

Terrorism

The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials

Justice Whealy - Supreme and Federal Court Conference 2007

I would like to focus on an important aspect of terrorism. My principal concern will be with the impact the new terrorism related laws have on our duties and responsibilities as Judges in criminal trials. In Huddart Parker & Co Pty Limited v Moorehead (1909) 8CLR 330 at 357, Griffith CJ said that judicial power means:

“The power which every sovereign authority must of necessity have to decide controversies between itself and its subjects whether the rights relate to life, liberty or property.”

The broad range of new anti-terrorist legislation has created a range of offences for acting in a variety of ways in preparation for a terrorist act, even though no terrorist act actually occurs. The offences carry very significant penalties including, in a number of cases, life imprisonment. Every person charged with a serious criminal offence under the terrorist legislation, as with every person who comes for trial on a criminal matter, has a fundamental right to a fair trial. It has been said that a fair trial does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree (Jarvie v The Magistrates' Court (1995) 1 VR 84 per Brooking J; Jago v The District Court (1989) 168 CLR 223 and Dietrich v The Queen (1992) 177 CLR 292). But the trial must in essence be a fair trial.

The new legislation, in all its manifestations, places special demands on the trial Judge. It raises special challenges to the need to ensure that a fair trial is maintained. This paper attempts to examine some of the reasons why this is so. It suggests a number of practical ways in which a trial Judge should seek to confront the legislative difficulties to ensure that the accused is dealt with fairly in the criminal justice system.

My own claim to fame in this area is, I candidly admit, very limited. I have been the trial judge in but one terrorist trial. It lasted for five months, however, during both the trial and pre-trial stages. It was a challenging experience. While I accept that my own performance as trial judge was no doubt far from beyond reproach, I trust that the experience entitles me to suggest, at least in a tentative way, some matters that may be of use to others at this Conference and beyond who may be confronted by the challenge of a large scale terrorist trial.

Prejudice and Bias

In every criminal trial, I like to give the jury an instruction of a general nature about prejudice. Normally, I do it during the summing-up. I like to say something along the following lines:

“The position of the accused, you might also think is a tragic one, charged as he is with a very serious crime. I repeat, however, that you must approach the task before you dispassionately and without emotion. You must carry out your tasks in this trial disassociating yourself from the natural emotional response of other people. You are the judges of the facts here, others are not. It is the duty of judges of the facts, no matter how difficult it is, to decide questions of fact free from the taint of emotional response.

It is also very important to free your mind of prejudice. Everyone has prejudice. Prejudice is no more than an attitude, a starting point from which we make all of our judgments in ordinary life. We make judgments from starting points of that sort all the time, day in, day out, really. But when you come to fulfil the role of being the judges of fact in a criminal trial, you have to put prejudice out of your mind altogether.

This, members of the jury, is not ordinary life. Here you are the judges; and it is the duty of a judge to free his or her mind from all preconceived ideas. It is the duty of a judge to try the case according to the law and according only to the evidence. Prejudice and moral judgments have no place in a court of law.

You should decide the matter on the issues without prejudice, without undue sympathy and without hostility.”

In the Lodhi trial, by the time I had completed nearly three months of pre-trial work, including the preparation of a considerable number of pre-trial judgments, I had come to realise that the issue of the accused receiving a fair trial was a matter of considerable importance and sensitivity in the particular circumstances of the matter. One has only to reflect on the frequent barrage of articles and commentary in the media, certainly on a weekly if not a daily basis, involving terrorism and terrorists to know that this is so. In addition, there are the endless articles and commentaries in relation to practitioners of the Muslim religion, extending not only to activities overseas but to Muslims in our own local communities. There are arguments about Muslim customs, laws, practices, dress, attitudes to women, attitudes to non-believers and the like. They are sometimes sensational and ill formed.

It became quite clear to me that I would need to give a special direction to the jury panel, even before the jury process selection had begun. I gave a direction to the jury panel, which is in the terms of the document that appears as Appendix “A” to this paper. I do not suggest that the direction I gave was perfect. Nor do I suggest that it could not be bettered, even substantially so. There are many criminal law judges at this Conference who have had considerably more experience than I have. But I have included it to highlight the need I felt to draw out from the jury panel people who felt that bias or prejudice might prevent them from approaching the issues in the trial fairly, but who might, without a degree of cajoling, be otherwise reluctant to come forward.

It will probably come as no surprise to you to know that I had more than a dozen people asking to be excused on the basis that they felt they could not judge the matter other than with a prejudiced mind. One or two said they were simply opposed to Muslims and were irrevocably prejudiced against them. Surprisingly, three persons applied to be excused on the basis that they knew people who had been killed or injured in the Bali Bombings. The bitter emotional experience involved in that association prompted these potential jurors to confront their own prejudices and admit that they could not approach the trial fairly and dispassionately.

Quite apart from focusing the jury panel on the possibility that individual members might in fact be prejudiced in this area of terrorism, the direction sought to reinforce among potential jury members the need, at the outset, to approach the issues in the trial dispassionately and free from emotional taint or bias.

I might say that the preparation and delivery of the direction also reinforced in my mind a matter which bears repetition: it is important, I think, that judges in terrorism trials carry out a little soul searching in relation to their own possible prejudices. Judges are just as capable as anyone else in the community of falling foul of racial ethnic or religious stereotyping in relation to the defendants who come before them. For my part, I determined that, throughout the trial, I would make every effort to demonstrate courtesy and politeness to the defendant and to his legal representatives and that I would do this in a way that would be plain and manifest to the jury. Where appropriate, I would address the defendant by name, although generally maintaining reference to him as “the accused”. It may be for others to judge whether I succeeded in relation to this endeavour. But I suggest that any judge who is selected to undertake a terrorist trial should reinforce the need to think impartially, to be impartial and be seen, at all times to be impartial and fair towards the accused. This is such a simple matter that it may indeed be offensive for me to remind judges of this point. I think it can be too easily overlooked and especially so where there may be multiple accused.

National Security Information (Criminal & Civil Proceedings) Act 2004

This legislation was passed, in part, to protect information whose disclosure in Federal criminal proceedings would be likely to prejudice National Security. It is quite a complicated piece of legislation. It may be respectfully observed that it gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial. I shall now say something about the detailed nature of the legislation. I regret to say that it is impossible to summarise it in other than a discursive manner.

In general, it may be said that the legislation seeks to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security. Specifically, the Act seeks to protect information the disclosure of which would be likely to prejudice Australia's defence, security, international relations or law enforcement interests. These expressions are given very broad meanings in the definition sections 8, 9, 10 and 11 of the Act. For example, "international relations, means political, military and economic relations with foreign governments and international organisations". (s 10).

It appears to have been the concern of Parliament that the existing rules of evidence and procedure may not provide adequate protection for information that relates to, or the disclosure of which may affect, national security, where that information may be adduced or otherwise disclosed during the course of a federal criminal proceeding (**Explanatory Memorandum 2004**).

The operation of the Act, will ordinarily be "triggered" when the prosecutor contemplates the brief of evidence necessary for the trial. The prosecutor may notify the Court and the parties that a particular case falls within the provisions of the legislation. In fact, however, such notice can be given at any time during the proceedings.

At the commencement of Part 3 the Act contemplates that either the prosecutor or the defendant may apply to the Court for the Court to hold a conference of the parties to consider issues relating to any disclosure in the trial of information that relates to national security or may effect national security. This conference may include consideration as to whether the prosecutor or defendant is likely to be required to give notice under s 24; and whether the parties wish to enter into an arrangement of the kind mentioned in s 22 (s 21(1)(a) and (b)). At any time during a federal criminal proceeding, the prosecutor and the defendant may agree to an arrangement about any disclosure in the proceeding of information that relates to national security or that may effect national security (s 22(1)). The Court may make such order (if any) as it considers appropriate to give effect to the arrangement (s 22(2)).

Relevantly, the central aspect of the operation of the Act is the requirement that a party must notify the Attorney-General at any stage of a criminal proceeding where that party expects to introduce information that relates to, or the disclosure of which may affect, national security. This information includes information that may be introduced through a document or a witness's answer to a question, as well as information disclosed by the mere presence of a witness (s 24(1) (2) and (3)). On receiving the advice that the Attorney General has been so notified, the Court must order that the proceedings be adjourned until the Attorney-General gives a copy of a certificate to the Court under sub-s 26(4) or gives advice to the Court under sub-s 26(7) (which applies if a decision is made not to give a certificate).

In a similar fashion, the prosecutor or defendant must advise the Court if he or she knows or believes that a witness may give an answer to a question in a federal court criminal proceeding that will disclose information relating to national security or may affect national security. In those circumstances the Court must adjourn the proceeding and hold a closed court hearing in which the witness provides a written answer to the question. This answer must be shown to the prosecutor. The obligation then falls on the prosecutor, in stipulated circumstances, to advise the Court that he has formed a knowledge or belief that the question relates to or may affect national security. In those circumstances the prosecutor must give the Attorney-General notice in writing of that knowledge or belief. Again, the obligation on the court is to adjourn the proceedings until a certificate is given or not as the case may be. (s 25).

Upon notification, the Attorney-General considers the information and determines whether disclosure of the information is likely to prejudice national security (s 26(1)).

If the information would be disclosed in a document (the source document), the Attorney-General may give each potential discloser of the information in the proceeding any of the following: -

- (i) A copy of the document with the information deleted;

(ii) A copy of the document with the information deleted and a summary attached;

(iii) A copy of the document with the information deleted and a statement of facts that the information would or would be likely to prove attached.

The material is to be accompanied by a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise) but may disclose the copy or the copy and the statement or summary. (s 26(2)(a))

The certificate however may describe the information and state that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise) (s 26(2)(b)).

If the information would be disclosed other than in a document, the Attorney-General may give each potential discloser of the information in the proceeding:

(a) Either:

(i) a written summary of the information; or

(ii) a written statement of facts that the information would or would be likely to prove;

Together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise) but may disclose the summary or statement;

Alternatively, the Attorney-General may give a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise). The Attorney-General must give the Court a copy of the certificate and the documents mentioned in this sub-section. (s 26(3) and (4)).

Where the Attorney-General has given a potential discloser a certificate under s 26, the Court must in any case where the certificate is given to the Court before the trial begins, hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3a)).

Where the certificate has been given to the Court after the trial begins, the Court must continue the adjournment formerly granted to hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3)).

Where the Attorney-General forms the opinion after notification that a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information by his or her mere presence and the Attorney-General considers that the disclosure is likely to prejudice national security, the Attorney-General may give a certificate to the prosecutor or defendant that states that the prosecutor or defendant must not call the person as a witness in the federal criminal proceeding (s 28(2)). The Attorney-General must give a copy of the certificate to the Court (s 28(3)). Again the giving of this certificate to the Court triggers the need for the Court to hold a hearing to decide whether to make an order under s 31 in relation to calling of the witness (s 28(5)). If the Attorney-General decides not to give such a certificate, the Attorney-General must, in writing, advise the prosecutor or defendant, as the case requires, and the court of his or her decision (s 28(10)).

Any certificates that have been issued must be considered at a closed hearing of the trial or pre-trial court (ss 27(5) and 28(7)). The Attorney-General may intervene in the proceedings to take part in the closed hearing. If the Attorney-General does intervene in the hearing, he or she is treated as if he or she is a party to the hearing (s 30 sub-ss (1) and (2)).

While the Court has a discretion to exclude the defendant, non security cleared legal representatives of the defendant or non security cleared court officials from the closed hearing, the defendant and his or her legal representative must be given the opportunity to make submissions to the court on arguments relating to the disclosure of information or the calling of witnesses (s 29(2) (3) and (4)). The discretion to

exclude only arise where the Court considers that the information would be disclosed to the defendant, the legal representative or the court officials and determines that the disclosure would be likely to prejudice national security.

After holding a hearing required under sub-s 27(3) in relation to the disclosure of information in a federal criminal proceeding, the court must make an order under one of sub-ss (2), (4) and (5) of s 31. In general the court may -

- (a) Agree with the Attorney-General that the information not be disclosed at all or be disclosed other than in the particular form; or
- (b) Disagree with the Attorney-General and order the disclosure of the information either generally or in a particular form. (s 31(1), (2), (4) and (5)).

The information or document is only admissible in evidence in the proceeding if, apart from the order made under s 31, it is in fact admissible (s 31(3) and (5)).

After holding a hearing required under s 28(5) the Court must order that:

- (a) The prosecutor or defendant must not call the person as a witness in the federal criminal proceeding; or
- (b) The prosecutor or defendant may call the person as a witness in the federal criminal proceeding. (s 31(6)).

In deciding what order to make under s 31, the Court must consider the following matters (s 31(7) and (8)):

- “7(a) Whether, having regard to the Attorney-General’s certificate there would be a risk of prejudice to national security if:
 - (i) Where the certificate was given under sub-s 26(2) or (3) – the information were disclosed in contravention of the certificate; or

(ii) Where the certificate was given under sub-s 28(2) – the witness were called.

(b) Whether any such order would have a substantial adverse affect on the defendant’s right to receive a fair hearing, including in particular on the conduct of his or her defence;

(c) Any other matter the Court considers relevant.”

In making its decision, the Court must give greatest weight to the matter mentioned in s 31(7)(a) (s31 (8)).

The Court must make and keep a record of the hearing under s 31 of the Act. It must make the record available to the Court that hears an appeal from its decision or reviews its decision; it must make the record available to the prosecutor and, if the Attorney-General has intervened, the Attorney-General and its legal representative. The Court must also allow access to the record to any legal representative of the defendant who has been given a security clearance at the appropriate level. Otherwise the Court must not make the record available or allow it to be accessed by anyone else (s 29(5)). There is also provision to give a copy of the proposed record to the prosecutor and to the Attorney-General to enable those persons to consider whether making the final record available to the prosecutor, the Attorney-General and the appeal court, and allowing access to it to the defence, will disclose information and that the disclosure is likely to prejudice national security. In such a situation the record recipient may request that the Court vary the proposed record so that the national security information will not be disclosed (s 29(5), (6) and (7)). There is also a provision made for the record recipient to request the Court from delaying making the record to allow time for the record recipient to decide whether to appeal against the Court’s decision in relation to the form of the record and, if the recipient decides to do so, make the appeal. The Court must grant the request (s 29A).

Where an order or orders has been made under s 31, the Court is required to give reasons. It must give a written statement of its reasons for making an order to the prosecutor, the defendant, any legal representative of the defendant and the Attorney-General where intervention has occurred (s 32(1)). Indeed, the Court must

give a copy of the proposed statement of reasons to the prosecutor and the Attorney-General to enable those persons to consider whether the statement of reasons may involve the disclosure of national security information and whether the disclosure might be likely to prejudice national security. The statement recipient may request the Court to vary the proposed statement so that national security information will not be disclosed.

The Court must make a decision in relation to such a request and where this is done, the statement recipient may request the Court to delay giving its statement of reasons to allow time to decide whether to appeal against the Court's decision and to make the appeal (s 32(2), (3) and (4); s 33(1) and (2)).

An order made by the Court under s 31 does not come into force until the order ceases to be subject to appeal; and remains in force until it is revoked by the Court (s 34).

Where the Court has made an order under s 31, the prosecutor may apply to the Court for an adjournment of the federal criminal proceeding to allow time for the prosecutor to decide whether to appeal against the Court order or to withdraw the proceeding. If the prosecutor decides to do either of these things, the adjournment is to allow time for the prosecutor to make the appeal or withdrawal. (s 36(1)).

Similarly where an order has been made under s 31, the defendant may apply to the Court for an adjournment of the federal criminal proceeding to allow time for the defendant to decide whether to appeal against the Court order; and if he or she decides to do so – to make the appeal. The Court must in either case grant the adjournment (s 36(1), (2) and (3)).

The Attorney-General also has a right of an appeal as an intervener in relation to orders under s 31. These appeal are to the Court of Criminal Appeal (ss 36A, 37 and 38).

Section 19 deals with the general powers of a court in a federal criminal proceeding. It provides: -

“19(1) The power of a court to control the conduct of a federal criminal proceeding, in particular in respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.

(2) An order under s 31 does not prevent the Court from later ordering the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under s 31 would have a substantial adverse affect on a defendant’s right to receive a fair hearing.”

General Comments

It is, I think, fair to make the following general observations: -

1. This legislation poses a very significant challenge to the efficient running of a criminal trial. At the same time, it has, as I shall explain later, the capacity, in an indirect sense, to create a situation where the defendant’s right to a fair trial may be significantly impaired.
2. The Act imposes highly unusual obligations on lawyers engaged in Federal proceedings. In particular, lawyers must obtain security clearance to have access to information concerning National Security.
3. There is also an obligation on the Court’s staff and Court reporters to obtain National Security clearances. The processes for obtaining these clearances are intrusive and, in some instances, upsetting. Not only must the individuals be scrutinised but so also their spouses and partners and their financial and personal lives.
4. If, before or during a hearing, either the prosecutor or the defendant knows or believes that information which relates to or may affect national security will be disclosed, each is required to notify the Attorney-General and take a number of other procedural steps as soon as possible. Failure to comply with the requirements exposes the practitioner concerned to imprisonment up to two years.

5. Delay and disturbance to the trial process is perhaps the most significant potential problem created by the legislation. As I have explained above, there is the possibility of a disruption to the trial itself while the Attorney-General contemplates whether to issue a Certificate. Where a Certificate is issued, there is a need to hold a Closed Court hearing in the absence of the jury. This will presumably take place days, or perhaps weeks, after the initial adjournment. If the Court decides to make orders after the Closed Court hearing, there are three possible appeals. The first is an appeal relating to the records to be kept. The second is an appeal relating to the reasons for the decision. The third is an appeal against the merits of the decision. In each of these cases there is the capacity for delay and the trial cannot proceed until the appellate court has resolved the issues arising under the various appeals.

It may be appropriate if I mention at this stage that during the Lodhi trial there were a number of strategies selected which, I trust, prevented these delays from intruding unfairly on the trial process. First, it was generally agreed that all aspects of national security disclosure (including the imposition of protective orders) would be dealt with entirely during pre-trial hearings. This had the effect of elongating the pre-trial stage of the proceedings. It had the advantage, however, of ensuring that there was very little delay, if any, in the hearing of the trial itself. In those circumstances, the jury were not inconvenienced by appellate delays.

Secondly, there was a considerable degree of co-operation between experienced counsel for the prosecution and the defence. It was plainly the desire of all parties to ensure that the trial proceeded as normally as possible. There was, it must be said, a degree of co-operation from those representing the Attorney-General although their concerns focused, as might be expected, more on the protection of national security and were less concerned with the trial process. Thirdly, a clear dichotomy was maintained between the issue of disclosure of sensitive information on the one hand; and the issue as to whether protective orders should be made or the manner in which evidence was to be given during the trial. There was, during the pre-trial procedures, an appeal to the Court of Criminal Appeal brought on behalf of the

defendant in relation to protective orders. There was some delay in relation to this but it was relatively limited. For example, the orders I made (relating to Closed Court hearings and the like) were made on 15 March 2006. The Court of Criminal Appeal heard the appeal on 24 March and dismissed the appeal on 4 April 2006. The important point to note, however, is that the appeal process occurred during the pre-trial proceedings and not during the trial itself. In that way, the jury did not experience the frustration and disruption of an interrupted hearing.

On the issue of delay, I gave a decision on 7 February 2006. This decision upheld the constitutional validity of the legislation and, in so doing, it addressed the issue of delay. If I may be permitted to refer to my own remarks, I said during the course of my reasons: -

“But even if the worst possible scenario were to develop and there were appeals under these sections as well as a merit appeal under s 37, there is no reason to suppose that these matters could not be dealt with expeditiously. In a worst case scenario, again, the Court would retain the right to bring the trial to an end either by discharge or, in the case of vexation or abuse of process by way of a stay.

Delays are not uncommon during a criminal trial. Experienced judges are generally able to explain the situation; to explain the reasons for the delay and to ask for the jury’s indulgence if delay occurs. It is also the function of the judge in such a situation to make it clear to the jury, if it is appropriate, that the delays are not the fault of the accused nor of the prosecution. The experience of the Court is that juries are understanding of such delays and do not allow properly explained interruptions to the trial process to divert them from their important task.

The critical point, however, is that the Court, even in the worst case situation I have outlined, would still retain control over the trial so as to be able to ensure that the accused was not tried unfairly (Dietrich (1992) 177 CLR 299). I am unable to accept the suggested dichotomy inherent in the submission for the media interests that the so called right to bring a trial to an orderly conclusion

is frustrated and not met, for example, where a stay order is made. In this regard, the presence of s 19 in the legislation is very important both in its general application and in particular its application to orders made during a s 31 hearing. The core function of a court in criminal trials is to establish guilt or innocence but the public interest may be met in an extreme case by a stay order.

In my view, adopting the test stated by Gummow J in **Nicholas v The Queen** at (145) the system of mandatory adjournments contemplated by the Act does not amount to such an interference with the governance of the trial, nor a distortion of its predominant characteristics, so as to involve the trial court in the determination of the criminal guilt of the accused otherwise than by the exercise of the judicial power of the Commonwealth. There is plainly a potential for a degree of disruption. The discretion of the Court has been displaced to the extent that adjournments must be granted in the stipulated circumstances, should they arise, but overall, in my opinion, the level of disruption is not so great as to render the legislation unconstitutional.”

Finally, notwithstanding that I thought that the legislation was valid, there is plainly a highly respectable school of thought that thinks otherwise. For example, in a recent paper, the Honourable Michael McHugh QC thought that there was a forceful argument to suggest that the **National Security Act** was unconstitutional, although as he kindly remarked, it appeared that the more powerful arguments in favour of invalidity had not been presented before me. Mr McHugh thought that a number of features of the legislation combined to make a strong case that it might properly be seen as an attempt by Parliament to usurp the judicial power of the Commonwealth. I am sure we have not heard the last of this contention.

Areas of potential unfairness for an accused in a terrorism trial

The barriers to disclosure in the **National Security Act** will not necessarily pose an unfairness problem for an accused person if those issues can be clarified and resolved during pre-trial session. There is another problem, however, arising from the way in which the legislation requires the Court’s discretion to be weighted. This

emerges from s 31(7) and (8) which I have set out earlier in this paper. On its face, the question as to whether there is a risk of prejudice to national security can plainly trump the defendant's right to receive a fair hearing, including, in particular, on the conduct of his or her defence. This is because the statute requires that "greatest weight" be given to the question as to whether there would be a risk of prejudice to national security if the information were disclosed in contravention of the Certificate, or the witness were to be called. For my part, however, I do not think that the statutory weighting of the discretion in this way necessarily works to the disadvantage of the accused. There are two reasons for this. First, the object of the Act, (s 3(1)), is to prevent the disclosure of information where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice. It is not difficult to prove in a particular case that, where a refusal to make a disclosure would have a substantial adverse effect on the defendant's right to receive a fair hearing, this may be sufficient to "seriously interfere with the administration of justice". Secondly, where disclosure is not made, the Court maintains the capacity, in an appropriate case, to stay the proceedings (s 19).

Special Counsel

Before leaving the issue of disclosure under the **National Security Act**, I should refer to one other matter: there is a capacity under the legislation for part of the argument addressed in a Closed Court hearing to be taken in the absence of the defendant or his or her non-security cleared legal representative (s 29). There is also the capacity, as occurs in ordinary public interest immunity claims, for affidavit material to be received from the Director of Security on a confidential basis. In either situation, the Court and the defendant may well be assisted by the appointment of special counsel.

In **Lodhi** [2006] NSWSC 586, I addressed the possibility of the appointment of special counsel to represent the interests of the defendant and to assist the Court in the area of national security claims. I traced the development of the practice of the appointment of special counsel in the United Kingdom (see paras 13-16). In particular, I was satisfied that the provisions of the legislation did not prohibit the

appointment of special counsel during, or for the purposes of, a hearing under sub-ss 25(3), s 27(3) or 28(3). I was satisfied that the language of s 29(2) was sufficiently wide to allow a person appointed as special counsel to take part in a s 31 hearing.

The appointment of special counsel in Australia is a novel concept. So far as I am aware, special counsel has not been appointed in Australia, either within or outside the confines of the **National Security Act**. Although the utility of the appointment of special counsel has been doubted (see Sir Anthony Mason in a paper given in Brisbane to the ISRCL “**Justice for All**” 2 July 2006), I consider that it could be a useful weapon in the armoury of a trial judge in a situation where there is a clash between a national security claim and a suggestion that the defence will be substantially prejudiced or interfered with in the conduct of the case. The problem is that defence counsel may not be entitled to look at the document, which is the subject of the national security claim. Special counsel, on the other hand, will be entitled to do so. One reason will be because he or she has a security clearance. In addition, special counsel will understand the nature of the defence case but will not have had any direct contact with the accused himself. This means that submissions, helpful to the defendant and of assistance to the trial judge, will be forthcoming to counter the arguments advanced on behalf of the Commonwealth.

For a broad discussion relating to the issue of the appointment of special counsel in the United Kingdom, see **R v H; R v C** (2004) 2 AC 134 at 150-151 per Lord Bingham and the remarks of Lord Woolf CJ in **M v Secretary of State** (2004) 2 All ER 863 at 868. It is, however, worthwhile recalling the cautionary words of Lord Bingham in **R v H; R v C** at para 22: -

“None of these problems should deter the Court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant”.

Protective Orders

I leave now the issue of disclosure and turn to the important issue of the making of protective orders. This issue raises the indirect effect of “disclosure” under the **National Security Act**. If disclosure is to be made or a witness called, there may arise a need to impose protective orders. For practical purposes, I will consider the following types of order – pseudonym orders; closed court and suppression of publication orders; and screening orders. There are others, of course, but time will defeat me if I try to cover the entire field.

(a) **Pseudonym**

In New South Wales, there has been recognition and acceptance for a considerable time of the making of orders in an appropriate case for the use of pseudonyms or ciphers (**Regina v C A L** (unreported decision of NSWCCA 18 February 1993). In addition, there is a need, on occasions, to consider making an ancillary order relating to the non-publication of details of the appearance of a witness (**Witness v Marsden** [2000] 49 NSWLR 429 at 464). In that case, an order was made in the following terms; -

“Any matter which is likely to lead to the identification of the witness is not to be reported by those in court”.

An example of the situation where the use of a pseudonym might be necessary is the taking of evidence from an ASIO witness or a police informant.

(b) **Court Closure and Non-publication of evidence orders**

The prospect of an order of this kind raises particular problems. May I give a hypothetical example: let it be assumed that the Australian Intelligence Agency has interviewed a witness and obtained information in circumstances where some degree of confidentiality has been promised. The prosecution proposes to call the witness to give the evidence that was communicated to the intelligence officer. Should the Court be closed while the witness gives his or her evidence? Should

there be a non-publication order relating to the evidence taken during the closed court session? Consider another example: one where the ASIO agent must himself or herself give evidence. An unwitting question might inadvertently disclose extremely sensitive material. There is also a need to protect the identity of the witness.

There are two statutory sources of power available. The first is s 85B of the **Crimes Act 1914 (Cth)**. The second source of power is s 93.2 of the **Criminal Code Act 1995**. The first section enables the Court to make protective orders if satisfied “that such a course is expedient in the interests of the defence of the Commonwealth”. The second operates if the Court is satisfied that “it is in the interests of the security or defence of the Commonwealth”.

Neither section mentions the principles of open justice. The content and scope of those principles are, and remain, one of the most fundamental aspects of the system of justice in Australia. The content and scope of open justice principles at Common Law have been the subject of determination by the New South Wales Court of Appeal in a number of decisions over the last 20 years. One of the most recent is the decision of the Court in **John Fairfax Publications Pty Limited & Anor v District Court of New South Wales & Ors** [2004] 61 NSWLR 344. The principles to be derived from the decision will be found in the judgment of Spigelman CJ with whom Handley JA and M. W. Campbell AJA agreed. (See also the extra judicial commentary by Spigelman CJ “**The Principle of Open Justice**” an address to the **Media Law Resource Centre Conference London, 20 September 2005**) (www.lawlink.nsw.gov.au/sc). Those principles may be summarised as follows:

1. Open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public is an essential quality of an Australian court of justice.
2. Where a Court has an inherent or statutory jurisdiction to make a non-publication order, a test of necessity is ordinarily applied to the exercise of the power to make such an order. A court can only depart from the fundamental rule that the administration of justice must take place in open court where

observance of the rule would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. An order of the court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in the proceedings before it.

3. An order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice or the protection of the relevant public interest.

4. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication (see **John Fairfax & Sons Pty Limited v Police Tribunal of New South Wales** (1986) 5 NSWLR 465; **Attorney-General (NSW) v Mayas Pty Limited** (1988) 14 NSWLR 342).

5. It is well established that the exceptions to the principle of open justice are few and strictly defined (see for example, **McPherson v McPherson** (1936) AC 177 at 200; **R v Tate** (1979) 46 FLR 386 at 402). It is now accepted that the courts will not add to the list of exceptions but, parliament may do so, subject to any Constitutional constraints.

In **Lodhi** [2006] NSWSC 596 I determined that orders of the kind under discussion here should be made. That decision was confirmed by the Court of Criminal Appeal (see **Lodhi v Regina** [2006] NSWCCA 101 per McLellan CJ at CL with whom Spigelman CJ and Sully J agreed).

In **Lodhi**, there were, however, two important qualifying considerations, it seemed to me, arising out of the protective orders to be made. First, there was the need to respect the principles of open justice so as to respect the right of the media to report matters occurring in a closed court and the public's right, as a consequence, to receive reasonably prompt notification of the evidence taken during the closed court hearing. The second qualifying consideration related to the obvious potential for

prejudice to the accused because of the closure of the court in the jury's presence and because of the making of a non-publication order in the same situation.

As to the first, I directed that, once a transcript had been scrutinised, it should, subject to any necessary editing arising from considerations of national security matters, be published. In that way, the media interests and the public would know precisely what it is that has happened in Court, subject only to the deletion of clearly sensitive material. And they will know these things very promptly after the evidence has been given. As to the second matter, I took the view – others may disagree – that the jury, properly instructed and directed, would approach their important task precisely in accordance with the oath or affirmation they had taken. In my experience, juries usually understand and respect the directions they are given. This extends to general directions to avoid particular areas of bias and to approach the evidence in the trial in a manner that is free from prejudice. In the same way, I considered that careful and appropriate directions could be crafted in relation to the imposition of protective orders and that they would be respected and taken into account by the jury. I attach as Appendix “B” to this paper an example of two directions that were ultimately given.

Before leaving this topic, I should say that I recognise and respect that other trial judges may legitimately take a robustly different view than the one I did in relation to closure of court orders and non-publication orders. It is, I think, fair to recognise that, in trials of this nature, it is by no means easy for an accused person to receive a fair trial. This is particularly so in light of the attention paid by the media and politicians to divisions within the community regarding people of the Muslim faith. It seemed to me, however, that the scope of the statutory power to make the relevant orders, considered in the light of the application of the principles of open justice required, in the particular circumstances, the making of the protective orders, subject only to the qualifications I have here mentioned.

Screening Orders

This is an area that requires particularly sensitive and careful attention. The screening orders sought related to certain individual ASIO witnesses identified

confidentially. The proposal was that protection be made for the evidence they would give both pre-trial and at trial. The Attorney-General sought an order that those particular witnesses give evidence in such a way that their appearances be screened from persons other than: -

- (i) The Judge and Judge's Associate
- (ii) The jury (during trial)
- (iii) Legal representatives of the defendant; and
- (iv) Prosecution legal representatives
- (v) Court Reporters and Court Officers

These orders were sought on the basis of the Court's inherent jurisdiction. No statutory power was called in aid. The basis of the application, publicly identified, was that the witnesses were ASIO personnel who were then presently involved in operational duties or who might be so in the future. There was confidential evidence to justify the proposition that screening orders should be made and that such orders were necessary for the purposes of national security. It was openly asserted that, unless a screening order were made, the accused would be able to identify ASIO witnesses presently involved in operational duties or likely to be so involved at a future time.

It is very clear that a trial judge, who is confronted with an application for orders of this kind, has a difficult decision to make. Arguably, the orders involve an area of special prejudice to the accused. It would, for example, be apparent to the jury that the only person in the courtroom who was being screened from the witness was the accused himself. No matter the nature of the directions given, this perception might lead inevitably to the conclusion, in the minds of the jury, that the accused was a dangerous person and therefore likely to be guilty as charged.

In Lodhi, screening orders were made for the purposes of pre-trial proceedings. Having observed the screening process in practice, it became quite apparent to me that it would be entirely inappropriate to make such an order in the trial itself. I was content to admit I had been wrong in the initial conclusion I reached. Consequently, a stratagem was devised, with the consent of the parties, that overcame the

problem. Emboldened by the decision of the Court of Criminal Appeal in **R v Ngo** [2003] 57 NSWLR 555, I decided to use a different methodology altogether.

In **Ngo's** case, the accused, a successful Vietnamese businessman and local identity, had been charged with the murder of a politician, John Newman. During the course of the trial, the trial judge authorised the giving of evidence of two witnesses by way of an audio-visual link. Each witness had expressed fear at giving evidence in front of the accused. While the jury, presiding Judge, counsel and court officers could hear and see the witnesses on the video screen, the accused was not permitted to see the witnesses. In order to overcome any prejudicial inference that might be drawn against the accused, a non-operating monitor was placed in front of him. This gave the jury the impression that the accused was looking at the same material as they were. The trial judge (Dunford J) concluded that it was in the interests of the administration of justice to make the order. His Honour specifically took into account a particular objection raised by the accused, namely that he would not have the opportunity to properly contest the evidence of the witness because he would not have the opportunity of personally seeing them and identifying them. This, however, did not outweigh the Judge's view that the video link application should be granted as well as the screening application.

In the **Lodhi** trial, the accused had a television monitor placed in front of the dock. There were also television monitors placed at the front of the jury box. In addition, there was a larger wall screen situated behind the dock area which the jury, and other people in the court, could observe as well. Counsel and the trial judge also had individual television monitors. The relevant witnesses gave evidence from a remote location. Their visual appearances were displayed on the monitor screens, with the exception of the screen placed in front of the accused.

As I have said, this proposal was one that was implemented by consent. It did away with the physical screen which had been placed in front of the accused during pre-trial. It became very apparent to me that the process of physically screening an accused from the presence of a witness had a high capacity to implant prejudice in the minds of the jurors. The fact that orders of this kind were sought at all highlights the tremendous clash existing between the need to protect national security matters

and the rights of an accused to a fair trial. The resolution of the conflict between these notions presents challenges of the highest order for a trial judge.

Miscellaneous Matters

There are two final matters I would like to mention. The first relates to applications for evidence to be taken by way of audio-visual link (“AVL”). The second relates to the structure of a prison sentence if an accused person is convicted of a serious terrorism offence.

Application for AVL

There is now a specific section of the **Crimes Act 1914 (Cth)** dealing with applications for video-link evidence in proceedings for terrorism and related offences. It is s 15YV. The section is in the following terms: -

“15YV (1) *Application by prosecutor*

In a proceeding, the court must:

- (a) direct; or
- (b) by order, allow;

a witness to give evidence by video link if:

- (c) both:
 - (i) the prosecutor applies for the direction or order; and
 - (ii) the court is satisfied that the prosecutor gave the court reasonable notice of his or her intention to make the application; and
- (d) the witness is not a defendant in the proceeding; and

- (e) the witness is available, or will reasonably be available, to give evidence by video link; and
- (f) the facilities required by section 15YY are available or can reasonably be made available;

unless the court is satisfied that giving the direction or making the order would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.

Application by defendant

(2) In a proceeding, the court must:

- (a) direct; or
- (b) by order, allow;

a witness to give evidence by video link if:

- (c) both:
 - (i) a defendant in the proceeding applies for the direction or order; and
 - (ii) the court is satisfied that the defendant gave the court reasonable notice of his or her intention to make the application; and
- (d) the witness is not a defendant in the proceeding; and
- (e) the witness is available, or will reasonably be available, to give evidence by video link; and
- (f) the facilities required by section 15YY are available or can reasonably be made available;

unless the court is satisfied that it would be inconsistent with the interests of justice for the evidence to be given by video link.

Definition

(3) In this section:

substantial adverse effect means an effect that is adverse and not insubstantial, insignificant or trivial.”

This new part of the **Crimes Act 1914** came into force in November 2005. It applies to any proceeding for an offence against Part 5.3 of the **Criminal Code** (s 15YU). The legislation gives the Court power in making a direction or order under the section to require, when the witness is giving evidence by video-link, that there be physically present at the place where evidence is given a person specified in the direction or order who may act as an observer. Such an observer may, if directed, give the Court a report concerning the person's observations in relation to the giving of evidence by the witness. The Court may make use of the report in determining whether evidence by the witness should or should not be admitted as evidence in the proceedings (s 15YW).

Section 15YY provides that a witness can give evidence under a s 15YV direction or order only if the courtroom or other place where the court is sitting (the courtroom point) and the place where the evidence is to be given (the witness point) are equipped with video facilities. These must be such as to enable appropriate persons of the courtroom point to see and hear the witness giving the evidence; and enable appropriate persons at the witness point to see and hear appropriate persons at the courtroom point. The court determines who are, in each case, appropriate persons.

Section 15YZA provides that a person who gives evidence under a s 15YV direction or order is taken to give it at the courtroom or other place where the Court is sitting. This sub-section has effect for the purposes of laws relating to evidence, procedure, contempt of court and perjury. Section 15YZB enables an oath or affirmation to be sworn or made by a witness who is to give evidence under a s 15YV direction or order. This may be administered either by means of the video link in as nearly as practicable the same way as if the witness were to give evidence at the courtroom or other place where the court is sitting. Alternatively, an oath or affirmation may be administered on behalf of the court and as directed by it at the place where the witness is to give the evidence. This will be done by a person authorised by the Court.

Section 15YZD gives a right of appeal where the Court gives a direction or makes an order or where it refuses to do so. Section 15YX requires that there be an

adjournment after a s 15YB direction or order or after the refusal to give a direction or make an order.

The prevailing view, at least in New South Wales, is that the taking of evidence by way of video-link facilities in an appropriate case is a satisfactory method of adducing evidence. This is so, not only in civil proceedings but in criminal proceedings as well (**R v Wilkie & Ors** [2005] NSWSC 794 per Howie J; **Shayan Badraie** NSWSC per Johnson J 6 December 2005; see also the views of Austin J in **ASIC v Rich & Ors** [2204] 49 ASCR 578 at [17-18]). These were cases brought under the New South Wales legislation enabling the taking of evidence by way of AVL. There is no reason to suppose that, in the case of the Commonwealth legislation, any different view would be taken.

In **Lodhi**, over defence opposition, I ordered that the evidence of three American witnesses be given by way of AVL. (**R v Lodhi** [2006] NSWSC 587. In so doing I considered, in an extensive decision, a number of Australian and United Kingdom authorities dealing with the concept of “a fair trial”. These authorities demonstrated that a court, in determining whether a particular procedure would put at risk a fair trial, is required, having regard to the particular circumstances, to consider and balance competing interests. It is only when this has been done that the court may properly determine the relevant application before it.

It was my view that there was a clear legislative intention in the relevant sections of the **Crimes Act 1914** that orders of directions should be made to allow the taking of evidence by video-link, if it were otherwise an appropriate discretionary exercise to do so, quite apart from considerations of convenience, cost and the like. Such matters might be relevant but they would not generally be determinative of issues posed by the legislation. I also concluded that the physical absence of the witnesses from the courtroom would not, in the circumstances, lead to unfairness. Once again, I accept that there might legitimately be a different approach on this issue. It seemed to me, however, that the demeanour of a witness could be assessed satisfactorily by the use of AVL facilities. For example, in New South Wales, juries are required to assess the evidence of complainants in child sexual assault cases where evidence has been given by way of AVL (see also the observations of Howie

J in **Wilkie & Ors** at para 31. His Honour mentioned the range of improvements in receiving visual and audio transmissions brought about by modern technology).

Sentencing discretion – statutory non-parole period

This is a matter that only arises after conviction. I thought I should draw it to your attention because, in the **Lodhi** trial, the Crown itself was not aware of the statutory provisions, necessitating the unexpected adjournment of the sentencing hearing.

Section 19AB of the **Crimes Act 1914 (Cth)** enables the Court, in the case of several offences, to fix a single non-parole period. The purpose of the non-parole period is to provide a mitigation of the punishment of the offender in favour of rehabilitation through conditional freedom. The non-parole period, however, must incorporate all the relevant sentencing principles including denunciation and deterrence. Prior to the enactment of s 19AG of the **Crimes Act 1914 (Cth)** – see Item 1B of Schedule 1 of the **Anti-Terrorism Act 2004** – the normal range for a non-parole period was between 60-66 per cent of the total sentence (**R v Bernier** (1998) 102 A Crim R 44), although a higher non-parole period, up to 75 per cent in the most serious situations, might be justified. The new legislation specifically applies to terrorism offences. It makes it obligatory now for the Court to fix the non-parole period at a percentage of “at least 3/4 of the sentence”. Where two or more sentences have been imposed on a person, the relevant percentage must relate to the aggregate of those sentences.

It will be seen that the section does not rob the Court entirely of discretion. But the discretion now moves upwards between $\frac{3}{4}$ of the sentence and 100%. This represents a very significant alteration of the previous situation against a person who has been convicted of a terrorism offence. One puts into the balance the fact that bail may be granted to a person accused of a terrorism offence only in exceptional circumstances; and the fact, at least in New South Wales, that a new prison classification has been created for persons both accused of, and convicted of, terrorism offences. The classification carries with it conditions that are not much better than to those we see depicted on the screen in images of Guantanamo Bay.

As trial judges, we have to respect the legislation that comes into existence from time to time relating to terrorism offences, even if we find it personally distasteful. But the very nature of the legislation to which I have referred may tend to reinforce the potential in the public mind for prejudice animosity and bias.

Conclusion

The National Affairs Editor of the Australian, in an article published on 26 October 2006, pointed out that, including the September 11 attacks, Americans who have lost their lives to terrorism since the late 1960's, total about the same as Americans killed by lightning, accident-causing deer or allergic reaction to peanuts. The writer wryly observed that, with about forty thousand fatal car accidents a year in the U.S., research in 2003 suggested that airlines crashes on the scale of September 11 would have to occur once a month to make flying as dangerous as driving a car. The author, however, concluded that none of this alleviated the deep and abiding fear in the U.S.A. relating to the threat of terrorist attacks.

In our country, we must take the potential for terrorist attacks seriously as well. As a Nation, we have suffered in recent times the horrors of the Port Arthur massacre. And not so many years ago, there was the spectre of terrorism involved in the Hilton bombing in Sydney. There is no doubt that we will see increasing emphasis on the investigation and prosecution of terrorism related trials.

It is interesting to note that the number of ASIO staff has now increased to well over 1100 in the three year period to 2006. The budget of the agency has gone from \$75 million to about \$233 million. The figures I have quickly researched would seem to indicate that only one Australian was killed in the London bombing, four in the second Bali bombing and one in Iraq. At the same time, Federal Parliament has passed 37 laws dealing with terrorism during the past five years. There is no doubt that the legislature passed these laws in the hope that they will help protect the community and frustrate the reality of a terrorist attack in this country.

As I have endeavoured to show in this paper, there will be a mounting pressure on trial judges (and the appellate courts for that matter) to maintain the reality of a fair trial for persons accused of terrorism offences. To my mind prejudice, delay and secrecy are the principal problems confronting a trial judge in these matters. I have endeavoured to argue in this paper that appropriate directions to jurors should mitigate and diminish the problem of bias and prejudice. Secondly, that sensible co-operation between counsel, and the use of appropriate pre-trial procedures, should reduce the problem of delay significantly. In the third area, that of secrecy, I can offer no magic solution. There is likely to be an increasing presence of ASIO agents in relation to the collection of evidence to be used in criminal trials involving terrorism. Yet our intelligence agency, for all its skill in intelligence gathering, is perhaps not well equipped to gather evidence for a criminal trial; and its individual agents are not well tutored in the intricacies of the criminal law relating to procedure and evidence. Moreover, the increasing presence of our intelligence agency in the investigating and trial processes brings with it an ever increasing appearance of secrecy which, if not suitably contained, may substantially entrench upon the principles of open justice and significantly dislocate the appearance and the reality of a fair trial.
