of the offence, complained that the sentencing Judge gave primacy to other factors such as general deterrence, specific deterrence, incapacitation and retribution over consideration of rehabilitation which incorporated the element of youth.[252] Bathurst CJ confirmed that there was a *"clear body of authority at the appellate level both in this State and Victoria"* that in sentencing terrorist offenders, mitigating factors such as youth and prospects of rehabilitation are to be given less weight,[253] and specifically referred to the Court's earlier decision in *IM v R* (the passages of which, are quoted above at [153]).[254] After analysing the relevant authorities, Bathurst CJ stated that *"the statements made in these cases are not inconsistent with general sentencing principles"*,[255] and that the sentencing Judge had not erred in *"sentenc*[ing] *in accordance with those general principles concerning the relevance of youth for terrorist offences"*.[256] The Chief Justice concluded:[257]

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[249] *Xiao v R* (2018) 96 NSWLR 1; [2018] NSWCCA 4
[250] As at the time of writing, IM's co-offenders have lodged appeals which have included the same ground of appeal. On 4 October 2019, the NSW Court of Criminal Appeal heard the appeal of one of IM's co-offenders, Sulayman Khalid, and has reserved its decision.
[251] *IM v R* at [8] and [68]
[252] *Alou v R* at [130]
[253] *Alou v R* at [131]
[254] *Alou v R* at [135]
[255] *Alou v R* at [136]
[256] *Alou v R* at [137]
[257] *Alou v R* at [138]

> [138] The submissions criticised the sentencing judge for not concluding that there was a causal link between the applicant's youth and the commission of the offence. At the time that he was radicalised he was 17 years of age and said to be impressionable. I do not think that the fact he was radicalised at the age of 17 leads to the conclusion that there was a causal link between the offence and his youth so as to reduce his moral culpability. It must be remembered that this was a carefully planned terrorist act involving the use of a juvenile to engage in the killing. It was not, as senior counsel for the applicant accepted, an impulsive crime or one which was committed without foresight to its consequences. The fact that the applicant may have acquired the beliefs which motivated the acts whilst a youth, does not ameliorate his moral culpability.[258]

158 With respect to the remaining argument that the sentencing Judge had erred in holding that a *"very strong element of general deterrence was required",* the offender relied on a passage in *Lodhi v R (2007)*,[259] wherein Spigelman CJ stated that such a feature *"may, in many cases, be entitled to less weight whenever it appears … that the force of an ideological or religious motivation is such that deterrence is unlikely to work"*.[260] In also rejecting this ground of appeal, the Chief Justice said:[261]

> [141] There are a number of answers to this proposition. First, the weight to be given to any particular matter required to be taken into account is quintessentially a matter for the sentencing judge. Second and related, Spigelman CJ was not seeking to set out any principle of universal application. That is apparent from his use of the word "may" in the passage relied upon (see *Lodhi* at [87]) and his agreement with the statement by Crockett J in *R v Sakr* that "[i]f ever there was a case in which the nature of the offence and the circumstances of its commission, called for a deterrent penalty, then this is that case".
>
> [142] Third and importantly, the force of the suggestion by Spigelman CJ in *Lodhi* at [87] has significantly less weight when the person being sentenced is one who aids and abets the commission of a terrorist act, as distinct from the actual perpetrator of the offence (the suicide bomber in Spigelman CJ's example). I respectfully agree with what was said by the Victorian Court of Appeal on this issue in *MHK* at [53]:
>
> > "[53] There are a number of responses to that proposition. First, it is not the case that, in each instance, or perhaps even in the majority of instances, terrorists, and intending terrorists, commit, or plan to commit, acts in which they themselves will be killed. Indeed, in the present case, it is not clear, at all, that that was the intention of the

[258] In rejecting this ground, his Honour noted that no further submissions were advanced on the ground that the sentencing Judge had erred in holding that a strong element of personal deterrence was required: *Alou v R* at [130] and [139]
[259] *Lodhi v R (2007)* at [86]
[260] *Alou v R* at [140]
[261] *Alou v R* at [141]-[142]

> respondent. Further and in any event, the submission made on behalf of the respondent contains a logical flaw. In each case, as in the present case, the preparation and planning for a terrorist act takes some time. It is during that time frame that the concept of general deterrence may have some important effect. Put simply, those planning to commit acts of terror must appreciate that, if they are apprehended in the process of preparing to perpetrate such acts, they will forfeit their liberty to live within our community for a very lengthy period of time. It is in that way that those seeking to enjoy a perverted form of glory, or satisfaction, from the perpetration of such acts, can be brought to understand that the cost to them, if they are intercepted, will be particularly high. Further, and in any event, it is not for the courts to 'second guess' the mentality of persons intending to embark on acts of terror. No doubt the mindset of such persons may well vary. The law can only do its best to endeavour to deter such acts, by imposing sentences that may alter the calculations of persons minded to commit such abominable acts as those that were under contemplation in the present case."

Relevance of mental health

159 In *R v Taleb (No. 5),*[262] the offender was convicted following trial on a charge of engaging in conduct preparatory to committing a foreign incursion offence contrary to s.119.4 of the Code, the jury having rejected a defence of mental impairment.[263] At the time of the trial, it was uncontested that the offender was suffering from schizophrenia, and this disease was *"at least in its incipient stages during the period of his offending".* However, two psychiatrists gave differing opinions as to whether the offender was afflicted by a psychotic delusional episode at the time of the offending.[264]

160 Hamill J found that the offender was suffering from a mental illness for *"some period of time before his incarceration but that the full impact of the schizophrenia, and its manifestation of delusional beliefs, probably came on towards the end of his period of offending or after he went into custody"*.[265] His Honour was satisfied that the schizophrenia played a *"significant role"* in his offending, and he was *"vulnerable to religious ideas and extremist ideology"*.[266]

[262] *R v Taleb (No. 5)* [2019] NSWSC 720
[263] *R v Taleb (No. 5)* at [51]
[264] *R v Taleb (No. 5)* at [46]-[50]
[265] *R v Taleb (No. 5)* at [53]
[266] *R v Taleb (No. 5)* at [54] and [58]

161 His Honour found that the offender's mental illness was relevant on sentence in three ways – first, it made the offender an inappropriate vehicle for the principle of general deterrence (although it still had a role to play in offences of this kind); secondly, the principle of specific deterrence was less significant; and finally, that the offender's conditions in custody would be *"more onerous"* in comparison to *"somebody who was not pre-disposed to a schizophrenic illness"*.[267] His Honour observed:[268]

> [The offender's] mental illness, and the substantial community interest in ensuring that Mr Taleb is treated once he is returned to the community, is also a matter that must be considered carefully in determining the nature of the penalty to be imposed and the structure of the appropriate sentence or penalty.

162 Hamill J was of the view that the offence fell *"towards the bottom end of the wide range of conduct potentially criminalised by s 119.4 of the Criminal Code"*[269] and that his moral culpability, given the impact of the offender's mental illness, was *"not particularly high compared with other offenders whose conduct is or may be caught by s 119.4"*.[270]

163 His Honour gave significant weight to protecting the community, and stated the encouraging and fostering the offender's rehabilitation was the *"most effective way of achieving this"*.[271]

164 His Honour was satisfied that a recognisance release order under s.20 Crimes Act was the appropriate sentence, having regard to the mitigating features of the offence, the psychiatric illness of the offender and the period of time previously spent in custody.[272]

165 In *R v Khan (No. 11)*,[273] the offender had pleaded not guilty by reason of mental illness, but failed to make out this defence at trial. The offender caused very serious injury to the victim in a knife attack which constituted a

[267] *R v Taleb (No. 5)* at [59]-[64]
[268] *R v Taleb (No. 5)* at [67]
[269] *R v Taleb (No. 5)* at [106]
[270] *R v Taleb (No. 5)* at [109]
[271] *R v Taleb (No. 5)* at [114]
[272] *R v Taleb (No. 5)* at [115]-[119]
[273] *R v Khan (No. 11*) [2019] NSWSC 594

terrorist act. The offender had a history of mental illness, including a provisional diagnosis of obsessive compulsive disorder (which was later confirmed), with a differential diagnosis of prodromal psychotic illness.[274]

166 The Crown accepted that the offender, as at sentence, has come to suffer from a form of mental illness, whether that be schizophrenia or obsessive compulsive disorder.[275] Counsel for the offender conceded that there was no casual connection between the offender's mental illness and his offending, but submitted that it remained relevant when the Court had to consider general deterrence.[276] In particular, the offender submitted that his conditions in custody would be *"more onerous as a consequence of his illness".*[277]

167 Bellew J recited the principles in *Director of Public Prosecutions v De La Rosa*[278] and said:[279]

> The offender's mental illness was not, in any way, causally connected to his offending. That said, I am unable to accept the submission of the Crown that the fact that the offender's current mental health is being satisfactorily treated in custody leads to a conclusion that his custodial conditions are not rendered more onerous than might otherwise be the case. The fact that the offender has a mental illness at all must have some effect upon his conditions of custody and I have taken that into account. However, given the nature of the offending in the present case, general deterrence remains relevant and is not significantly moderated by mental health considerations.

168 In *R v Pender*,[280] the offender's mental condition played a significant part in the determination of sentence for offences including a terrorism offence under s.101.4(1) of the Code. This case is summarised in detail in the Appendix to this paper.

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[274] *R v Khan (No. 11)* at [108]
[275] *R v Khan (No. 11)* at [109]-[110]
[276] *R v Khan (No. 11)* at [111]
[277] *R v Khan (No. 11)* at [112]
[278] *Director of Public Prosecutions v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194 at [177] (McClellan CJ at CL)
[279] *R v Khan (No. 11)* at [114]
[280] *R v Pender* [2019] NSWSC 1814

Is a terrorist act less serious because it occurred in private?

169 In *R v Shoma*,[281] the offender argued that the objective seriousness of her offence was *"less egregious"* than contemplated terrorists acts considered in other cases, *"because it occurred in a private home rather than a public space"*.[282]

170 Taylor J rejected this argument, and was *"far from convinced that … the division between public and private spheres is binary".*[283] Her Honour stated:[284]

> [60] It cannot be said that your physical actions in carrying out the knife attack were seen or intended to be seen by the public, but they were done with the intention to advance your extremist cause and to intimidate a government or the public. In other words, you always intended the result of those actions to be public; the more public the better. You sought notoriety and widespread dissemination of your actions. You wished to be a martyr and, as you told police, to 'trigger the west'. The west could not be triggered if its citizens remained ignorant of your actions.
>
> [61] The fact that there were no (adult) witnesses to your attempt to kill [the victim] does not necessarily, in my view, make the gravity of your offending less than in any potential lone wolf knife attack in public.
>
> [62] Further, you violated the legitimate expectation that everyone should be and feel safe in their home. The very idea that a foreign student, welcomed into an Australian home, was there for no reason other than to kill a member of that family in the name of violent jihad is as shocking to the sense of safety that members of our community feel as if your attack had been perpetrated on a random member of the public on a major Melbourne thoroughfare.

171 Her Honour also accepted a Crown submission that the choice of a private home for the attack was one made out of necessity, *"driven by* [the offender's] *physical capability"* as she was a slight woman weighing only 40 kilograms, and it was unlikely that she would find a random, sleeping victim in public.[285]

[281] *R v Shoma* [2019] VSC 367
[282] *R v Shoma* at [57]
[283] *R v Shoma* at [59]
[284] *R v Shoma* at [60]-[62]
[285] *R v Shoma* at [63]

Harm to individual victims and the Australian community resulting from a terrorist offence

172 As a general proposition, the level of harm results from an offence is a factor to be taken into account in sentencing: ss.16A(2)(a), (e), (ea) Crimes Act. As part of this process, for offences of *engaging* in an act of terrorism, the harm is perhaps much easier to assess. Harm done to victims and the family of victims was taken into account on sentence in *R v Khan (No. 11); R v Shoma* and *R v Alou (No. 4)*. However, this process is more difficult for a preparatory terrorism offence, which by its nature, *"does not require any harm, tangible or intangible, to be completed"*.[286]

173 The offenders *R v Shoma* and *R v Khan (No. 11)* were the first persons to be sentenced for the offence of intentionally engaging in a terrorist act, with sentence being passed coincidentally on the same day in the Supreme Courts of NSW and Victoria. Shoma carried out a terrorist act, as opposed to doing an act or acts in preparation for or planning a terrorist act, or aiding and abetting a terrorist act.[287] Taylor J accepted that each case will turn on its facts, and that a preparatory offence may be more egregious than a completed terrorist act.[288] Her Honour continued:[289]

> [68] At the same time, I note that there will always be a unique quality to the terrorist act prosecuted as completed as opposed to that contemplated. It is the obvious fact that it happened. It was not thwarted, either by law enforcement activity, a weakened last minute resolve or ineptitude on the part of the offender. The completed terrorist act is not hypothetical, potential, possible or even probable. It is real.
>
> [69] That must, in turn, affect the assessment of the gravity of the offending and the moral culpability of the offender for it. The additional factor to consider in sentencing for a completed terrorist act is, if nothing else, the demonstrated resolve and capacity of the offender to execute the act with the prohibited intentions. The completed act makes tangible the potency of the ideological motivation of the offender, as well as the broader harm to Australian society.

[286] See fn. [291] below. This is because preparatory offences may be "*pre-inchoate because a person commits it even before they would be liable for an inchoate offence such as an attempt"*.
[287] cf *R v Alou (No. 4); Alou v R*
[288] *R v Shoma* at [67]
[289] *R v Shoma* at [68]-[69]

174 Reference was made earlier to statements in *Lodhi v R (2007)* concerning the distinction between preparatory offences under the Code and crimes of attempt, with Price J describing the former as *"anticipatory offences"*.

175 Price J stated that it is the offender's *intention* that is relevant in the assessment of the objective seriousness of the offence.[290] By extension, as part of the sentencing process, Judges should have regard to the level of harm *intended* by the offender, regardless of how simplistic the method of performing the contemplated act of terror (or in other cases, whether the act was foredoomed for failure).[291]

176 In *R v Shoma,* the offender argued that the attack was *"limited"* as *"it was never intended to cause more than a single death"*[292] but conceded that the number of intended or actual victims was not dispositive.[293] Taylor J observed:[294]

> [65] … irrespective of the number of immediate victims, the assessment of harm must necessarily take into consideration the harm done to the Australian public and the Australian polity. The intention to effect that harm is an essential ingredient of the offence to which you have pleaded. And, there can be no defined mathematical relationship between the number of immediate victims and the degree of that broader, less tangible harm. It all depends upon the circumstances.
>
> [66] If illustration is necessary, the murder of Fusilier Lee Rigby was notable for its impact throughout the western liberal world.

177 In *R v Khan (No. 11)*, Bellew J said:[295]

> The fact that one may envisage offending of greater gravity, perhaps involving multiple victims, does not mean that the present offending was not serious. Clearly, it was …

A similar argument was also advanced and rejected, in the context of an act in preparation offence: *R v Hraichie (No. 3)*.[296]

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[290] *Lodhi v R (2007)* at [229]
[291] For a criticism of this approach from a UK perspective, see: Rory Kelly, *Sentencing Terrorism Offences: No Harm Intended?* (2019) *Criminal Law Review* 764
[292] *R v Shoma* at [57]
[293] *R v Shoma* at [65]
[294] *R v Shoma* at [65]
[295] *R v Khan (No. 11)* at [81]

Prospect of deportation

178 In *R v Shoma*, the offender had come to Australia on a student visa. The sentencing Judge accepted that the offender would be deported when she was released from custody.[297] The offender had submitted that if she was returned to Bangladesh, she would be vulnerable to being extrajudicially murdered, said to be part of a *"hard-line approach by Bangladeshi governments to terrorist violence …"*.[298] Taylor J relied on *Guden v R*[299] for the proposition that deportation was a factor which could operate as a mitigating factor on sentence, both during the period of actual incarceration and on release.[300] It has been held in New South Wales that the likelihood of deportation is an impermissible consideration in the sentencing process (save for consideration of special circumstances).[301] More recently, the NSW Court of Criminal Appeal stated that for Commonwealth offences the prospect of deportation is irrelevant to the sentencing discretion.[302]

179 In *R v Shoma,* Taylor J noted that the principle in *Guden v R* does not go so far as to require a sentencing Judge to accept the impact of the deportation as a mitigating factor in the absence of demonstrable hardship.[303] Her Honour did not make such a finding as the offender had no intention of ever residing in Australia, and all that had been advanced on her behalf was that there was a subjective belief that the Bangladeshi government would meet her with violence, without any basis for that belief.[304]

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[296] *R v Hraichie (No. 3)* at [227]-[228]
[297] *R v Shoma* at [98]
[298] *R v Shoma* at [99]
[299] *Guden v R* (2010) 28 VR 288; [2010] VSCA 196
[300] *R v Shoma* at [100]
[301] See *R v Pham* [2005] NSWCCA 94 at [13]-[14]; *Konamala v R* [2016] VSCA 48; and *Da Costa Junior v R* [2016] VSCA 49. The Victorian approach was recently approved in Queensland in *R v Norris; Ex parte Attorney-General (Qld)* (2018) 272 A Crim R 12; [2018] QCA 27. In *R v Norris,* Gotterson JA (with whom Sofronoff P and Philippides JA agreed), expressly considered and distinguished *R v Pham* [2005] NSWCCA 94: [31]-[45]
[302] *Kristensen v R* [2018] NSWCCA 189 at [23]-[24] (Payne JA, R A Hulme and Button JJ). See also: NSW Judicial Commission, *Sentencing Bench Book* at [10-570]. For an analysis of the relevance of deportation in sentencing, and the differences in approach as between the various Australian states, see: Sentencing Advisory Council of Victoria, *Deportation and Sentencing: An Emerging Area of Jurisprudence*, November 2019
[303] *R v Shoma* at [103]; *Guden v R* at [29]
[304] *R v Shoma* at [105]

No consideration is to be given to the existence of a continuing detention order regime for high risk terrorist offenders

180 In *Alou v R*,[305] the offender argued that the sentencing Judge erred because he failed to take into account the existence of a continuing detention scheme for high risk terrorist offenders. It was said that this was erroneous because the existence of such a scheme *"may reduce the need to take into account the protection of the community"*. His argument rose no higher than a passing submission that the remarks in *DPP (Cth) v Besim (No. 3); DPP (Cth) v MHK (a Pseudonym) (No. 3)*[306] did not conclusively determine the issue, and that what was said was merely dicta. Further, it was submitted that *Muldrock v The Queen*[307] did not *"unambiguously exclude as irrelevant the existence of a mechanism outside the sentencing regime"*.[308]

181 In *Muldrock v The Queen*, the High Court unanimously held:[309]

> … The notion that a sentence might be reduced to take into account the existence of a regime outside the criminal law providing for the detention of sex offenders may be thought to have little to commend it as a matter of principle. The Court of Criminal Appeal was right to reject the submission. The expression "mitigating factor" in s 24A refers to a factor that is taken into account to reduce the sentence that would otherwise be appropriate. It is the function of the court sentencing an offender for a criminal offence to take into account the purposes of criminal punishment in determining the appropriate sentence. A purpose of punishment is the protection of the community from the offender. A court may not refrain from imposing a sentence that, within the limits of proportionality, serves to protect the community in a case that calls for it because at some future time the offender may be made the subject of an order under the *Sex Offenders Act*.

182 Bathurst CJ in rejecting this ground, held that what had been said in *Muldrock v The Queen* about similar orders under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) was not ambiguous and *"applied with equal force"* to the scheme for high risk terrorist offenders.[310]

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[305] *Alou v R* (2019) 373 ALR 347; [2019] NSWCCA 231
[306] *DPP (Cth) v Besim (No. 3); DPP (Cth) v MHK (a Pseudonym) (No. 3)* (2017) 52 VR 303; [2017] VSCA 180
[307] *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39
[308] *Alou v R* at [144]-[147]
[309] *Muldrock v The Queen* at [61]
[310] *Alou v R* at [148]-[149]

Requirement under the Crimes Act 1914 (Cth) to assess the offender's prospects of rehabilitation

183 s.16A(2)(n) Crimes Act requires a sentencing Judge to take into account, when sentencing for a federal offence, the prospect of rehabilitation of the offender. In *Alou v R*, the Applicant complained that the sentencing Judge had erred because he was not entitled to sentence the offender on the basis that he was a danger to the community, or that he had *"grim"* or *"bleak"* prospects of rehabilitation.[311] In support of this ground, the Applicant relied on a passage from a psychologist's report tendered in his case, which relevantly stated:[312]

> … Preliminary examination of Mr Alou's case against these factors suggests that at this time he has many of the characteristics associated with risk of reoffending, particularly with regard to his belief system. However, risk assessment is not static, but dynamic, changing over time in response to fluctuations in the factors measured. *The extent to which these dynamic factors will continue to be present in the future (such as that Mr Alou becomes eligible for parole after a lengthy period in custody) cannot be predicted with any certainty. There is therefore limited utility in assessing Mr Alou's current risk given the likelihood of a long sentence being imposed*.

184 It was submitted that *"as a matter of common sense"*, it could not be said that the offender's prospects were unlikely to change within the duration of the offender's non-parole period, or that his prospects were poor.[313]

185 In rejecting this ground of appeal, Bathurst CJ held that when assessing the offender's prospect of rehabilitation, *"the task is to be carried out on the evidence before the court"*[314] and in this case, there was *"ample support for the finding by the sentencing judge"*.[315] His Honour continued:[316]

> [105] The criticism of the reasoning of the sentencing judge was that his Honour had no material on which to conclude that the position would remain the same on what on any view would be a very lengthy sentence. That may be so, even though there was no evidence that there would be any change. However, that does not mean that the sentencing judge is not obliged to make an assessment of the prospects of rehabilitation on the evidence before him …

[311] *Alou v R* at [93]-[94]
[312] *Alou v R* at [27]
[313] *Alou v R* at [95]
[314] *Alou v R* at [102]
[315] *Alou v R* at [103]
[316] *Alou v R* at [105] and [107]

> [107] … it must be remembered that the sentencing judge referred to the statement of Mr Sheehan, "[t]he nature of his sentence will be an influencing factor in his future prognosis, with a sentencing structure that allows for hope, creating a platform for motivation". The sentencing judge recognised the possibility that the applicant may see things differently at some time in the future and that a sentence which held some hope in the future may assist in his change of mindset …

Where an offender purports to resile from their extremist beliefs

186 In *R v Khan (No. 11)*,[317] the offender gave evidence, both orally and in writing, at his sentencing hearing that he had resiled from his extremist ideology, stating that his previous belief that Islamic State *"spoke the truth about Islam"* was wrong. The offender stated that he did not hate Australia or Australians, and that he hoped to reintegrate into Australian society.[318] He also expressed remorse and apologised to the victim.[319]

187 The offender was extensively cross-examined, and conceded that he had attempted to minimise the depth of his radical beliefs in order to obtain a more favourable report, and in turn, assist his case at trial. He did not accept that he was downplaying his extremist views because he would receive a lighter sentence. Finally, he expressed his belief that he was *"not against Jihad"* in the militaristic sense, but was not in favour of *"killing innocent civilians or running people down, flying a plane into buildings"*.[320] It was submitted that the offender had *"reached the point where he* [was] *substantially rehabilitated".*[321]

188 Bellew J approached the offender's evidence with caution. His Honour stated:[322]

> [100] Necessarily, the offender's prospects of rehabilitation are dependent, in large measure, upon a complete and unconditional abandonment of the ideology he held when he attacked Mr Greenhalgh. I am unable to accept the submission that the offender has reached the point where he is substantially rehabilitated. That conclusion would necessarily depend upon a finding that

[317] *R v Khan (No. 11*) [2019] NSWSC 594
[318] *R v Khan (No. 11)* at [84]
[319] *R v Khan (No. 11)* at [85]-[87]
[320] *R v Khan (No. 11)* at [88]-[94]
[321] *R v Khan (No. 11)* at [100]
[322] *R v Khan (No. 11)* at [100]-[102]

> his evidence before me should be accepted, and that is a finding which I am not able to reach. Quite apart from the matters to which I have already referred, the fact that the offender admitted lying to medical practitioners in order to be portrayed more favourably in their reports is necessarily significant. At least some of those reports, if not the majority of them, incorporated the opinions which went directly to the offender's defence of mental illness. It was not simply a matter of the offender lying in order to be portrayed more favourably in those reports. It was, as the offender effectively admitted, a matter of lying in the hope that the jury would find him not guilty on the grounds of mental illness. In acting as he did, the offender demonstrated an unequivocal preparedness to conduct himself in a completely manipulative fashion, and to consciously tell lies in order to suit his own purposes. The significance of the fact that subject of his lies on those occasions was, at least in part, the very ideology which he now maintains that he has abandoned, needs no further comment.
>
> [101] If the offender maintains his current stated mindset, then his prospects of rehabilitation may be favourable. However, I am not persuaded that he will do so. At its highest, his evidence should be regarded as some preliminary indication of a stepping away from his previously held beliefs. For the same reasons, and whilst the offender's expressions of contrition were unequivocal, I remain sceptical about their veracity. Time will tell whether they prove to be genuine.
>
> [102] In any event, and although issues of rehabilitation require consideration, they are to be afforded less weight in matters of this nature.

189 In *R v Al-Kutobi; R v Kiad*,[323] Mr Al-Kutobi gave evidence and tendered two documents, being a psychologist's report and a handwritten letter.[324] Mr Kiad did not give evidence, but relied on an unsworn narrative provided to a psychologist.[325] Mr Al-Kutobi stated that he had given up drug use, and was hoping to engage in a de-radicalisation program, asserting that he no longer followed the *"extreme tenets of Islamic State"* and radical Islam. Mr Al-Kutobi also apologised to the community for his actions.[326] Garling J accepted Mr Al-Kutobi's account of his upbringing and background (especially when the Crown did not challenge it), but treated the evidence about his renunciation of radical Islam with *"some reserve"* because it was *"self-generated and uncorroborated"* and *"a relatively recent phenomenon"*.[327] His Honour also

[323] *R v Al-Kutobi; R v Kiad* [2016] NSWSC 1760
[324] *R v Al-Kutobi; R v Kiad* at [155]
[325] *R v Al-Kutobi; R v Kiad* at [170]
[326] *R v Al-Kutobi; R v Kiad* at [161]-[162] and [166]
[327] *R v Al-Kutobi; R v Kiad* at [167]

noted that the cleric who had assisted Mr Al-Kutobi change his views did not give evidence, nor was there any other letter of reference in support.[328]

190 Mr Kiad, through the psychologist, stated that his views of Islamic State had *"considerably moderated"* in custody. The psychologist opined that his isolation and vulnerability since arriving in Australia to live with his new wife *"provided fertile ground … for extremist ideology to take hold … with the misguided belief that* [serving Islamic State] *might give life some purpose and meaning".* However, his Honour noted that although Mr Kiad experienced some feelings of depression from time to time, he did not suffer from any diagnosable psychiatric condition.[329]

191 His Honour later concluded that he was *"unable to form any view about the prospects of successful rehabilitation of either offender"* in the absence of any *"realistic basis for the conversion of* [hope for successful rehabilitation] *into a reliable prediction of successful rehabilitation".*[330]

192 Similarly in *R v Mohamed, Chaarani & Moukhaiber*,[331] each co-offender sought to place before the Court, evidence of their de-radicalisation.

(1) Chaarani had provided a letter of apology directed to the Court, a letter of apology to the Shia mosque which he had burned down, and a letter from his wife. In his letter to the Court, he expressed sorrow, shame and disgust for his actions, and stated that he had been *"brainwashed and misled"* by Islamic State, an organisation which he now condemned. Chaarani had also befriended a Shia man in prison, and indicated through his counsel, his preparedness to engage in a de-radicalisation program.[332]

(2) Mohamed also provided a letter of apology to the Court, in which he described his radicalisation and how he became seduced by the *"dark*

[328] *R v Al-Kutobi; R v Kiad* at [168]
[329] *R v Al-Kutobi; R v Kiad* at [175]-[176]
[330] *R v Al-Kutobi; R v Kiad* at [197]-[198]
[331] *R v Mohamed, Chaarani & Moukhaiber* [2019] VSC 498
[332] *R v Mohamed, Chaarani & Moukhaiber* at [119]-[123]

path" of Islamic State. He now condemned Islamic State, stating *"I utterly reject ISIS and their ideology, their followers and people of their ilk".* He also tendered a letter from his former wife about his rehabilitation.[333]

(3) Moukhaiber, though his counsel, denied that he was radicalised.[334] However, Moukhaiber tendered a letter from the Senior Chaplain of the prison in which he was being housed, indicating that he had requested to be admitted to a de-radicalisation course. Moukhaiber also relied on academic literature, to some aspects of the evidence led at trial, and other certificates and written material. His Honour later said that no sensible assessment could be made on the material as to his prospects of de-radicalisation.[335]

193 None of the offenders gave sworn evidence which could be tested by the Crown. Both Chaarani and Mohamed conceded that the Court would be entitled to give the evidence little weight.[336] The Crown submitted that each of these offenders' claim to *"abandon ideology made now, is no more than an attempt to advance themselves"* and *"no more than opportunism"*. This was particularly so in circumstances where each of them was maintaining their innocence, had come at the *"last minute"*, and was *"designed to ensure it could not be tested".*[337]

194 Tinney J observed that each co-offender bore the onus to establish on the balance of probabilities that they had each moved away from their extremist beliefs.[338] His Honour was not persuaded on balance that either Mohamed or Chaarani had been de-radicalised or were moving down such a path.[339]His Honour said:[340]

[333] *R v Mohamed, Chaarani & Moukhaiber* at [125]-[129]
[334] *R v Mohamed, Chaarani & Moukhaiber* at [136]
[335] *R v Mohamed, Chaarani & Moukhaiber* at [113]; [131] and [143]
[336] *R v Mohamed, Chaarani & Moukhaiber* at [124] and [130]
[337] *R v Mohamed, Chaarani & Moukhaiber* at [132]-[134]
[338] *R v Mohamed, Chaarani & Moukhaiber* at [137]
[339] *R v Mohamed, Chaarani & Moukhaiber* at [140]
[340] *R v Mohamed, Chaarani & Moukhaiber* at [138]-[140]

> [138] The authorities are clear that in the absence of sworn evidence from either of you, Mohamed and Chaarani, the material upon which you have relied pointing to a degree of de-radicalisation by both of you should be given very little weight.
>
> [139] In addition to that, the circumstances in which the material eventually came before the Court would in any event have made me very hesitant to rely on it. You have been in custody on these and other terrorism matters for some years. You were convicted of one terrorism crime in late 2018. You were found guilty by the jury in the current case on 9 May 2019. No submission was made on your behalf pointing to any indication of de-radicalisation until the third occasion on which the plea proceeded. This is not explainable by the fact that there was any practical difficulty marshalling the material. I am left with the impression that the material tendered on your behalf, including your letters to the Court, is unconvincing, contrived and self-serving.
>
> [140] I believe the material should be given very little weight by me in the sentencing process. It is certainly not sufficient to discharge the onus you bear to establish that you have de-radicalised or at least moved down that path.

195 However, his Honour did take into account the public renunciation of Islamic State, and said:[341]

> [141] One matter is worthy of further mention in your cases, Mohamed and Chaarani. Each of you, through your counsel, in open court, renounced IS and your previous support for it. You have sought to rely on this fact, in line with the approach of Croucher J in *The Queen v Cerantonio*.
>
> [142] Your public renunciation of IS may, at first blush, be seen as being entirely self-serving and unconvincing. On the other hand, it does represent a public statement by two followers of that criminal organisation that they now reject its ideology. Whether the renunciation is genuine or not, some good may flow from its having been made by you. I take that into account in your favour.

196 For a further illustration of when an offender, who had not given evidence, purports to resile from their extremist views, see *R v Elmir (No. 3).*[342] In rejecting the offender's claim, Davies J had regard to, amongst other things, the fact that the offender had yet to access or participate in any formal program of rehabilitation and/or deradicalisation, or access more moderate

[341] *R v Mohamed, Chaarani & Moukhaiber* at [141]-[142]
[342] *R v Elmir (No. 3)* [2019] NSWSC 1040 at [54]-[64]

religious teaching from the visiting Imam at the High Risk Management Correctional Centre.[343]

197 In *R v Shoma,* the offender had remained a devout adherent to Islamic State, and had demonstrated no contrition for her offending, with her only regret being that she did not successfully kill her victim.[344] Her prospects of rehabilitation were poor, given her *"ongoing ferocity and strength of* [her] *radical belief".* [345]

Remorse and contrition where tentative apology given but later withdrawn

198 In *R v Atai (No. 2)*,[346] the offender was sentenced for various terrorism offences, including his criminal involvement in the events leading to the killing of Curtis Cheng. The offender pleaded guilty to one count of aiding, abetting, counselling or procuring the commission of a terrorist act, namely engagement in a terrorist act by Farhad Mohammad (the 15 year old who killed Mr Cheng); and two counts of intentionally collecting funds for Islamic State, knowing that it was a terrorist organisation.[347]

199 The offender gave substantial oral evidence at his sentencing hearing in the course of which he apologised to Mr Cheng's wife. Johnson J said:[348]

> [308] The onus lies upon the Offender, on the balance of probabilities, to demonstrate the existence of genuine contrition and remorse. Likewise, the Offender carries the onus of establishing, on the civil standard of proof, that he is moving away from the extremist beliefs which motivated his crimes: *Director of Public Prosecutions (Cth) v Besim* at [108]-[109]. The fact that the Offender was prepared to give evidence in September 2018, and face cross-examination, and in doing so, to move some (perhaps small) distance from Islamic State, assisted him to an extent on sentence: *Director of Public Prosecutions (Cth) v MHK (A Pseudonym) (No 1)* at [67]-[68].
>
> [309] The Offender's expression of regret for the offence contained in Count 1 which saw the killing of Mr Cheng was somewhat lukewarm. At the same time, it may be said that the expression of a fulsome apology would itself have been of doubtful credibility at that point.

[343] *R v Elmir (No. 3)* at [59]
[344] *R v Shoma* at [85]-[89]
[345] *R v Shoma* at [90]-[92]
[346] *R v Atai (No. 2)* [2018] NSWSC 1797
[347] *R v Atai (No. 2)* at [2]
[348] *R v Atai (No. 2)* at [308]-[314]

> [310] The most that could be said is that, by September 2018, the Offender had moved, to an extent, from the position which he held certainly throughout 2015 and up to his arrest in March 2016. He maintained a fully radicalised position supportive of Islamic State well into his period in custody.
>
> [311] Courts must exercise caution in assessing the genuineness of claims that a holder of extremist views is prepared to move away from them, especially when that claim is made at a sentencing hearing. That said, it is in the public interest for persons who have committed terrorist offences to seek to engage in a process which has a capacity to assist an offender to alter thought processes so as to comply with the laws of society. As at 21 September 2018, there was some prospect that the Offender was prepared to set out on this pathway in the extended period of imprisonment which must follow for his serious crimes.
>
> [312] The Offender had stated belatedly that he wished to undertake a process of deradicalisation commencing from deeply entrenched extremist beliefs which have modified to a limited extent from support to Islamic State to support for the Taliban and Jabhat al-Nusra.
>
> [313] The Offender has no prior criminal history so that his prospects of rehabilitation and risk of reoffending are tied closely to an alteration in his belief system so that he complies with the ordinary decent standards of the law-abiding community.
>
> [314] As things stood as at 21 September 2018, I proposed to take into account in the Offender's favour on sentence the very guarded assessment which could be made at that stage with respect to these features, knowing that the Offender has family and community support systems available to him, and that any steps to be taken by him towards rehabilitation would be scrutinised carefully during his sentence, and when the time came for a parole decision to be made with respect to him at a considerable time in the future (citations omitted).

200 However after the sentencing hearing, but before sentence was passed, the offender sent to the AFP and senior counsel for the Crown, letters which retracted his apology to Mrs Cheng, and stated that he was not remorseful for his actions.[349]

201 At a re-opened sentencing hearing, the Crown submitted that these letters demonstrated that the offender maintained his extremist views supportive of violent jihad, and *"operated strongly against the offender in areas of contrition and remorse, the need for general and specific deterrence, his prospects of*

[349] *R v Atai (No. 2)* at [15]-[16] and [315]-[317]

rehabilitation and deradicalisation, protection of the community and his veracity and truthfulness as a witness".[350]

202 Johnson J said:[351]

> [324] What was a somewhat fragile and tentative expression of regret directed in Court to Mrs Cheng has been withdrawn and replaced by a cursory observation made to the psychologist that the Offender *"felt for* [Mrs Cheng] *as anyone would"*. This is not evidence of remorse. Indeed, the approach adopted by the Offender towards the Cheng family is cruel and devoid of basic humanity.
>
> [325] Beyond that, the Offender is once again using the slogans of violent jihad. He states that he is *"happy with my action"* and asks *"Allah to grant victory to the believers and to destroy those who oppress his slaves"*. The Offender makes clear that he continues to attach himself to the warped and criminal belief system which has led him to his present custodial position.

203 His Honour observed that although there was no evidence of pressure being applied to the offender, he was being housed with other offenders who shared radical beliefs, and *"it may be easier for the offender to remain aligned with others in custody who hold to the robotic slogans and fixated thought processes of Islamic State*".[352]

204 Johnson J was prepared, prior to the receipt of the letters, to make a very guarded assessment of the offender's prospects of rehabilitation (see above at [199]).[353] However, in light of the letters, his Honour found that the offender's prospects of rehabilitation were not favourable, and his risk of reoffending remained significant.[354] In arriving at this conclusion, his Honour noted:[355]

> [328] The Offender is not to be punished further for the course he has taken since 14 October 2018. However, he is deprived of several mitigating factors which would otherwise have operated in his favour on sentence.
>
> [329] There is no evidence of contrition or remorse or the development of insight into his offending and the harm done to individuals and the Australian community. The Offender remains attached to the belief system of violent

[350] *R v Atai (No. 2)* at [319]
[351] *R v Atai (No. 2)* at [324]-[325]
[352] *R v Atai (No. 2)* at [326]
[353] *R v Atai (No. 2)* at [314]
[354] *R v Atai (No. 2)* at [331]
[355] *R v Atai (No. 2)* at [328]-[329]

> jihad which bears upon issues of specific deterrence and protection of the community and his prospects of rehabilitation and risk of reoffending. I have regard, as well, to the Offender's acknowledgement that he gave untrue evidence on a number of issues at the sentencing hearing.

205 Much like *R v Atai (No. 2),* the offender in *R v Hraichie (No. 3)* wrote a letter to the Court some weeks after his sentencing hearing in which he unequivocally expressed his support for violent jihad, stating that: *"I will always support jihad as it is part of Islam and I love my brothers from Al Qaeda and the Taliban and the other mujahid soldiers"*. The letter also criticised democracy, the Court, and stated that he did not accept the laws of Australia.[356]

206 Unlike in *R v Atai (No. 2)*, the offender did not give evidence at his sentencing hearing, but relied on references from his parents, in which there were suggestions that he was remorseful for his conduct. However, in his letter to the Court, the offender stated that he *"ma*[de] *disassociation from their claims that I have made comments pertaining to my actions of a remorseful nature* [sic]*"* and that he *"never … express*[ed] *regret or remorse from the religion of Allah".*[357]

207 The Court said:[358]

> [290] What emerges from the Offender's letter? He remains firmly committed to violent jihad. He rejects the laws of Australia and the authority of the Court.
>
> [291] He has a fixated view which is adverse to democracy and the institutions which are part of a free and democratic society, including the media. He defends the random murder of an innocent man such as Curtis Cheng. He expresses limited regret for part of his attack on Mr O'Keefe, not because he is sorry for it, but because he considers that some of the things he did to him were not strictly authorised by his religious beliefs. He dresses his beliefs in a cloak of religious dogma which is far removed in history and is based upon a distorted understanding of Islam. He supports Al Qaeda and the Taliban and the actions of Islamic State against non-Muslims.
>
> [291] And all this reflects his present thoughts after several years in custody.

[356] *R v Hraichie (No. 3)* at [270]-[288]
[357] *R v Hraichie (No. 3)* at [287]
[358] *R v Hraichie (No. 3)* at [290]-[292]

208 Johnson J found that the letter worsened the offender's position with respect to his prospects of rehabilitation and his risk of reoffending.[359] His Honour concluded that the offender's risk of reoffending was high and his prospects of rehabilitation were bleak.[360]

Failure to stand for the jury and for the Court as a sentencing issue

209 Reference was made earlier in this paper (at [37]-[45]) to a pre-trial ruling in *R v Dirani (No. 7)* where the Court declined to excuse the accused from his obligation to stand for the jury and Judge during his trial. A failure to stand has been taken into account by sentencing Judges as evidence that the offender did not accept the laws of Australia, and by extension, demonstrated a continued commitment to radical Islam. Such attitudes do not assist offenders when the Court comes to assess the offender's risk of reoffending and prospects of rehabilitation.[361]

210 The position in *R v Dirani (No. 34)* was arguably more extreme, as the offender had unsuccessfully made a pre-trial application to excuse him from standing.[362]

211 In *R v Hraichie (No. 3)*, the offender, in a letter written to the Court, explained why he did not stand during his sentencing hearing. He said: *"The reason is simple. You are the representative of Democracy. A Taghoot - ie false deity. and I will never stand for a Taghoot. Nor will I acknowledge, respect, accept or submit to this Disbeliever*".[363] The Court had regard to the offender's failure to stand when assessing his prospects of rehabilitation and risk of reoffending, as it illustrated his continued commitment to violent jihad.[364]

[359] *R v Hraichie (No. 3)* at [301] and [304]
[360] *R v Hraichie (No. 3)* at [306]
[361] *R v Alou (No. 4)* at [238]-[241]; *R v Azari (No. 12)* at [166]-[172]; *R v Dirani (No. 34)* at [221]-[222]; and *R v Elmir (No. 3)* at [62]-[63]
[362] *R v Dirani (No. 7)* and *R v Dirani (No. 34)* at [223]
[363] *R v Hraichie (No. 3)* at [281]
[364] *R v Hraichie (No. 3)* at [304]-[305]

Who can give a victim impact statement?

212 In *R v Khan (No. 11)*,[365] the offender had been convicted of engaging in a terrorist act, namely stabbing a person multiple times with a knife with the intention of killing him. The key issue at the trial was whether he was suffering from a schizophrenic illness such that he did not know that his conduct was wrong.[366] The victim was going for a walk when the offender attacked him in the street with a hunting knife. The offender rushed the victim and repeatedly stabbed him in the head, neck, arms, hands, torso and stomach. The victim ran into a nearby hairdresser to escape.[367] A couple saw the offender threaten and stab the victim[368] and another witness assisted by distracting and obstructing the offender from attacking the victim. That witness was also attacked by the offender, and his wife and son had witnessed the entire incident unfold.[369]

213 The offender objected to the tender of the victim impact statements of the other witnesses to the incident because they were not *"victims"* and s.16AAA Crimes Act did not permit witnesses to be regarded as victims.[370] In support of this submission, the offender relied on *R v Nahlous*.[371]

214 Bellew J had regard to the definition of *"harm"* in s.16 Crimes Act, but noted that the term *"victim"* was not defined.[372] His Honour observed that *R v Nahlous* was of *"limited assistance"* because it did not involve consideration of s.16AAA, and could be distinguished from *R v Khan (No. 11)* because the person who had made the victim impact statement in that case was the loved one of a victim, and not a witness to the offending.[373]

215 His Honour accepted a Crown submission that the term *"harm"* in s.16 contemplates that a victim could experience *"physical, psychological and*

[365] *R v Khan (No. 11*) [2019] NSWSC 594
[366] *R v Khan (No. 11)* at [1]-[2]
[367] *R v Khan (No. 11)* at [30]-[37]
[368] *R v Khan (No. 11)* at [16]
[369] *R v Khan (No. 11)* at [17]-[19]
[370] *R v Khan (No. 11)* at [10]
[371] *R v Nahlous* (2013) 228 A Crim R 503; [2013] NSWCCA 90
[372] *R v Khan (No. 11)* at [12]-[14]
[373] *R v Khan (No. 11)* at [21]

emotional suffering": s.16(a), and allowed the tender of the statements from the other witnesses.[374]

Onerous conditions in custody

216 The prospect of an offender serving part of all of his or her term of imprisonment in a more confined custodial setting, such as the High Risk Management Correctional Centre at Goulburn Correctional Complex ("**HRMCC**"), is usually taken into account on sentence.[375]

217 Evidence has been given in sentencing hearings concerning changes made to the HRMCC in 2019. When sentencing Milad Atai in November 2018, the Court referred to evidence concerning these changes:[376]

> [281] In response to a question from the Court, Senior Assistant Superintendent Poulsen explained that an expansion of the HRMCC was being undertaken with an area of the Goulburn Correctional Complex being closed and refurbished for the purpose of it being regazetted as part of the HRMCC. He explained that this will become part of the HRMCC next year. He described the purpose to which this new area would be put in the following way:
>
> > "Area 2 will be highly resourced with education, counselling, PRISM are going to have a very big role in there, the chaplaincy service, there's a lot of programs and education and that is what that unit is specifically being developed for as a transition unit from the super-max setting to a more normal correctional centre. So it's like a trial area to see how they participate and how they go."
>
> [282] Senior Assistant Superintendent Poulsen explained that this new area would be able to locate inmates who showed signs of rehabilitation.

218 When sentencing Mustafa Dirani in August 2019, Johnson J said:[377]

> In sentencing the Offender, I will take into account the undoubtedly stricter custodial conditions to which he will be subject while he remains housed at the HRMCC as appears likely, at least for an extended period. The placement of the Offender will depend upon a number of matters, including his willingness to commit to disengagement from radical behaviour, which may potentially see him considered for transfer to the new Stage 2 Centre within the HRMCC referred to in the Minister's media release of 14 May 2019. It is a

[374] *R v Khan (No. 11)* at [22]-[23]
[375] See for example: *R v Alameddine (No. 3)* at [249]-[257]; *R v Dirani (No. 34)* at [190]-[200]; *R v Alou (No. 4)* at [214]-[223]
[376] *R v Atai (No. 2)* at [281]-[282]
[377] *R v Dirani (No. 34)* at [200]

> matter for the Offender to consider what course he seeks to take in that respect.

219 The Stage 2 Centre within the HRMCC was said to operate as a *"step down unit"* from the HRMCC to house *"offenders who have demonstrated a commitment to disengage from radical behaviour"* allowing the authorities to *"combat extremist narratives and challenge ideology".*[378]

220 In *Baladjam v R*,[379] the offender complained that the sentence imposed on him in April 2009 was manifestly excessive because insufficient weight was placed on the conditions of custody which the offender has now come to endure.[380] The offender gave evidence which described his classifications and the onerous conditions he had experienced being housed in the HRMCC,[381] and responded to the evidence led by the Crown of his custodial conditions by way of an affidavit from his solicitor.[382]

221 The offender did not seek to traverse the conclusions of the sentencing Judge, but argued that there was (now) evidence demonstrating that *"his conditions of custody were far more onerous than the sentencing judge was led to believe and which warranted far greater consideration in mitigation of sentence".*[383] It was submitted that the sentencing Judge acted on *"imperfect knowledge"* and evidence which was now shown to be incorrect.[384]

222 Bathurst CJ (with whom Hoeben CJ at CL and Fagan J agreed) cited the principle in *R v Smith*,[385] where King CJ said:[386]

> While the evidence sought to be admitted on this appeal in a sense establishes the occurrence of events occurring after the passing of sentence, it does so for the purpose of explaining the full extent and implications of the appellant's condition of health which existed at the time of sentence. I think that the authorities show that it is permissible to have regard to events

[378] *R v Dirani (No. 34)* at [214]
[379] *Baladjam v R* [2018] NSWCCA 304
[380] *Baladjam v R* at [156]
[381] *Baladjam v R* at [158]-[196]
[382] *Baladjam v R* at [197]-[214]
[383] *Baladjam v R* at [215]
[384] *Baladjam v R* at [216]
[385] *R v Smith* (1987) 44 SASR 587
[386] *R v Smith* at 588

> occurring after sentence for the purpose of showing the true significance of facts which were in existence at the time of sentence.

His Honour noted that this principle does not apply when custodial conditions change as a result of executive action.[387]

223 The Chief Justice concluded that the evidence did not fall within the principle enunciated in *R v Smith*, and rejected the evidence. After detailing the evidence of the alleged differences between his actual conditions and those acted upon by the sentencing Judge, his Honour said:[388]

> In summary, what the evidence establishes, subject to the two exceptions to which I have referred, is not that the sentencing judge failed to appreciate the conditions of incarceration as they existed at the time of sentence, but rather that those conditions have changed as a result of actions by the executive. In these circumstances, the evidence does not fall within the principle set out in *R v Smith*. The evidence is thus irrelevant and should be rejected.

Taking into account boasting of a terrorist intent and planning

224 In *R v Hraichie (No. 3)*,[389] the offender pleaded guilty to a number of serious offences, including one offence of committing acts in preparation for or planning a terrorist act, namely attacks on Australian law enforcement officers in support of Islamic State, contrary to s.101.6(1) of the Code.[390] In addition, the offender was sentenced for offences of wounding with intent to murder under s.27 *Crimes Act 1900* (NSW) and causing grievous bodily harm with intent under s.33(1)(b) *Crimes Act 1900* (NSW). The State offences arose from an attack by the offender upon his cell mate in a correctional centre in which, amongst other injuries, the letters "E4E" (*"Eye for an Eye"*) were carved on the victim's forehead.[391]

[387] *Baladjam v R* at [225]
[388] *R v Smith* at [232]
[389] *R v Hraichie (No. 3)* [2019] NSWSC 973
[390] *R v Hraichie (No. 3)* at [1]-[4]
[391] *R v Hraichie (No. 3)* at [98]-[131]

225 The offender had made a series of admissions to both NSW Police and the AFP about all of his offences. Johnson J accepted that the offender should be afforded various discounts on sentence, for both assistance to authorities and for the utilitarian value of the pleas of guilty. However, it was observed that in his various interviews with police, the offender was *"boasting concerning his exploits and planned acts of violence on behalf of Islamic State … he was proud of his acts and his support of violent jihad"*.[392] The Court held that there ought be a modest allowance for his admissions, and no allowance for contrition and remorse.[393] His Honour stated:[394]

> [267] In my view, any combined discount which exceeded these [nominated] percentages would give rise to a sentence which was unreasonably disproportionate to the nature and circumstances of the offence. This is especially so as the Offender's desire to make these admissions did not reflect the more common scenario where a confession is made out of remorse or for tangible self-interest such as *"wiping the slate clean"* (*Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21) or to seek entry to a diversion program (*CMB v Attorney General for NSW*).
>
> [268] The Offender in this case made a number of admissions because he was proud of his criminal acts. This aspect does not disqualify him from a discount, but it is clear that any discount should be modest having regard to the purposes of sentencing.
>
> [269] As should be clear, there is no allowance for contrition and remorse as these features are not demonstrated by the Offender in this case.

226 A similar approach was taken in *R v Shoma*, where Taylor J did not accept the submission that the offender's admissions augured well for the offender's prospects of rehabilitation. Her Honour instead found that the admissions were made because she was *"proud"* of her actions, *"believing them to be those of a martyr"*.[395]

[392] *R v Hraichie (No. 3)* at [254]
[393] *R v Hraichie (No. 3)* at [267]-[269]
[394] *R v Hraichie (No. 3)* at [267]-[269]
[395] *R v Shoma* at [95]

Sentencing of terrorist offenders for plot to bring down international aircraft and to carry out poisonous gas attack on members of the public

227 In *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)*,[396] the offenders were found guilty of conspiring with each other, and divers others, to do acts in preparation for a terrorist act or acts, contrary to ss.11.5(1) and 101.6(1) of the Code.[397] Adamson J noted that because the offenders were convicted in separate trials, it was necessary to make findings of fact by reference to the evidence led in the particular trial, but *"the Crown case was substantially similar in both trials".*[398] There were, in effect, three separate plots which formed part of the conspiracy.

228 Her Honour explained the offenders' familial relationships stating that Khaled Khayat was the eldest surviving sibling, and was 18 years older than Mahmoud Khayat, who was the youngest.[399] The offenders and their brother, Amer Khayat, migrated to Australia, with the balance of their family remaining in Lebanon or Syria. Tarek Khayat, another of the offender's brothers, was a leader of Islamic State and a sheikh, and fought for Islamic State in Syria with his sons and nephew.[400]

229 There was substantial evidence obtained from the offenders' phones and led at their trials.[401] The evidence revealed that the offenders had been sympathetic and supportive of the cause of Islamic State and their relatives who were fighting on its behalf, and that they were in contact with another party to the conspiracy, *"the Controller"*, an associate of Tarek Khayat who in large part instructed Khaled Khayat from Syria or Lebanon.[402]

230 By way of summary, the first plot involved a package being sent from Turkey to Australia – that package, to the knowledge of both offenders, contained a bomb.[403] Khaled was in contact with the Controller about various components

[396] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* [2019] NSWSC 1817
[397] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [1]-[5]
[398] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [9]
[399] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [16]-[22]
[400] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [16]
[401] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [23]-[25]
[402] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [32]
[403] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [32]-[40]

of the bomb, including the timer, and how to get the bomb to explode at a pre-determined time.[404]

231 In June 2017, Khaled learned that his brother Amer was intending to fly to Lebanon. After consultation with Tarek and the Controller, the offenders decided to send the bomb with Amer, who was leaving Sydney on 15 July 2017.[405] On 1 July 2017, Tarek instructed Khaled to purchase a machine in which to secrete the bomb. Khaled determined to secrete the bomb in a meat mincer, and sent a photo to Tarek and the Controller to demonstrate what he had done.[406] At that point, the bomb was not yet ready for detonation, but further experimentation and work was completed by Khaled, and again, shown to the Controller. Khaled and the Controller also exchanged messages about how to set the timer so that it would explode on the flight mid-air.[407]

232 The offenders and Amer arrived at Sydney Airport. Amer remained oblivious to the bomb plot, and it was fortuitous that the bomb did not find its way onto the flight. A passenger service agent working at the check-in informed Amer that his two cabin baggage pieces were overweight, and exceeded the allowance. Amer was told to repack his bags or pay the excess for one of his cabin baggage pieces. The agent was concerned that Amer would attempt to take excess bags onto the flight, and made a note on the system. She also instructed him to come back to see her once he had repacked his bags. Her Honour found that a compelling inference was that Khaled had decided to remove the bomb from Amer's luggage because *"he assessed the danger of detection as being too great once …* [a] *note on the system"* had been entered against Amer.[408]

233 Following the failed attempt have Amer take the bomb onto the aircraft, one of the offenders taped the leg wires together so that they would not accidentally

[404] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [39]-[47]
[405] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [51]
[406] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [56]
[407] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [57]-[59]
[408] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [70]-[75]

complete the circuit,[409] and Khaled attempted to placate the Controller about this failed leg of the conspiracy.[410]

234 There was a second plot, which involved Khaled receiving instructions from the Controller about the preparation and testing of poisonous gas. Khaled received instructions about making the gas in lethal concentration as early as May 2017.[411] The Controller gave Khaled information about the amounts of the gas which would need to be made in order to achieve a lethal concentration in a confined space. Khaled transcribed the formula and calculations onto a piece of paper that he kept in his wallet, and was found following a search.[412] On 29 July 2017, the offenders conducted a test burn of the poisonous gas, but it became clear that the burn had not been effective to cause the constituent elements to react to create the requisite compound.[413] Her Honour later found that the first plot (the bomb) was *"still on foot"* although its *"execution had been deferred"*, so that the offenders could advance this second plot.[414] Both offenders were arrested later that day.[415]

235 The third plot in the conspiracy involved the Controller sending Khaled a video on 1 July 2017. The video showed how to make a highly explosive substance, and although Khaled attempted to follow the instructions, it was *"too dangerous for him personally and* [he] *did not persevere"*.[416]

236 Her Honour described the conspiracy as amounting to a *"course of conduct"*[417] and accepted that Khaled was more culpable than Mahmoud *"because his involvement, measured by the time spent, the amount of communication with the Controller and the nature and extent of the tasks performed, was greater".*[418] Her Honour explained that Tarek and the

[409] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [76]
[410] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [78]
[411] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [48]-[49]
[412] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [83]
[413] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [85]-[96]
[414] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [109]
[415] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [97]-[101]
[416] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [55]
[417] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [110]
[418] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [111]

Controller were the *"guiding minds of the conspiracy"*, but Khaled relied on Mahmoud to *"do things which he was either unable to do, which were harder for him than for Mahmoud, or which required a second person".*[419]

237 About the offence of conspiracy to do acts in preparation for a terrorist act(s), her Honour said generally:[420]

> The crime of conspiring to do acts in preparation for a terrorist act or acts is not one which can be left by police to continue with a view to seeing what will come of it. It is to be distinguished from crimes such as importation of prohibited drugs where police might intercept an importation and replace it with a substitute to see where it might end up. Doing acts in preparation for a terrorist act is a crime, which, once detected, must be closely monitored lest its ultimate goal be achieved with potentially devastating consequences.

And specifically about this instant conspiracy, that it was one which *"plainly envisaged that a large number of people would be killed"* which given its intended scale, added *"significantly to the gravity of the offence".*[421]

238 Her Honour found that the objective seriousness of the offence was *"very high for each offender".*[422]

239 Khaled advanced a case at trial that he only pretended to commit a terrorist act so as to prevent Tarek and the Controller from identifying a *"real terrorist who could carry out a terrorist act"*. He gave evidence, that he had second thoughts about the bomb plot when he saw children at the airport, and decided to take it home. Her Honour rejected this account as being *"untrue"* and *"designed to exculpate him".*[423] Mahmoud ran an argument that he did know of Khaled's plans, and was an *"innocent helper, who through a sense of filial obligation, performed acts for his older brother ignorant of Khaled's ultimate purpose".*[424]

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[419] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [115]
[420] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [113]
[421] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [114]
[422] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [116]
[423] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [118]
[424] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [119]

240 Her Honour found that neither offender showed any contrition or remorse, with each continuing to *"protest his innocence"*[425] and that the offenders were motivated in part by their familial and religious obligation to *"help Tarek in a cause in which they all believed".*[426] However, her Honour stated that it was *"difficult to know whether any sentence I might impose might deter them from committing other offences on release or make them more determined to advance the cause of Islamic State and Islamic fundamentalism".*[427]

241 Her Honour then turned to consider general deterrence, and cited a passage in *Lodhi v R (2007)*[428] where it was said that general deterrence is a *"vexed one in this context"* because like-minded terrorists may not be deterred by a lengthy prison sentence given the force of their religious or ideological cause.[429] Her Honour however stated that general deterrence continued to play a role given that the sentence should also provide reassurance to the community that such crimes are regarded as serious.[430]

242 Her Honour then considered the subjective circumstances of each offender, and found that although each offender continued to protest his innocence, both *"had some prospects of rehabilitation".*[431]

243 After weighing all the factors, her Honour sentenced Khaled Khayat to a term of imprisonment of 40 years, with a non-parole period of 30 years; and Mahmoud Khayat to a term of imprisonment of 36 years, with a non-parole period of 27 years.[432]

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[425] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [118]
[426] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [125]
[427] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [126]
[428] *Lodhi v R (2007)* at [87]-[88]
[429] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [128] cf *Alou v R* at [141]-[142], where the same argument was rejected by the Court of Criminal Appeal
[430] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [129]
[431] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [153]
[432] *R v Khaled Khayat; R v Mahmoud Khayat (No. 14)* at [171]

Assessment of objective seriousness of an offence of being a member of a terrorist organisation

244 In *R v Lelikan (No. 5)*,[433] the offender pleaded guilty to an offence of intentionally being a member of a terrorist organisation contrary to s.102.3(1) of the Code. The terrorist organisation was the Kurdistan Workers' Party (PKK). McCallum J sentenced the offender by way of a community corrections order. The Crown appealed, contending that the sentencing Judge had erred in her assessment of both the objective seriousness of the offence and the offender's moral culpability; and that the sentence was manifestly inadequate: *R v Lelikan*.[434] In the result, whilst finding errors which infected the sentence, the appeal was dismissed upon the discretionary basis applicable to Crown appeals. An important feature of the decision concerned the manner in which the nature of a terrorist organisation, and *"more particularly, the scope of its operations, aims and methodology"* should be taken into account on sentence for this offence.[435]

245 The Crown argued that the sentencing Judge erred in taking into account irrelevant considerations in assessing the objective seriousness of the offence and the offender's moral culpability.[436] The principal Crown submission was that the sentencing Judge erred in her assessment because it *"must have been dependent on her Honour's evaluation of the merits of the PKK's political and ideological cause*".[437]

246 With respect to the offender's moral culpability, the Crown contended that this was *"informed by the question of whether the offender joined the organisation with his or her 'eyes wide open' to 'what the organisation stands for' and to the fact that organisation is well-funded and organised".* The Crown submitted that an offender's moral culpability was increased when an offender

[433] *R v Lelikan (No. 5)* [2019] NSWSC 494
[434] *R v Lelikan* [2019] NSWCCA 316
[435] *R v Lelikan* at [5]
[436] *R v Lelikan* at [23]
[437] *R v Lelikan* at [55]-[56]

became a member of a group where he or she did not know what the group was up to.[438]

247 The Crown submitted that the sentencing Judge had erred in her assessment by having regard to irrelevant considerations such as the PKK purporting to comply with the principles of international humanitarian law,[439] the *"highly contested"* characterisation of the PKK as a terrorist organisation at international law,[440] that the PKK's ideology was *"less serious than the ideologies of other listed terrorist organisations"*;[441] and that her Honour had impermissibly focused on the aims of the PKK rather than its methods[442] and failed to have regard to the highly organised and structured nature of the PKK.[443]

248 The Court of Criminal Appeal (Bathurst CJ, Bell P and Davies J agreeing) noted that what had been said in *Benbrika v R* was not in dispute.[444] In *Benbrika v R*, the Victorian Court of Appeal stated that in determining the objective seriousness of the offence *"the history of the organisation is relevant because it informs the nature of the organisation".*[445] However, the Court of Criminal Appeal said that it did not follow that this consideration extended to the *merits* of the organisation's objectives.[446] The Chief Justice observed that there was *"no authority in his country to support the contrary proposition that the Court can assess the merits of the political ideology of the organisation in assessing the objective seriousness of the offence"*, and that nothing that was said in *Benbrika v R*, or the English case of *R v Kahar*[447] detracted from that principle.[448]

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[438] *R v Lelikan* at [58]
[439] *R v Lelikan* at [57]
[440] *R v Lelikan* at [66]-[67]
[441] *R v Lelikan* at [72]
[442] *R v Lelikan* at [73]
[443] *R v Lelikan* at [55]
[444] *R v Lelikan* at [119]
[445] *Benbrika v R* at [555]-[557]
[446] *R v Lelikan* at [119]
[447] *R v Kahar; R v Ziamini* [2016] EWCA Crim 568; [2017] 2 All ER 782
[448] *R v Lelikan* at [131]. In a recent UK decision, *R v Aidan James* (Central Criminal Court Edis J, 7 November 2019), the offender had been convicted after trial of an offence of attending a place where terrorist training in weapons was delivered. The offender had travelled to Syria through Iraq, with the assistance of the PKK. He later received basic firearms training at a PKK base, and joined a unit which

249 Here, the PKK had been proscribed as a terrorist organisation by the relevant Minister, who must have been satisfied that the organisation was *"directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act"* or *"advocates the doing of a terrorist act":* s.102.1 of the Code. The Court observed that the enabling legislation did not *"draw any distinction between terrorist organisations by reference to the merits of the organisation"*, and accordingly it was erroneous to take it into account on sentence.[449] To do so, the Court held, would be to impermissibly go behind the legislature's decision to declare it a terrorist organisation – a decision which would have involved consideration of its ideology.[450] In agreeing with Bathurst CJ, Bell P said in additional comments:[451]

> … Value judgments as to the ideology and motivations of a particular terrorist organisation are quintessentially a matter for the executive government, and a court exercising federal criminal jurisdiction is not equipped and is ill-suited to making an assessment of such matters. Such an assessment may be quite invidious, not least in circumstances where the terrorist organisation is engaged in an historic campaign against a country with which Australian has sovereign diplomatic relations.

250 However, Bathurst CJ observed that the *"nature of the organisation's past activities and its potential future activities"* was relevant to the determination of objective seriousness[452] as was the fact, that this particular organisation did not advocate or engage in the indiscriminate killing of civilians.[453] As to the latter point, his Honour did qualify his observation by noting that *"the extent to which the objective seriousness is lessened … is doubtful"*, especially here, where the PKK treated the loss of civilian lives as *"acceptable collateral"*.[454]

251 Further, it is relevant to take into account that the organisation was *"well-organised and resourced"*, including the fact that an established

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became part of the Syrian Democratic Forces. Like Australia, the UK had declared the PKK as a proscribed terrorist organisation. Edis J said at p 4: "*In treating this case as substantially less serious than other offences contrary to the same section I am not in any way ranking the PKK as less of a terrorist organisation than any other. It is a proscribed organisation, and that is that. The offence is less serious than others because of the very limited extent to which you assisted or supported the PKK*".

[449] *R v Lelikan* at [122]
[450] *R v Lelikan* at [121]-[122]
[451] *R v Lelikan* at [155]
[452] *R v Lelikan* at [123]
[453] *R v Lelikan* at [124]
[454] *R v Lelikan* at [124]

organisation[455] has demonstrated *"an intention and capacity to carry out terrorist acts".*[456]

252 It was not relevant to the determination of objective seriousness that the PKK sought to comply with international humanitarian law. Bathurst CJ held that it was *"more relevant to look at what the PKK has done and what it is proposing"*. In this respect, his Honour did not find it useful to compare the actions of the PKK to that of other terrorist organisations (*eg* the PKK did not recruit children or engage in sexual violence) because, *"the fact remains that soldiers, government officials and citizens are killed as a result of* [the PKK's] *activities"*. Nor was it relevant that there was expert opinion which classified the animosity between Turkey and the Kurds as being a *"non-international armed conflict with the meaning of the Geneva Conventions".*[457]

253 As was accepted at sentence, the offender had joined the PKK with *"full knowledge of its objectives and the method by which it sought to achieve them"*. Bathurst CJ held that the offender's *"moral culpability is greater than that of a person who joined the organisation with little knowledge of its aims and methods"*. Also relevant to the assessment of his moral culpability was the length of time he remained a member; the extent of his involvement in the organisation; and his reason for him joining the PKK, namely his mistreatment at the hands of the Turkish authorities.[458] However, it would be erroneous to have regard to the offender's belief in the *"rightness of the cause"* of the PKK, when assessing his moral culpability.[459]

[455] cf. "[A] *rag-tag collection of malcontents"*: *Benbrika v R* at [555]
[456] *R v Lelikan* at [126]
[457] *R v Lelikan* at [125]
[458] *R v Lelikan* at [128]
[459] *R v Lelikan* at [129]

A POST-TRIAL ISSUE

Applications by the media for access to exhibits for publication

254 In the course of or following a trial[460] or the sentencing of the offender, it is not unusual for the media to make application for access to exhibits in the trial or sentencing proceedings for the purpose of publication, in particular video or audio recordings.

255 In the context of a terrorism trial (or sentencing proceedings), it should be borne in mind that some of the material tendered may include propaganda, or extremist material – that is, strong ideological material designed to *"promote their* [terrorist] *cause"*.[461] Other material tendered may also, if published by the media, be stylised by terrorist organisations to celebrate the offender as a martyr and to advance their terrorist purpose.[462] In particular, Islamic State has been notorious in employing a sophisticated and effective online communication strategy using social media to recruit young men and women.[463]

256 In the *Dirani* trials, there was voluminous electronic evidence over an extended period of time that had been collated in a form to be played to the jury. This included moving images of extremist material, nasheeds, propaganda videos of Islamic State, and other material, both audio and visual. In *R v Dirani (No. 32)*, Johnson J stated with respect to such material:[464]

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[460] See: *R v Dirani (No. 32)* [2019] NSWSC 275 at [3], where applications were made by the various media interests before the verdict was delivered. Access was granted to certain exhibits but not until a verdict was returned: [37]

[461] *R v Dirani (No. 33)* [2019] NSWSC 288 at [60]. In the *Dirani* trials, such material was relied on by the Crown to support an assertion that the accused supported the ideology of Islamic State, and therefore relevant to his state of mind at the time of the offending conduct.

[462] As pointed out in *R v Dirani (No. 4)* [2019] NSWSC 888 at [5], the murderer of Mr Curtis Cheng, Farhad Mohammed, was praised in an Islamic State publication *"Dabiq"* for his actions

[463] Islamic State's use of social media has been described as "*cyber jihad*". See: Dr Christina Schori Liang, "Cyber Jihad – Understanding and Countering Islamic State Propaganda", *Geneva Centre for Security Policy*, published February 2015 <https://www.gcsp.ch/publications/cyber-jihad>; and Miron Lakomy, "Cracks in the Online 'Caliphate': How the Islamic State is Losing Ground in the Battle for Cyberspace", (2017) 11(3) *Perspectives on Terrorism* 40. For an assessment of how sophisticated social media use has transformed extremist discourse see: Ella Minty, *Social Media and the Islamic State – Can Public Relations Succeed Where Conventional Diplomacy Failed?* (Routledge, 1st ed, 2019). For an interdisciplinary overview on how Islamic State has used the media to convince jihadists to join their cause, see: Neil Krishan Aggarwal, *Media Persuasion in the Islamic State* (Columbia University Press, 1st ed, 2019)

[464] *R v Dirani (No. 32)* at [18]-[19]

> [18] … Some of this material is quite sophisticated in its content. It is apparent from perusal of this material in the trial that it has been prepared by persons who have taken some care, no doubt with the intention of persuading persons who may be susceptible to its contents to adopt extremist positions. In my view, the release of this material to the press (and its publication) may have the potential to radicalise persons who have access to it, or to fortify the views of some who are susceptible to material of this type.
>
> [19] From other sentencing proceedings in which the Court has been involved, and knowledge of sentencing decisions of other Judges for terrorist offences, it is apparent that the availability of material such as this electronically, operates in a way which can lure (in particular) susceptible young persons into the adoption of views of an extreme terrorist type. The Court must be very careful before access is granted to the media of material of this type … [465]

257 In *R v Hraichie (No. 2)*, Johnson J stated that an unsolicited letter written by the offender to the Court should not give rise to an automatic expectation that its contents will be made available for general publication and dissemination.[466]

258 In *R v Dirani (No. 33)*, the Court considered the media application for access to exhibits by reference to Practice Note Gen 2 *"Access to Court Files"* and s.314 Criminal Procedure Act.

259 Johnson J outlined the relevant principles:[467]

> [36] The principle of open justice is a fundamental axiom of the Australian legal system and it is appropriate to have regard to the principle when determining applications for access to exhibits: J*ohn Fairfax Publications Pty Limited v Ryde Local Court* (2005) 62 NSWLR 512; [2005] NSWCA 101 (*"Fairfax v Ryde Local Court"*) at 525 [60].
>
> [37] Neither the media, nor the public at large, have a right of access to court documents. The open justice principle is a principle and not a freestanding right. There is no common law right to obtain access to a document on the court record: *Fairfax v Ryde Local Court* at 521 [29]-[31].
>
> [38] There is a public interest in facilitating fair and accurate reporting of proceedings in court: *Fairfax v Ryde Local Court* at 523 [47]. The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public, and nothing should be done to discourage fair and accurate reporting of proceedings: *John Fairfax Pty*

[465] See also: *R v Hraichie (No. 2)* [2019] NSWSC 765 at [10], [13]–[15].
[466] *R v Hraichie (No. 2)* at [16]-[17]. See also: *R v Hraichie (No. 3)* at [273]
[467] *R v Dirani (No. 33)* at [36]-[38]

> *Limited v District Court of New South Wales* (2004) 61 NSWLR 344; [2004] NSWCA 324 at 353 [20]; *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at 321 [33]. It has been said that the media are *"the eyes and ears of the general public"*, not all of whom can attend court proceedings: *Attorney General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 183. An application for media access to exhibits should proceed on the prima facie assumption that a fair and accurate report of the trial will occur: *R (Cth) v Elomar and Ors (No. 3)* [2008] NSWSC 1443 at [24].

260 It was held that s.314 Criminal Procedure Act did not bear upon the application. The Court said:[468]

> With respect to s.314, I agree with what Whealy J said in *R (Cth) v Elomar and Ors (No. 3)* and Schmidt J in *R v Gatt (No. 5)*. Section 314 Criminal Procedure Act 1986 is directed at a different scenario. It does not apply to an application by the media for access to exhibits made to the trial or sentencing Judge during or after the criminal proceedings at which the Judge has presided, in particular where the application relates to video, audio or other electronic exhibits.

261 With respect to the application under Practice Note SC Gen 2, Johnson J said:[469]

> [57] To the extent that the exercise of discretion in a media application for access to trial exhibits raises broader questions concerning the administration of justice, it should be kept in mind that the concept of the administration of justice is a multifaceted one: *Rinehart v Welker* at 323 [39].
>
> [58] Where a media application for access to electronic exhibits is made whilst the jury trial is still on foot, there are additional factors to be taken into account in favour of refusal of the application until after verdict: *R v Sam (No. 5)* at [19]-[29]. After a verdict is returned, or in sentencing proceedings, these additional factors which applied during a jury trial will fall away.
>
> [59] Many factors may bear upon the exercise of discretion in a particular case, including:
>
> > (a) the grief and distress which may result for the family of victims of violent crimes, including the fact that constant repetition of images can be quite traumatising for the immediate families of victims and also the community: *R v Abdallah (No. 3)* at [24]; *R v Hemming* [2015] VSC 351 at [33]; *R v Brewer (No. 1)* at [16]; *R v Gatt (No. 5)* at [11];
> >
> > (b) the fact that murders and other serious crimes are not "entertainment" and ought not be the subject of repeated electronic reporting unless there are proper reasons unconnected with "entertainment": *R v Hemming* at [33];

[468] *R v Dirani (No. 33)* at [44]
[469] *R v Dirani (No. 33)* at [57]-[61]

> (c) the privacy of persons not said to be involved criminally in the events in question: *R v Benbrika and Ors (No. 26)* at [7]; *R v Jovanovic* (2014) 285 FLR 108; [2014] ACTSC 98 at 115 [42]-[43]; *R v Abdallah (No. 3)* at [23];
>
> (d) the fact that, even when published electronically by the media as part of a fair and accurate report of criminal proceedings, visual and audio evidence so captured will be let loose and available on the Internet or other social media platforms for replay and rebroadcasting with no realistic prospect of control or recall given the lack of current controls on further use of electronic material: *Fairfax Digital Australia and New Zealand Pty Limited v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125 at 71-73 [71]-[80]; *R v Abdallah (No. 3)* at [21].
>
> [60] Concern about capture and further broadcasting of visual evidence on the Internet or other electronic platforms for criminal purposes is especially relevant in the area of terrorism offences. The proponents of violent jihad have demonstrated a capacity for sophisticated electronic propaganda to promote their cause, whether in the name of al-Qaeda, Islamic State or another prescribed terrorist organisation. As will be seen, the praise of so-called martyrs who have died in the commission of a terrorist act is exemplified by the evidence in this case concerning Farhad Mohammad. The murder of Curtis Cheng by Farhad Mohammad was the first case where the commission of a terrorist act in Australia in the name of violent jihad has caused the death of a person: *R v Alou (No. 4)* (2018) 330 FLR 402; [2018] NSWSC 221 at 404 [7].
>
> [61] The media access applications in *R (Cth) v Elomar and Ors (No. 3)* and *R v Benbrika and Ors (No. 26)* arose in the context of terrorism trials. However, those trials (fortunately) did not involve completed terrorist acts which had caused death, injury or destruction of property. There is an additional feature arising in the present case which must be considered in the context of this application.

262 The media application extended to Exhibit F, a disc containing footage which had not been made public. This evidence was described as follows:[470]

> [14] Exhibit F is a disk containing a compilation of CCTV footage of events from about 3.48 pm on 2 October 2015 depicting Farhad Mohammad at various locations inside the Parramatta Mosque until 4.09 pm, with him then departing the Mosque and walking in the streets of Parramatta towards the New South Wales Police Headquarters in Charles Street, Parramatta where the murder of Curtis Cheng took place. Exhibit F ends with footage of Farhad Mohammad before he reached the vicinity of the New South Wales Police Headquarters, so that the terrorist act itself is not depicted.
>
> [15] The footage in Exhibit F inside the Parramatta Mosque depicts other people, as well, who (apart from Raban Alou) were incidentally and innocently in the Mosque at that time for purposes quite unrelated to the planned terrorist attack.

[470] *R v Dirani (No. 33)* at [14]-[15]

263 In declining the media application for access to certain exhibits, his Honour said:[471]

> [67] With respect to Exhibits F and AJ, the privacy of persons who may be innocently and incidentally depicted in photographic evidence in a criminal trial is a relevant factor to be taken into account on such an application: *R v Benbrika and Ors (No. 26)* at [7]; *R v Abdallah (No. 3)* at [23].
>
> [68] It is necessary to keep in mind the vivid and permanent nature of video evidence which is capable of being broadcast and rebroadcast and further dissemination via the Internet and other electronic platforms. Once footage of this type is broadcast, it is not presently possible to control or recall. The material is available generally to not only responsible media outlets, but others who may seek to use or misuse it for their own sinister purposes.
>
> [69] This is a matter of particular significance where evidence arises in a terrorism case and where material such as that contained in Exhibits F and AJ includes CCTV footage taken in private religious premises where persons are gathered for the purpose of prayer and religious devotion. The capacity to misuse material of this type for the purpose of fanning prejudice is not farfetched in contemporary society and is an important factor to bear in mind in the exercise of discretion as to whether access to electronic exhibits ought be granted.
>
> [70] As noted earlier … the circumstances giving rise to the murder of Curtis Cheng on 2 October 2015 constituted the first lethal attack in Australia by supporters of a prescribed terrorist organisation. Other prosecutions, including those in *R v Benbrika and Ors (No. 26)* and *R (Cth) v Elomar and Ors (No. 3)* involved proceedings for conspiracy to do acts in preparation for a terrorist act. Those trials did not involve a terrorist killing or circumstances where the terrorist killer was himself killed as occurred in the present case.
>
> [71] Here, there is a capacity for the killer, Farhad Mohammad, to be praised and described as a martyr by those supportive of Islamic State and other extremist jihadist groups. This is illustrated by Exhibit L in the trial, the Islamic State publication *"Dabiq"*, released on 18 November 2015 which, in the course of praising *"the martyred 'lone' knights of the Khilafah who struck out against the kafir and apostate enemies near them"* then stated:
>
> > *"Amongst these brave knights of tawhid and jihad was fifteen-year old Farhad Khalil Mohammad Jabar, who on '2 October 2015' struck the crusaders of Australia and killed one of their personnel."*
>
> [72] Elsewhere in the trial evidence, Raban Alou expressed delight in a recorded conversation with his wife, Sharna Perger, on 3 October 2015, describing Farhad Mohammad as *"a soldier"* and *"a martyr"* who had been *"killed in the path of Allah"* (Exhibit P). In other intercepted telephone conversations on 4 October 2015, Raban Alou referred to Farhad Mohammad as *"a lion"* who *"will be in Paradise"* (Exhibit P). It is not difficult to see how video evidence of Farhad Mohammad could be deployed in promotional propaganda by advocates of violent jihad.

[471] *R v Dirani (No. 33)* at [67]-[73]

> [73] Although the geographical boundaries of Islamic State have now been eliminated, it is widely known that supporters of Islamic State (and related terrorist groups) continue to operate in various parts of the world including the Philippines and elsewhere. Their propaganda machine, with videos broadcast on electronic platforms (some of which were adduced in evidence at the trial), is likely to continue to operate so that the praising of those who have died in the cause of Islamic State, characterised as martyrs, is likely to recur. Reference was made earlier (at [71]) to the publication in *"Dabiq"* in November 2015 which lauded the criminal acts of Farhad Mohammad in this way.

264 The Court stated:[472]

> [81] Although my ruling was made on 14 March 2019, it is impossible to disregard the terrible events which occurred the next day in Christchurch where many people were murdered in mosques at which they were present for peaceful religious purposes by way of Friday prayers. What is already in the public arena about that atrocity fortifies the concern that extremist anti-Muslim groups could use for criminal purposes, electronic evidence arising from a terrorism trial.
> …
>
> [88] I am satisfied that the interests of the administration of justice are served by the adoption of a cautious and conservative approach where the media seek access to electronic evidence tendered in a terrorism trial, given the particular capacity for such material to be misused by both those who advocate the use of violent jihad and those who advocate the use of violence against members of the Muslim community.
>
> [89] The ready availability of the images contained in Exhibits F and AJ would have real potential to serve the interests of one or other of these fixated groups, both of whom are minded to commit acts of gross criminality in Australia or elsewhere.
>
> [90] I do not consider that the open justice principle is compromised or restricted in any significant way by ruling that Exhibits F and AJ ought not be made available to the media for further broadcasting. I am fortified in this view by the making available of MFI 68, which permits broadcasting of significant evidence adduced at the trial of the Accused without the incidental identification of innocent persons.

265 A further development concerning extremist material on the internet should be noted. The *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) commenced on 6 April 2019. This Act inserted new Subdivision H (ss.474.30-474.45) into Division 474 of the Code. Subdivision H is titled *"Offences relating to use of carriage service for sharing of abhorrent*

[472] *R v Dirani (No. 33)* at [81]; [88]-[90]

violent material". In the second reading speech,[473] the Attorney-General, Mr Porter, referred to the terrorist attack in Christchurch on 15 March 2019 and continued:

> "The Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill represents an important step in this process. It will ensure that hosting and content services expeditiously remove abhorrent violent material and notify the Australian Federal Police when it appears on their platforms. Internet platforms must take the risks posed by the spread of abhorrent violent material online seriously. The new offences will therefore be accompanied by criminal penalties.
>
> With respect to the removal of abhorrent violent material, it is clear that live-streaming and other video platforms can and will continue to be abused to spread messages of hate and terror, and this cannot be allowed to continue. The bill addresses this risk by requiring the providers of online content and hosting services, whose services can be used to access abhorrent violent material, to ensure the expeditious removal of that material. This will apply when the material is reasonably capable of being accessed within Australia, regardless of whether the content or hosting service is providing from within or outside of Australia. It is important to ensure that this offence is limited to the worst types of material that can be shared online.
>
> Platforms will only be required to ensure the expeditious removal of audiovisual or audiovisual material that is recorded by the perpetrator or an accomplice and that depicts specified abhorrent acts and violent conduct. This is defined to mean acts of terrorism, murder, attempted murder, torture, rape or kidnapping.
>
> The bill does include defences to the offence in certain circumstances, including for law enforcement purposes where the material relates to a news or current affairs report that is in the public interest, for court and tribunal proceedings where the accessibility of the material is for lawful advocacy purposes and where the accessibility of the material relates to research or artistic works created in good faith.
>
> These offences will attract penalties of up to $2.1 million or three years imprisonment, or both, for individuals, and bodies corporate will face penalties of up to $10.5 million or 10 per cent of the annual turnover of the body corporate. There should be no mistake made. These very serious penalties are warranted.
>
> Internet platforms provide immense value to the Australian community, but recent events have shown that they can also be used for great harm and as a platform to spread violent and dangerous ideologies. These penalties will send a clear message that the Australian government expects the providers of online content and hosting services to take responsibility for the use of their platforms to share abhorrent violent material.

[473] Second reading speech, Hansard, House of Representatives, 4 April 2019. For a critique of the Act, see Douek *"Australia's 'Abhorrent Violent Material' Law: Shouting 'Nerd Harder' and Drowning Out Speech"* (2020) 94 ALJ 41

Notably, proceedings for an offence against these provisions would require the written consent of the Attorney-General, which acts as an important safeguard against inappropriate prosecutions and allows a wide range of circumstances to be taken into account before proceeding to any prosecution.

…

In conclusion, the events of Christchurch have shown us that internet platforms can be used to spread messages of hate and terror, and this bill forms an important part of the Australian government's response to these events. Internet platforms have the means to prevent the spread of abhorrent violent material and will face criminal sanction if they do not work expeditiously to remove such material. Separately, the government has announced a task force that includes industry stakeholders to examine immediate and longer term actions with a focus on prevention, transparency and response times."

SOME CONCLUDING OBSERVATIONS

266 A number of observations are pertinent with respect to the prosecution and sentencing for persons for terrorism offences under the Code.

267 Firstly, the provisions in Parts 5.3 and 5.5 of the Code have extended the general criminal law in a number of significant respects to meet the policy objective of Parliament to protect the community by preventing terrorism acts before they are committed and before preparation for such acts has progressed very far.

268 Secondly, as all trials for terrorist offences must proceed before juries, additional challenges arise in procedural areas (such as accused persons refusing to stand for the jury) and with respect to evidence where extremist material is likely to be confronting in content but highly probative of elements of the offences charged.

269 Thirdly, Parliament has enacted legislation concerning terrorism offences in the areas of bail, the fixing of non-parole periods and the decision to release on parole. These are additional measures which Parliament has chosen to take in these areas in the interests of protection of the community. At the same time, Parliament has ameliorated the law to an extent concerning persons under 18 years who are charged with or convicted of terrorism offences.

270 Fourthly, the process of determining sentence for terrorism offences attracts particular difficulty in the areas of an offender's prospects of rehabilitation and risk of re-offending. A recurring feature is that the fixated extremist beliefs which motivated the commission of the offence remain entrenched at the sentencing stage. Whilst contrition and remorse and a desire to adopt a lawful life are features found regularly in sentencing persons for offences under the general criminal law, they have been relatively rare in sentencing terrorist offenders.

271 Fifthly and finally, an associated issue concerns the role of correctional authorities in the housing of terrorist offenders and the provision of rehabilitative programs to that class of offender. The concepts of disengagement and deradicalisation have been discussed,[474] but continue to pose particular challenges. Related issues concern the making of parole decisions for terrorist offenders. For persons who are not released on parole and serve their full sentences, the use of control orders under Division 104 of the Code may be a recurring event.[475]

[474] Inspector of Custodial Services, "The management of radicalised inmates in NSW", *Department of Justice* (Web page, May 2018) <http://www.custodialinspector.justice.nsw.gov.au/Documents/The%20management%20of%20radicalised%20inmates%20in%20NSW.pdf>

[475] See, for example, *Booth v Kaya* [2020] FCA 25 (Anastassiou J)