

A COMPARISON OF AUSTRALIAN AND CANADIAN ANTI-TERRORISM LAWS

KENT ROACH*

I INTRODUCTION

Comparative analysis of anti-terrorism law can identify broad trends of convergence and divergence that would be lost if one focused on the details of a particular domestic response to terrorism.¹ There are many areas of convergence between Australian and Canadian anti-terrorism laws. This is not surprising given that both countries have been influenced by United Nations Security Council Resolution 1373² and British anti-terrorism laws.³ Both countries have enacted many new terrorism offences with a broad definition of ‘terrorism’; both countries allow terrorist organisations to be proscribed; and both countries have enacted laws designed to prevent the release of information that could harm national security.

Yet, there are substantial differences between anti-terrorism laws in the two countries. Canada has only enacted two major pieces of anti-terrorism legislation since 11 September 2001 (‘9/11’), while Australia has enacted close to 40 pieces of such legislation. Australia has given its civilian domestic security intelligence agency, ASIO, new powers to detain and question those with information about terrorist offences while Canada only gave more limited powers to judges presiding at investigative hearings. The Supreme Court of Canada upheld investigative hearings under the *Canadian Charter of Rights and Freedoms* (‘*Charter*’), but ruled that any evidence derived from them cannot be used in any

* Professor of Law and Prichard-Wilson Chair in Law and Public Policy, University of Toronto. I thank the University of New South Wales Faculty of Law and the Gilbert + Tobin Centre for Public Law for making it possible for me to visit at the University of New South Wales Faculty of Law where I taught an intensive course in August, 2006 on comparative anti-terrorism law. Special thanks to Andrew Lynch, George Williams and all the students in my seminar for their enthusiasm and insights. Thanks to Andrew Lynch, Rayner Thwaites, George Williams and two anonymous reviewers for helpful comments on an earlier draft of this article.

1 See generally Victor Ramraj, Michael Hor and Kent Roach (eds) *Global Anti-Terrorism Law and Policy* (2005).

2 SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001).

3 See Kent Roach, ‘The Post 9/11 Migration of Britain’s *Terrorism Act, 2000*’ in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 374; Kent Roach, ‘Sources and Trends in Post 9/11 Anti-Terrorism Laws’ in Liora Lazarus and Benjamin Goold (eds), *Human Rights and Terrorism* (2007) 227.

subsequent proceedings⁴ and that they are to be subject to a rebuttable open court presumption.⁵ Despite these decisions, investigative hearings remained controversial. The minority Conservative Government in Canada was unable to renew investigative hearings and preventive arrests under a five year sunset provision in the original post 9/11 legislation and both powers have expired.⁶ In contrast, the Howard Government in 2006 extended ASIO's detention and questioning powers until 2016.⁷

A number of hypotheses can be presented to explain the significant divergences between Australian and Canadian anti-terrorism law. One is that Canadian law is subject to a constitutional bill of rights, the *Charter*, which Australia does not have.⁸ As will be seen, the *Charter* explains some but not all of the differences between Australian and Canadian anti-terrorism law. Other factors include particularly strong civil society resistance in Canada to anti-terrorism laws⁹ and the inability of Canada's minority Conservative Government in early 2007 to gain support for the renewal of powers of investigative hearings and preventive arrest or to enact new anti-terrorism laws. In contrast, the Howard Government has been in a majority position since 2004 and has been able to enact many new anti-terrorism laws.

Other explanations for the differences between Australian and Canadian anti-terrorism laws are more speculative. Although 24 Canadians died in the 9/11 attacks and 331 people died in the 1985 bombings of two Air India planes originating in Canada, many Canadians may feel somehow less affected by international terrorism than Australians. Since 9/11, 88 Australians were killed in the 2002 Bali bombings and the Australian embassy was bombed in Jakarta in 2004. Another possible factor may be Canada's sensitivity towards multiculturalism, which is constitutionally recognised in s 27 of the *Charter*. Multiculturalism helps explain the Canadian government's decision to appoint two major public inquiries into the activities of Canadian officials in relation to Maher Arar and three other Canadians held abroad on suspicion of terrorism,¹⁰ as well as the appointment of a Cross Cultural Roundtable on National Security.¹¹ It

4 *Application under Section 83.28 of the Criminal Code* [2004] 2 SCR 248.

5 *Re Vancouver Sun* [2004] 2 SCR 332.

6 Jeff Sallot, 'Terror vote fails as Dion Reins in Liberals', *Globe and Mail* (Ontario) 28 February 2007; Ian Austen, 'Canadian Parliament Decides to Let 2 Measures Passed After 9/11 Expire', *New York Times* (New York), 28 February 2007.

7 *ASIO Legislation Amendment Act 2006* (Cth) s 32.

8 See George Williams, 'The Rule of Law and the Regulation of Terrorism in Australia and New Zealand' in Ramraj et al (eds), above n 1, 534.

9 See Kent Roach, *September 11: Consequences for Canada* (2003) ch 3 for an account of wide-spread opposition to Canada's *Anti-Terrorism Act*, SC 2001, c 41 ('*Anti-Terrorism Act* 2001').

10 Canadian Commission of Inquiry into the Action of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006). An Internal Inquiry headed by retired Supreme Court Justice Iacobucci has recently been appointed to investigate the actions of Canadian officials in relation to three other Canadian citizens, Abdullah Almalki, Ahmad El Matti and Muayyed Nureddin. See *Terms of Reference* (2006) Public Safety Canada <<http://www.psepc-sppcc.gc.ca/media/nr/2006/nr20061212-3-en.asp>> at 18 March 2007.

11 Canada's new Conservative Prime Minister Stephen Harper defended multiculturalism in light of criticisms of it after the Toronto terrorism arrests. See Kent Roach, 'National Security Policy, Multiculturalism and Muslim Minorities' [2006] *Singapore Journal of Legal Studies* 405.

may also explain a recent lower court decision holding that the requirement to establish a religious or political motive in a terrorism prosecution was an unjustified limitation on freedom of expression and freedom of religion,¹² as well as Canada's reluctance to follow the lead of the United Nations *Security Council Resolution* 1624 (2005)¹³ in enacting new laws targeting speech inciting terrorism.

II DEFINITIONS OF TERRORISM

Both Australia and Canada were confronted with the difficult task of defining terrorism as they responded to 9/11 and United Nations *Security Council Resolution* 1373 (2001).¹⁴ The Canadian process of enactment was quick with a massive new anti-terrorism law being introduced into Parliament on 15 October 2001 and enacted before the end of the year. The Australian process was somewhat slower in large part because of the election held in November 2001 and because of resistance to some of the initial proposals in Australia's elected Upper House of Parliament which at the time did not have a majority supporting the Howard government.

A Broad Definitions of Terrorism

The general definitions of terrorist activities in Australia and Canada are quite similar. They both follow the broad definition of terrorist activities in s 1 of Britain's *Terrorism Act 2000* (UK)¹⁵ by including various forms of politically or religiously motivated property damage and interferences with essential public and private services. Section 100.1 of Australia's *Criminal Code 1995* (Cth) ('*Australian Criminal Code*') provides that action falls within the definition of a terrorist act if it:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person's death; or
- (d) endangers a person's life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - i) an information system; or
 - ii) a telecommunication system; or
 - iii) a financial system; or
 - iv) a system used for the delivery of essential government services; or

12 *R v Khawaja* [2006] OJ No 4245.

13 SC Res 1624, UN SCOR, 60th sess, 5261st mtg, UN Doc S/Res/1624 (2005).

14 SC Res 1371, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001).

15 *Terrorism Act 2000* (UK) c 11.

- v) a system use for, or by, an essential public utility; or
- vi) a system used for, or by, a transport system

This above definition is very broad because it includes all serious damage to property and all serious interference or disruption of essential public or private services.

Section 83.01(1)(b)(ii) of the Canadian *Criminal Code* defines a ‘terrorist activity’ as including acts or omission inside or outside Canada that intentionally:

- (A) causes death or serious bodily harm to a person by the use of violence,
- (B) endangers a person’s life,
- (C) causes a serious risk to the health or safety of the public or any segment of the public,
- (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct referred to in any of clauses (A) to (C), or
- (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C).¹⁶

The broadest and most controversial part of this definition is subclause E which applies to serious interference or disruption of all essential public and private services. Although defined in broader and more generic terms than the Australian reference to interference with an electronic system, the result is virtually identical.

The Australian definition applies to all serious property damage whereas the Canadian definition only captures substantial property damage if the damage is likely to endanger life, health or safety. The more restrained Canadian approach to property damage limits the ability of the definition to capture politically motivated property destruction.

B Exemptions for Protests and Strikes

There are similar exemptions for some forms of protests and strikes in both laws. Section 100.1(3) of the *Australian Criminal Code* provides that action does not fall within the definition of a terrorist act if it:

- (a) is advocacy, protest, dissent or industrial action, and
- (b) is not intended:
 - i) to cause serious harm that is physical harm to a person; or
 - ii) to cause a person’s death; or
 - iii) to endanger the life of a person, other than the person taking the action; or
 - iv) to create a serious risk to the health or safety of the public or safety of the public or a section of the public

¹⁶ *Criminal Code*, RSC 1985 c C-46 (‘*Canadian Criminal Code*’).

Section 83.01(1)(b)(ii)(E) of the *Canadian Criminal Code* has a similar exemption for ‘advocacy, protest, dissent or stoppage of work’ that is not intended to cause death or serious bodily harm by the use of violence, endanger a person’s life or cause a serious risk to public health or safety. Both exemptions indicate that Australia and Canada are more sensitive to the dangers of protests and strikes being branded as terrorism than the United Kingdom which has no such exemption. The exemption for protests and strikes in both Australia and Canada was initially qualified to ‘lawful’ protests and strikes, but the word ‘lawful’ was deleted in the face of arguments that unlawful strikes and protests should not be considered to be terrorism. There was significant support for the freedom to protest and strike in both countries regardless of whether there was a constitutional bill of rights.

C Distinguishing Terrorism from Ordinary Crimes

Both Australia and Canada rely on a variety of motive requirements to distinguish terrorism from ordinary crime. Section 100.1(1) of the *Australian Criminal Code* provides:

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - ii) intimidating the public or a section of the public.

Section 83.01(b)(i) of the *Canadian Criminal Code* defines terrorist activity in part as an act or omission inside or outside Canada that is committed:

- (A) in whole or in part for a political, religious or ideological purpose, objective or cause; and
- (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organisation to do or to refrain from doing any act, whether the public or the person, government or organisation is inside or outside of Canada

D Compulsion of Governments, Persons or International Organisations

The Australian definition requires the coercion of domestic or foreign governments or the attempt to influence them by intimidation. This definition departs from the British definition by requiring that actions be intended to coerce governments or influence them by intimidation as opposed to the broader British law that applies to all actions ‘designed to influence the government’. The coercion or influence by intimidation requirements in Australia were only introduced ‘after an outcry from legal and community groups’ who expressed

concerns about the breadth of the broader British concept of influencing governments.¹⁷ This change, coupled with the exemption for even unlawful protests and strikes, suggests some sensitivity towards freedom of expression even in the absence of a national bill of rights.

Unlike Australia, Canada includes the compulsion of international organisations and persons, as well as governments in its definition. The inclusion of international organisations makes sense given the nature of international terrorism and it has been recently recommended by a Parliamentary committee as an addition to Australia's definition.¹⁸ The Canadian inclusion of the compulsion of persons, however, is much more problematic. It raises concerns about whether it is possible to distinguish terrorist crimes from ordinary crimes such as robbery which are designed to compel persons to act under Canadian law. The inclusion of persons under the Canadian law was likely designed to protect corporations and to capture extremist elements of the anti-globalisation, animal rights and Aboriginal movements that might target corporations. This reading of the Canadian legislation is also supported by the inclusion of the concept of 'economic security' in the definition of terrorist activities, something that points to Canada's extreme reliance on trade with the United States and Canadian concerns that a repeat of 9/11 would again result in temporary closing of the Canadian-American border. Australia's definition of terrorism is more restrained by not containing similar references to economic security or acts that are designed to compel persons or corporations to act.

E Political or Religious Motive Requirements

Both countries also distinguish terrorist crimes from ordinary crimes on the basis that acts of terrorism are designed to advance a political, religious or ideological cause. As McSherry has noted, however, this is a departure from criminal law principles and 'proving motive as well as intention is venturing into uncharted territory'.¹⁹ Acquittals of terrorism offences have been entered in Australia on the basis of a failure to prove political or religious motive beyond a reasonable doubt,²⁰ but two recent reviews have recommended the retention of the motive requirement.²¹ The focus in Australia has been on the ability of the political and religious motive to restrict crimes of terrorism rather than on the discriminatory effects that such requirements may have on accused persons and those who may share political or religious beliefs with terrorists.

17 Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006) 15.

18 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 11. See also Ben Saul, *Defining Terrorism in International Law* (2006) 65-66.

19 Bernadette McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 *University of New South Wales Law Journal* 354, 363.

20 *R v Mallah* [2005] NSWSC 317, [26].

21 The Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006), 15; Parliamentary Joint Committee on Intelligence and Security, above n 18, Recommendation 7.

Although the Canadian government has similarly defended the political and religious motive requirements as restrictions on crimes of terrorism, there have been concerns that such motive requirements might promote discriminatory political or religious profiling that would target those who shared political and religious views with terrorists. After its anti-terrorism bill was first introduced, the Canadian government was forced to add an interpretative clause stating that 'for greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within' the definition of terrorist activity 'unless it constitutes an act or omission that satisfies the criteria of that paragraph'.²² The Canadian interpretative clause was unique and demonstrates some sensitivity to claims that the legislation would contribute to discriminatory profiling.

Even with the interpretative clause added, the trial judge in *R v Khawaja* held in 2006 that the requirement for proof of religious or political motive constituted an unjustified violation of freedom of expression, religion and association under s 2 of the *Charter* and severed that requirement from the rest of the definition. Justice Rutherford concluded that:

the inevitable impact ... from the inclusion of the 'political, religious or ideological purpose' requirement in the definition of 'terrorist activity' will be to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups both in Canada and abroad.²³

He held that the motive requirement could not be justified as the least drastic restriction on fundamental freedoms.²⁴ Justice Rutherford's decision to read the political or religious motive requirement out of the act has the effect of broadening the definition of terrorist activities in Canada, but it also means that judges will no longer be required to admit motive evidence without regard to whether its prejudicial effects outweigh its probative value.²⁵ Canadian concerns about the political or religious motive requirement are not limited to the judiciary. A unanimous bi-partisan Committee of Canada's unelected Senate has recently recommended that the political or religious motive requirement be repealed because it may 'encourage racial and religious profiling during investigations'. A committee of the House of Commons has, however, recommended that the political or religious motive requirement be retained to distinguish terrorism from ordinary crime.²⁶

Suresh v Canada is another example of a definition of terrorism that does not rely on proof of political and religious motive. In this case, the Court borrowed

22 *Canadian Criminal Code* s 83.01 (1.1).

23 *R v Khawaja* [2006] OJ No 4245, [58].

24 *Ibid* [67]-[80].

25 See Kent Roach, 'Terrorism Offences and the Charter: A Comment on *R v Khawaja*' (2007) 11 *Canadian Criminal Law Review* 215.

26 Special Senate Committee on the *Anti-terrorism Act*, Parliament of Canada, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act* (2007) 14; Standing Committee of the House of Commons on Public Safety and National Security, Parliament of Canada, *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues* (2007) 8-9.

from a general definition of terrorism in the *International Convention on the Suppression of the Financing of Terrorism* to interpret an undefined reference to terrorism in Canadian immigration law to apply to acts ‘intended to cause death or serious bodily injury to a civilian’ when designed ‘to intimidate a population or to compel a government or an international organisation to do or abstain from doing any act’.²⁷ The focus was on harm to humans and there was no requirement of political or religious motive. Although it noted that Canadian legislatures were free to adopt a different definition, the Supreme Court pointedly commented that its international law inspired definition ‘catches the essence of what the world understands by “terrorism”’.²⁸ The Canadian Parliament has accepted this narrower definition of terrorism and has not sought to apply the broader *Canadian Criminal Code* definition to immigration law. Whilst Parliament has not yet revised the *Canadian Criminal Code* definition to better mirror the narrower definition of terrorism used by the Supreme Court of Canada in immigration law, a Senate Committee has, however, recommended uniformity in the definition of terrorism and expressed a preference for the broader Criminal Code definition because it includes some forms of property damage.²⁹

F Incorporation of International Law

The Canadian definition of terrorism includes not only a general definition of terrorism, but a more specific definition that includes a variety of existing and new offences committed outside Canada to the extent that they implement various international conventions against specific forms of terrorism.³⁰ Although this part of Canada’s definition was designed to demonstrate Canada’s good international citizenship, it can be criticised for a lack of clarity and precision about what has been labelled a terrorist activity.³¹ The Australian approach of simply relying on a general and domestic definition of terrorist activities is simpler and clearer. It may, however, demonstrate less engagement with international law than in Canada or other countries which partially incorporate international law in their definitions of terrorism.

G Summary

Inspired by the British example, both Australia and Canada opted for very broad definitions of terrorism that included serious disruptions to essential public or private systems such as telecommunications and public utilities. At the same time, both countries softened the British definition by exempting protests and strikes so long as they were not intended to endanger life, health or safety. The

27 *Suresh v Canada* [2002] 2 SCR 3, 98.

28 *Ibid.*

29 Special Senate Committee on the *Anti-terrorism Act*, above n 26, 16.

30 *Canadian Criminal Code* s 83.01(1).

31 Although they are more supportive of the Canadian than the New Zealand approach to incorporation because the Canadian approach relies on existing domestic criminal offences, Golder and Williams point out that international conventions are not drafted in a way that facilitates their incorporation into domestic criminal law. See Ben Golder and George Williams, ‘What is “Terrorism”? Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270, 286-287.

Australian definition is broader than the Canadian in including all politically and religiously motivated serious property damage whereas the Canadian definition only applies to such property damage when it is likely to endanger life, health or safety. At the same time, however, the Canadian definition is broader than the Australian definition in including attempts to compel persons and international organisations, and not just governments, to act.

Both countries have included a political or religious motive requirement in their definition of terrorism, but this requirement has been very controversial in Canada. In response to concerns that the motive requirement would promote political and religious profiling, the Canadian Parliament added a clause providing that the expression of political or religious opinions would not normally satisfy the definition of terrorist activities. The Supreme Court of Canada subsequently read an internationally inspired definition of terrorism into immigration law that did not require proof of political or religious motive and a trial judge has recently struck the motive requirement from the definition as an unjustified and unnecessary violation of freedom of speech and religion. Technically, the effect of this decision is to relieve prosecutors of the requirement to prove political or religious motive, an extra hurdle that both the Australian and Canadian governments had shown some interest in eliminating. At the same time, Canada's judicial invalidation of the motive requirement, like its legislative attempts to qualify its meaning, has been inspired by concerns in civil society that such a requirement could promote a process of political and religious profiling that would discriminate against those who might share religious and political views with terrorists.

III TERRORISM OFFENCES

A Financing Offences

Both Australia and Canada have a broad range of offences to punish various forms of conduct in preparation to commit acts of terrorism. Both countries did so in part to comply with United Nations *Security Council Resolution 1373* (2001)³² and the United Nations *International Convention on the Suppression of Terrorism Financing*.³³ Sections 103.1 and 103.2 of the *Australian Criminal Code* create broad new crimes relating to the financing of terrorism, as do ss 83.02 and 83.03 of the *Canadian Criminal Code*. The two Australian offences require some nexus to a terrorist act whereas one Canadian offence is broader because it applies to the provision of property or financial services to a terrorist group without a nexus to a terrorist act.³⁴ At the same time, the Australian offences apply if the accused is reckless as to whether the funds will be used to facilitate or engage in a terrorist act whereas the Canadian offences require higher fault levels of intent or knowledge.³⁵

32 See above n 14.

33 GA Res 109, UN GAOR, 54th sess, supp no 49, UN Doc A/54/49 (1999).

34 *Canadian Criminal Code* s 83.03(b).

35 *Australian Criminal Code* ss 103.1(1)(b), 103.2(1)(b). As will be discussed below, there is an argument that a recklessness standard for terrorism offences in Canada might violate the *Charter*.

B The/A Issues About the Specificity of the Contemplated Terrorist Act

Both countries have multiple new offences relating to the preparation for terrorism and participation and association with terrorist organisations even though existing inchoate crimes including conspiracy could have been applied to apprehended terrorist plots. Canada created a new offence of knowingly facilitating a terrorist activity that is subject to a maximum of 14 years imprisonment.³⁶ In response to concerns that members of a terrorist cell might not know the exact nature of a planned terrorist act, the Canadian drafters provided that a person could be guilty of the above offence ‘whether or not a) the facilitator knows that a particular terrorist activity is facilitated; b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or c) any terrorist activity was actually carried out’.³⁷ This provision addressed what became known in Australia as the ‘the/a’ issue.

In 2005, rushed amendments were made to the *Australian Criminal Code* that required that preparation only be in relation to a general terrorist activity as opposed to the particular terrorist activity.³⁸ Although there are strong arguments that courts could have sensibly interpreted the existing legislation in Australia³⁹ and that the removal of any linkage to a particular terrorist activity has expanded the offences considerably,⁴⁰ the Canadian drafters opted for the wider approach that only requires a connection with some general and non-specific terrorist activity from the start. Justice Rutherford in *R v Khawaja* has recently rejected a *Charter* challenge to the broad Canadian approach by concluding that the provisions could still be read in a manner consistent with principles of criminal fault.⁴¹

C Fault Levels

Subject to the qualifications noted above, all the Canadian offences require a high level of subjective fault in the form of knowledge that a group is a terrorist group or knowledge that terrorist activity is being facilitated or an intent to facilitate a terrorist activity. In contrast, the Australian offences often draw a distinction between knowledge based terrorism offences that generally carry a

36 *Canadian Criminal Code* s 83.19(1).

37 *Ibid* s 83.19(2).

38 *Anti-Terrorism Act 2005* (Cth) no 127 sch 1.

39 *R v Lodhi* 199 FLR 303, [65]-[66].

40 See Andrew Lynch, ‘Legislating with Urgency – The Enactment of the Anti-Terrorism Act [no 1] 2005’ (2006) 31 *Melbourne University Law Review* (forthcoming).

41 Justice Rutherford concluded that ‘these so called erosions or diluents do not, in my view, significantly reduce the moral opprobrium or fault requirement of the accusations open under sections 83.18, .19, .21 merely because of the lack of details or specifics of the operation ... The subjective fault requirement or mens rea involves a knowing provision of assistance, support or benefit to a person or group that the accused knows is engaged in terrorist activity. That in my view amply meets the minimal constitutional requirement to comport with the fundamental principles of justice under the Charter’: *R v Khawaja* [2006] OJ no. 4245, [40]-[42].

maximum of 25 years imprisonment and less serious offences based on recklessness,⁴² which generally carry a maximum of 15 years imprisonment.⁴³

One of the reasons for Canada's refusal to extend liability to the reckless commission of terrorism offences is the Canadian jurisprudence surrounding constitutionally required fault requirements for crimes with high stigma and high penalties. The Supreme Court of Canada has determined that the stigma and penalty of murder, attempted murder and war crimes necessitate, under s 7 of the *Charter*, that there be a constitutional requirement that the accused has subjective fault in relation to all the elements of the prohibited act.⁴⁴ Terrorism offences could be added by the courts to this short list of special high stigma and high penalty crimes and this may well explain Canada's decision not to employ recklessness as a fault level for even less serious terrorism offences.

D Membership Offences

Another significant difference between Australia and Canada is the decision in Australia to make membership in a terrorist organisation a crime. Section 102.3(1) of the *Australian Criminal Code* makes it a crime subject to 10 years imprisonment for a person intentionally and knowingly to be a member of a terrorist organisation. This offence does not apply if the accused satisfies the legal burden of proving on a balance of probabilities that 'he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation'.⁴⁵ In Canada, an offence of membership was rejected because of concerns that it could not be justified as a reasonable limit on freedom of association and expression under the *Charter*. The reverse onus that requires the accused to prove on a balance of probabilities that he or she took all reasonable steps to cease to be a member of a terrorist organisation in the Australian membership offence⁴⁶ would also violate the presumption of innocence protected under s 11(d) of the *Charter* and would have to be justified as a proportionate and least restrictive limit on that right. No reverse onuses were included in the Canadian anti-terrorism legislation in part because of a desire to ensure that the legislation was consistent with the *Charter*.

The closest Canadian offence to the Australian membership offence is one that requires knowing participation or contribution to any activity of a terrorist group for the purpose of enhancing its ability to facilitate or carry out terrorist

42 Recklessness requires awareness of a substantial risk that the prohibited circumstance or result exists. In addition, having regard to the circumstances known to the accused, it must be unjustifiable to take the risk. Alternatively, knowledge requires the higher fault level of awareness that the prohibited result exists or will exist. *Australian Criminal Code* ss 5.3, 5.4.

43 Cf, eg, s 101.2(1) of the *Australian Criminal Code* which makes providing or receiving training *knowing* that it is to assist a terrorist or a terrorist act an offence subject to 25 years imprisonment, as compared to s 101.2(2) which makes providing or receiving training and being *reckless* that it is to assist a terrorist act a lesser offence subject to 15 years imprisonment.

44 See *R v Martineau* [1990] 2 SCR 633 (murder); *R v Logan* [1990] 2 SCR 731 (attempted murder); *R v Finta* [1994] 1 SCR 701 (war crimes).

45 *Australian Criminal Code* s 102.3(2).

46 See McSherry, above n 19, 369-70.

activities.⁴⁷ This offence, which is punishable by up to 10 years imprisonment, has been charged in the only two cases where offences under the new terrorism provisions of the *Canadian Criminal Code* have been used.

The Australian law goes beyond criminalising membership in a terrorist organisation to also making it an offence, subject to imprisonment for three years, to on two or more occasions intentionally associate with another person who is a member of or who promotes or directs an organisation that the accused knows is a terrorist organisation with the intent to assist the organisation to expand or continue to exist and when the association provides support for the organisation. This offence provides some specific exemption for associations between family members, for public religious worship, for humanitarian aid and for the provision of legal assistance, as well as for the constitutional doctrine of implied freedom of political communication.⁴⁸ The Report of the Security Legislation Review Committee has recommended the repeal of the whole section on the grounds of its imprecision and its potential adverse affects on associations within Muslim communities.⁴⁹

E Multiple Charges

Despite the above noted differences with regards to membership and association offences, recklessness fault requirements and reverse onuses, there are some important similarities in terrorism offences in both countries. Although Australia has enacted more offences than Canada, both countries have enacted so many new terrorism offences that accused terrorists will typically face charges under multiple offences. In Australia for example, Faheem Lodhi was charged with four nominally different but closely connected offences involving possessing a thing connected with preparation for a terrorist act,⁵⁰ collecting documents connected with preparation for a terrorist act,⁵¹ making a document connected with preparation for a terrorist act⁵² and doing an act in preparation for a terrorist act.⁵³ He was convicted of three of the four charges on which he had been indicted,⁵⁴ but only after the issue of duplicity in the charges was litigated twice.⁵⁵

In Canada, Mohammed Momin Khawaja faces two separate explosive charges that were charged under s 83.2 as indictable offences committed for the benefit of a terrorist group, with participating in a terrorist group,⁵⁶ with facilitating a terrorist activity,⁵⁷ with instructing an activity for the benefit of a terrorist group⁵⁸

47 *Canadian Criminal Code* s 83.18.

48 *Australian Criminal Code* s 102.8.

49 The Security Legislation Review Committee, above n 21, 123-126.

50 *Australian Criminal Code* s 101.4.

51 *Ibid* s 101.5

52 *Ibid* s 101.5

53 *Ibid* s 101.6. See also Lynch and Williams, above n 17, 77.

54 *R v Lodhi* (2006) 199 FLR 364.

55 *R v Lodhi* [2006] NSWSC 584; *R v Lodhi* [2006] NSWSC 639.

56 *Canadian Criminal Code* s 83.18.

57 *Ibid* s 83.19

58 *Ibid* s 83.21

and with making property available for a terrorist group.⁵⁹ Those arrested in the Toronto terrorist arrests also face multiple charges⁶⁰ and the *Charter* does not protect persons from multiple convictions from the same wrong so long as there is some additional and distinguishing feature between the offences.⁶¹

F Summary

On balance, the themes of convergence and divergence are evenly balanced with respect to anti-terrorism offences in Australia and Canada. Both countries have enacted many new offences to criminalise various forms of preparation for acts of terrorism and various forms of association with terrorist groups. Both countries do not require specificity with respect to the contemplated terrorist act. At the same time, Australia has criminalised both membership in a terrorist group and association with terrorists while Canada has not. In addition, Australia has created a series of less serious terrorism offences that require recklessness as opposed to higher subjective fault requirements of intent or knowledge that are favoured and may even be constitutionally required in Canada.

IV ASIO QUESTIONING POWERS AND CANADIAN INVESTIGATIVE HEARINGS

The most controversial parts of new anti-terrorism measures in both Australia and Canada were new powers designed to compel those with information about possible terrorist offences to co-operate with authorities. In Australia, such compelled questioning is achieved through ASIO's detention and questioning powers, which as originally introduced were criticised as draconian if not totalitarian.⁶² In Canada, such compelled questioning was achieved by the introduction of investigative hearings that were likened by some critics to the Star Chamber in their attempt to compel incriminating answers from those with information about future or past terrorism offences.⁶³

A Different Approaches to Sunsetting

In both Australia and Canada, the above provisions were subject to sunset clauses. This represented a recognition that the new powers were extraordinary, enacted in response to 9/11 and subject to possible abuse. The fates of the sunsets were, however, very different. In 2006, the majority Howard government

⁵⁹ Ibid s 83.03

⁶⁰ See Kent Roach, 'The Toronto Terrorism Arrests' (2006) 51 *Criminal Law Quarterly*, 389.

⁶¹ *R v Prince* [1986] 2 SCR 480.

⁶² See George Williams, 'Why the ASIO Bill is rotten to the core', *The Age* (Melbourne), 27 August, 2002, 15. For arguments that the ASIO powers require a derogation of rights under the ICCPR, but that a derogation cannot be justified, see Christopher Michaelsen, 'International Human Rights on Trial' (2005) 25 *Sydney Law Review* 275.

⁶³ See Kent Roach, 'The Dangers of a Charter-Proof and Crime-Based Response to Terrorism' in Ronald Daniels et al (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001) 135-38; David Paciocco, 'Constitutional Casualties of September 11' (2002) 16 *Supreme Court Law Review* (2d) 185.

extended the ASIO powers until 2016,⁶⁴ a long time period that blunts much of the value of a sunset provision. In Canada, the minority Conservative government attempted but failed to extend the investigative hearings for a further three year period and unsuccessfully offered to consider even shorter extensions.⁶⁵ Although it is possible that new legislation may be introduced in the future, the Canadian provisions for both investigative hearings and preventive arrests have now expired because of the original but unrenewed five year sunset placed on those powers.

B ASIO Questioning Powers

In March 2002, a bill to amend the *ASIO Act 1979* (Cth) was introduced that would allow the detention of adults and children for renewable 48 hour periods without access to legal advice until after 48 hours and potentially without being able to inform anyone of their whereabouts. There was widespread opposition to this proposed law and ASIO questioning and detention powers were not enacted until June 2003. These powers, which were amended by the *ASIO Legislation Amendment Act 2006* (Cth), now allow for questioning or detention warrants to be requested with the consent of the Attorney-General and granted by an issuing authority who is a federal magistrate or judge appointed by the Attorney-General. The questioning or detention warrants are granted on the grounds that other methods of collecting intelligence would be ineffective and that there are reasonable grounds to believe that the warrant will ‘substantially assist the collection of intelligence that is important in relation to a terrorism offence’.⁶⁶ A refusal to answer questions or the giving of either false or misleading answers is an offence punishable by up to five years imprisonment.⁶⁷ The answers that the subject provides under the warrant cannot be used against that person in subsequent criminal prosecutions, but there is no provision that prevents the authorities from introducing evidence that is derived from the compelled answers.

The actual questioning under ASIO warrants is carried out not before a judge but before a ‘prescribed authority’ who is a retired judge appointed by the

64 *ASIO Legislation Amendment Law Act 2006* (Cth) s 32.

65 See, eg, Jeff Sallot, ‘Terror vote fails as Dion reins in Liberals’, *Globe and Mail* 28 February 2007. Section 83.32 of the *Canadian Criminal Code*, which was included in the original 2001 anti-terrorism legislation, required a resolution to be passed by both Houses of Parliament by the end of the 15 sitting days of Parliament after 31 December 2006 to renew provisions for investigative hearings and preventive arrests. The Leader of the Official Opposition decided not to support a renewal unless there was a full review of the anti-terrorism law. The minority Conservative government accused the opposition of being soft on terrorism and threatening ongoing police investigations into the 1985 Air India bombing. In turn, the opposition accused the government of suggesting that the Liberal party had changed its position on the provisions for improper reasons relating to a relation between a Liberal Member of Parliament and a person who it was reported might be subject to an investigative hearing in the Air India police investigation. On 27 February 2007, the House of Commons defeated a motion to renew these provisions by a 159-124 vote with all the opposition parties voting against the motion moved by Canada’s minority Conservative government. As of 1 March 2007, the 15th sitting day of Parliament after 31 December 2006, the provisions for investigative hearings and preventive arrests expired.

66 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G(1)(b).

67 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34L(2), 34L(4).

Attorney-General. This provision is designed to prevent a challenge based on the limits of the judicial function if a sitting judge played the investigative and inquisitorial role of the prescribed authority. Interestingly enough, two judges in dissent in Canada would have struck down investigative hearings on a similar basis that they violated judicial independence by requiring judges to preside at essentially what are police investigations.⁶⁸

There are provisions which allow the subject's lawyers and the Inspector General to attend ASIO questioning, but the lawyer cannot object to certain lines of questioning and the contact between the lawyer and the subject of the warrant may be monitored by the prescribed authority and may not be subject to legal professional privilege.⁶⁹ Finally, it is an offence to disclose operational information obtained during the questioning process or even to reveal the fact that someone has been detained or questioned while the warrant is in effect, generally for 28 days, except for the purposes of obtaining legal advice.⁷⁰ These very restrictive conditions have justly been subject to strong criticism.⁷¹ As will be seen, the Canadian procedure was interpreted before its expiry to give both the press and defence lawyers a much more robust role than under the comparable Australian procedure.

C Canadian Investigative Hearings

As in Australia, Canadian investigative hearings were ordered by a judge and required the prior consent of the Attorney-General. A judge could order an investigative hearing on the grounds either that there were reasonable grounds to conclude that a terrorism offence had been committed and that the information would reveal information about the offence or the whereabouts of a suspect or that there were reasonable grounds to believe that a terrorism offence would be committed and that the person had direct and material information about the offence or the whereabouts of a suspect.⁷² In the case of offences not committed,

68 Justices Lebel and Fish concluded that investigative hearings require 'judges to preside over police investigations; as such investigations are the responsibility of the executive branch this cannot but leave a reasonable person with the impression that judges have become allies of the executive branch. This perception that the judicial and executive branches are allied when conducting an investigation pursuant to this provision results, in my view, from the difficulty that a judge presiding over such a process will have protecting the rights and freedoms of the person being examined, the overly broad discretionary powers wielded by the judge, the legislative objectives behind the provision and the very nature of these proceedings, which may be held *in camera*': *Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248 [180]. The majority of the Court held, however, that investigative hearings did not necessarily compromise judicial independence especially if carried out in an adversarial fashion with defence counsel present, subject to the presumption of open courts and application of the rules of evidence.

69 See Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27 *University of New South Wales Law Journal* 373, 382-86.

70 *ASIO Legislation Amendment Law Act 2006* (Cth) s 34ZS.

71 Retired Australian High Court Justice Michael McHugh has stated that the provision may be an unconstitutional invasion of the judicial power by allowing the executive to punish a person for refusing to co-operate with authorities: Michael McHugh, 'Terrorism Legislation and the Constitution' (2006) 28 *Australian Bar Review* 117. See also Michael Head, 'ASIO, Secrecy and Lack of Accountability' (2004) 17 *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v11n4/head114.html>> at 17 March 2007.

72 *Canadian Criminal Code* s 83.28(4).

there was also a requirement that reasonable attempts be made to obtain information from the subject of the proposed investigative hearing.

The Canadian investigative hearing provision was less forthright than the ASIO procedures because it did not spell out the consequences of refusing to answer questions or giving false or misleading questions, which, as discussed above, constitute offences punishable by up to five years imprisonment under the Australian law. That said, however, the difference between the Australian and Canadian procedures in this regard may have been more apparent than real. An investigative hearing order in Canada would constitute a court order and refusing a court order is a separate offence punishable by up to two years of imprisonment.⁷³ Moreover, knowingly making a false statement under oath or affirmation with an intent to mislead constitutes the offence of perjury and is punishable by up to 14 years imprisonment.⁷⁴ A refusal to obey a court order of an investigative hearing could also precipitate contempt of court proceedings. The Canadian procedure had an implicit, but very real, threat of coercion.

The actual questioning under a Canadian investigative hearing would have been carried out before the judge and following *Charter* right to counsel requirements, ‘a person has the right to retain and instruct counsel at any stage of the proceedings’.⁷⁵ Further, the subject had the right to refuse to answer questions or produce documents on the grounds that the information ‘is protected by any law relating to non-disclosure of information or to privilege’.⁷⁶ In upholding the constitutionality of investigative hearings, the Supreme Court of Canada stressed that counsel should play an active role in enforcing evidentiary rules.⁷⁷ Unlike under the ASIO procedures, defence lawyers could object to lines of questioning on the basis of evidentiary privileges and laws relating to non-disclosure of information.

D Protections Against Self-Incrimination

The Canadian legislation provided those compelled to incriminate themselves with broader protections than the Australian legislation. Section 83.28(10) of the *Canadian Criminal Code* provided that answers to questions could not be used against that person except in subsequent perjury prosecutions and that ‘no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceeding’.⁷⁸ In upholding the constitutionality of investigative hearings, the Supreme Court stressed that protection against both use and derivative use immunity of compelled statements was the constitutional standard under s 7 of the *Charter*. In recognition of the international context of terrorism investigations, the Court extended the use and

73 *Canadian Criminal Code* s 127.

74 *Canadian Criminal Code* ss 131, 132.

75 *Canadian Criminal Code* s 83.28(11)

76 *Canadian Criminal Code* s 83.28(8).

77 *Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248.

78 *Canadian Criminal Code* s 83.28(10).

derivative use immunity of the statements to subsequent extradition and immigration procedures.⁷⁹

E Protections for Freedom of Expression

The Canadian procedure has also made a more generous allowance for freedom of expression than Australia in their legislation. The Supreme Court in *Re Vancouver Sun* overturned a sweeping publication ban imposed in relation to an investigative hearing and held that investigative hearings, like all judicial proceedings, are subject to the open court presumption.⁸⁰ Publication bans could only be ordered to respond to a serious risk to the proper administration of justice and only when salutary benefits outweigh their harm to free expression.⁸¹ This ruling was made despite the arguments by two judges in dissent that publicity would frustrate the investigative purpose of the hearings and could expose reluctant witnesses to harm.⁸² What in Australia is a statutory ban on the disclosure of operational information with respect to ASIO questioning and detention warrants, was in Canada handled by the exercise of judicial discretion on a case-by-case basis.

F Summary

Although there was convergence in terms of a willingness to introduce novel and controversial procedures in an attempt to obtain information about terrorism from reluctant people, there was significant divergence between the two countries. The Canadian law provided greater immunity protections and greater protections for freedom of expression than the Australian law. The Australian and Canadian procedures also diverged with respect to the use of judges and in terms of spelling out the consequences of non-compliance. Although a sitting judge authorises ASIO questioning or detention warrants, retired judges actually preside at the questioning because of concerns that the constitutional separation of powers would prevent judges exercising investigative powers. In contrast, judges would have presided at Canadian investigative hearings and would have had considerable discretion to apply most rules of evidence and to decide what, if any consequences, would follow if a subject refused to answer questions or produce documents. There was only one attempt in Canada to use investigative

79 *Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248.

80 *Re Vancouver Sun* [2004] 2 SCR 332. The Court only applied the open court principle to the actual conduct of the investigative hearing and not the application by the police officer and the Crown for authorization to conduct an investigative hearing.

81 *Ibid* 29.

82 *Ibid* 77.

hearings before they expired in 2007.⁸³ In contrast, 14 ASIO questioning warrants have been issued in Australia.⁸⁴

V PREVENTIVE DETENTION AND CONTROL ORDERS

Along with investigative hearings, the introduction of preventive arrests was one of the most controversial features of Canada's 2001 anti-terrorism laws. In response to criticisms, the government amended the bill to provide that both new powers would expire in five years time unless renewed⁸⁵ and to require relevant federal and provincial officials to provide annual reports on the number of times these extraordinary powers had been used.⁸⁶ Canadian powers of preventive arrest have now expired along with investigative hearing powers.

A Canadian Preventive Arrests and Recognizances with Conditions

The Canadian preventive arrest provision was officially labeled the 'recognizance with conditions' section. As with the silence in the investigative hearings about the consequences of non-compliance, the recognizance with conditions provision followed a trend in the Canadian legislation of not always candidly recognizing the full coercive nature of the new powers being created. The label of the Canadian provision was deceptive because the one provision combined powers of preventive arrests and control orders that are explicitly and separately recognised in Australian law. Conceptualising what in Australia and Britain are called control orders as recognizances with conditions, or colloquially as 'peace bonds', had the advantage of drawing on *Charter* jurisprudence which has upheld the use of peace bonds in cases of reasonable fears that the person will commit serious offences if a recognizance is not imposed.⁸⁷ One difference, however, would be that a peace bond for a suspected terrorist would have likely involved much more publicity and stigma than a routine peace bond. The fact that no preventive arrest and accompanying peace bonds were issued before the provision expired on 1 March 2007, however, makes it difficult to know how judges would have administered this provision. As with investigative hearings, much would have depended on how judges exercised their discretion.

83 The attempt was made during the middle of a trial of two men for murder in relation to the 1985 Air India bombing. Authorities did not conduct the investigative hearing even after its constitutionality was upheld in Application under s 83.28 of the Criminal Code [2004] 2 SCR 248. Press reports that the RCMP planned to use investigative hearings in the ongoing investigation of the 1985 Air India bombing became a factor in the political debate about whether the provisions should be extended beyond their sunset.

Victims of terrorism, including some representatives of the Air India families, supported the government's unsuccessful attempt to renew the provisions. See 'Air India families deplore bickering over slur', *Hamilton Spectator* (Ontario), 23 February 2007.

84 See Lynch and Williams above n 17, 39. ASIO reports only one questioning warrant being issued during 2005-2006: ASIO, Commonwealth of Australia, *Report to Parliament 2005-2006* (2006) 45. The longest period of detention under the warrants was for 42 hours 26 minutes: McHugh, above n 71.

85 *Canadian Criminal Code* s 83.32.

86 *Canadian Criminal Code* s 83.31.

87 In *R v Budreo* (2000) 46 OR (3d) 381 (CA) peace bonds in cases where a judge determines that there are reasonable grounds to fear that they are necessary to prevent a sexual offence with a child were upheld under the *Charter*.

Before the expiry, a peace officer could, with the consent of the Attorney-General, apply for an arrest warrant on the basis of reasonable grounds to conclude that a terrorist activity would be carried out and reasonable suspicion that the arrest or imposition of conditions on the person was necessary to prevent the carrying out of a terrorist activity.⁸⁸ Although reasonable grounds were required in relation to a terrorist activity, only reasonable suspicion was required in relation to the person. A preventive arrest could also have been made without a warrant in exigent circumstances.⁸⁹ Once the person was arrested, he or she would have been taken before a provincial court judge within 24 hours. The judge then had discretion to decide to adjourn proceedings for another 48 hours.⁹⁰ These provisions combined to provide for up to 72 hours of preventive arrest, but the law was silent on important questions such as the place of detention and the questioning of the accused during this period.⁹¹ As with investigative hearings, there were important legislative lacunae in the Canadian regime. Legislative silence could be criticised for not promoting candid clear statements by the legislature about the coercive aspects of preventive arrests or investigative hearings. On the other hand, it provided judges with an opportunity to read in procedural protections that were not explicitly provided by the legislature.

Within 72 hours of the preventive arrest, the provincial court judge must have commenced a hearing to determine whether reasonable grounds had been established for the suspicion that a recognizance was necessary to prevent the carrying out of a terrorist activity. If such grounds were established, the judge could have ordered that the person enter into a recognizance to keep the peace and be of good behaviour for up to 12 months. The judge was required to consider prohibiting the suspect from having access to weapons or explosives⁹² and could impose 'any other reasonable conditions' that the judge 'considers desirable for preventing the carrying out of a terrorist activity'.⁹³ A refusal by the suspect to agree to the conditions was punishable by up to 12 months imprisonment⁹⁴ and a breach of a condition was a separate offence punishable by up to two years imprisonment.⁹⁵

Although the above preventive arrest powers have now expired, a separate peace bond provision remains in effect. It was included in the *Anti-Terrorism Act 2001* but was not made subject to the special reporting or sunset requirements that applied to preventive arrests. This provision allows a provincial judge to impose a peace bond or recognizance on a person for a 12 month period on the

88 *Canadian Criminal Code* s 83.3(1).

89 *Canadian Criminal Code* s 83.3(4).

90 *Canadian Criminal Code* s 83.3(7)(ii).

91 See Gary Trotter, 'The Anti-Terrorism Bill and Preventive Restraints on Liberty' in Ronald Daniels et al (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), 243 for criticisms that the provision could allow a person to be detained in a police station for a 72 hour period and could also be used as a form of investigative detention to enable the police to search for grounds to charge the detainee with an offence.

92 *Canadian Criminal Code* s 83.3(10).

93 *Canadian Criminal Code* s 83.3 8(a).

94 *Canadian Criminal Code* s 83.3(9).

95 *Canadian Criminal Code* s 811.

grounds that there are reasonable grounds to fear that the person will commit a terrorism offence.⁹⁶ A breach of such orders, which can include prohibitions on the possession of firearms or explosives and other reasonable conditions, is still an offence punishable by up to two years imprisonment.⁹⁷ Preventive arrests on reasonable suspicion have expired but control orders in the form of peace bonds are still available in Canada.

B Control Orders under Canadian Immigration Law

What are effectively control orders have also been fashioned under the security certificate procedure in Canadian immigration law. This procedure has been used to apprehend and detain five men suspected of involvement with terrorism pending deportation. The result has been long term detention without charge as the men resisted deportation to countries such as Egypt and Syria. They resisted in part because the Supreme Court in 2002 refused to rule out the possibility that deportation to torture could be constitutional in 'exceptional circumstances'.⁹⁸ Most of the men originally detained under security certificates have now been released by judges upon strict conditions that amount to house arrest.⁹⁹ The Supreme Court of Canada has recently approved of such controlled release decisions as less drastic means to protect national security than long term detention pending deportation. The Court, however, noted that any restrictions on liberty must not be disproportionate to the threat and should be subject to regular ongoing judicial review.¹⁰⁰

C Australian Preventive Arrests

Australian federal law did not authorise either preventive detention or control orders for terrorist suspects until the passage of the Anti-Terrorism Bill (No 2) 2005 (Cth) in late 2005. These amendments were a response to the London bombings of July 2005 and to the arrests of suspected terrorists in Sydney and Melbourne in November 2005. The Australian provisions, like the expired Canadian ones, contemplate preventive detention for up to 72 hours. Unlike in Canada, however, the consent of the Attorney-General is not required and the period can be extended by the operation of state legislation.¹⁰¹

The Australian provision allows preventive detention for the first 24 hours to be authorised by a senior member of the Australian Federal Police Force.¹⁰² An extension of the initial period of preventive detention for up to another 48 hours

⁹⁶ *Canadian Criminal Code* s 810.01.

⁹⁷ *Canadian Criminal Code* s 811.

⁹⁸ *Suresh v Canada* [2002] 1 SCR 3, [78]. See Kent Roach, 'Canada's Response to Terrorism' in Victor Ramraj et al, above n 1, 524-527 for criticism of this exception and reliance on security certificates.

⁹⁹ *Charkaoui (Re)*, [2005] FC 248; *Harkat v Canada (Minister of Citizenship and Immigration)* [2006], 270 DLR (4th) 50; *Jaballah v Canada (Minister of Public Safety)* 2007 FC 379.

¹⁰⁰ *Charkaoui v Canada (Citizen and Immigration)* [2007] SCC 9, [103]-[104], [116]-[117].

¹⁰¹ See, eg, *Terrorism (Police Powers) Act 2002* (NSW) s 26K; *Terrorism (Community Protection) (Amendment) Act 2006* (VIC) s 13G (preventive detention order under New South Wales and Victorian legislation of up to 14 days). In Canada, the federal government has exclusive jurisdiction over criminal law and procedure: *Constitution Act, 1867* s 91(27).

¹⁰² *Australian Criminal Code* s 105.8, 105.10.

can be authorised by either a sitting or retired judge who has been designated in his or her personal capacity to be a prescribed authority for such purposes.¹⁰³ These arrangements reflect Australian constitutional concerns about the separation of powers and the limits of the judicial function,¹⁰⁴ and they raise problems with respect to self-selection and judicial independence that were not present in Canada because preventive arrests would have been authorised and administered by members of the provincial court (which is the court that decides most criminal charges and enjoys full judicial independence).

The Australian provisions address a number of important issues about the treatment of the person subject to preventive detention that were not addressed in the expired Canadian law. There are explicit requirements that detainees be detained in remand centres or territory prisons and 'be treated with humanity and respect for human dignity'.¹⁰⁵ There are also explicit prohibitions on federal police and security intelligence agents questioning detainees beyond asking questions designed to establish their identity and well being.¹⁰⁶ The Canadian scheme was entirely silent on these questions, raising the possibility that Canadian police officers could have detained a person subject to preventive arrest in a police lock up and have interrogated that person.

The Australian legislation explicitly addresses the right of detainees to contact lawyers, family and employers while also contemplating the possibility of monitoring and restricting communications for reasons related to police operations. As with ASIO questioning, there are also broad statutory prohibitions on the disclosure of the very existence of the preventive detention order. In contrast, the Canadian legislative silence on these matters continued the operation of the regular law concerning the right of persons to contact lawyers when detained and the presumptive openness of subsequent judicial proceedings. The explicit nature of the restrictions on liberty and publicity in the Australian regime may also be related to a desire to impose clear legislative restraints that fetter the discretion of the judiciary. In contrast, the Canadian legislation accepted that the judiciary would exercise discretion particularly with respect to the openness of proceedings.

D Australian Control Orders

Australian control orders, unlike preventive detention orders, can only be made with the Attorney-General's consent and only be issued by a sitting judge.¹⁰⁷ In this respect the Australian regime is closer to the expired Canadian provision discussed above. Control orders can be granted on the basis that they 'would substantially assist in preventing a terrorist act'¹⁰⁸ which is a similar but

103 *Australian Criminal Code* s 105.12.

104 See McHugh J, above n 71, for criticism of the fiction that a judge acts in a personal capacity.

105 *Australian Criminal Code* s 105.33.

106 *Australian Criminal Code* s 105.42.

107 See Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Detention Orders' (2007) forthcoming *Flinders Journal of Law Reform*, for an examination of possible constitutional separation of powers challenges to both the Australian control order and preventive detention regimes.

108 *Australian Criminal Code* s 104.4.

slightly more restrictive condition than the Canadian standard that the judge considers them 'desirable for preventing the carrying out of a terrorist activity'.¹⁰⁹ In addition a control order can be entered under the Australian law on the alternative basis 'that the person subject to the order has provided training to, or received training from, a listed terrorist organisation'.¹¹⁰ This alternative focus on the status of the person underlines how Australian law has blurred the distinction between security intelligence concerns and law enforcement more than in Canada.¹¹¹ A person who has received terrorist training is a legitimate target for investigation and surveillance by a security intelligence agency, but the person's status as a person who once received training tells us nothing about whether he is likely to commit a terrorist act or has engaged in any wrongful act that may be a crime.

Control orders in Australia can last 12 months, but can also be renewed. The violation of a condition of a control order is an offence subject to five years imprisonment. The Australian legislation specifically lists possible conditions including wearing a tracking device and not associating with persons. With the exception of reference to prohibitions of the possession of weapons and explosives, the Canadian legislation was silent about what conditions a judge may find to be reasonable to prevent a terrorist activity. Again, the Canadian legislative silence could be criticised for a lack of democratic candor, but it also maximized judicial discretion in determining the conditions imposed on terrorist suspects whereas the Australian legislative regime restricts judicial discretion and resolves possible interpretative ambiguities in favour of the state.

E Summary

There are some important themes of convergence with respect to preventive detention in Australia and Canada. Federal legislation in both countries authorised up to 72 hours of preventive detention of terrorist suspects and up to 12 months of conditions being imposed on suspects while they live in the community. In both countries these new investigative powers can be used as shortcuts around the regular criminal arrest, bail and prosecution processes. Control orders whether under criminal or immigration law do not require proof of guilt beyond a reasonable doubt.¹¹² They follow from an increasing willingness to use the law to respond to risks and even fear of harm.

Preventive detention in Australia is not confirmed by a sitting judge but rather initially by police and later by a prescribed authority who may be a specially designated sitting or retired judge acting in his or her personal capacity. This raises concerns about self-selection and judicial independence that were not present in Canada. At the same time, the use of sitting judges in the Australian

109 *Canadian Criminal Code* s 83.3(8)(a).

110 *Australian Criminal Code* s 104.4.

111 See, eg, Stanley Cohen, 'Law in a Fearful Society: How Much Security?' (2005) 54 *University of New Brunswick Law Journal* 143; Commission of Inquiry into the Action of Canadian Officials in Relation to Maher Arar, above n 10, ch 9 for a discussion on the desire in Canada to maintain the distinction between intelligence and law enforcement functions.

112 See Lynch and Williams, above n 17, 55-56.

and Canadian control order regimes raise concerns that judges will become involved in the investigative activities of the state. Australia provided for legislated restrictions on the ability of detainees to contact others and to publicise the fact of their preventive detention, whereas such matters were left to judicial discretion in Canada which would be applied in a manner that respected *Charter* rights to counsel and free expression.¹¹³

Those subject to preventive detention in Australia cannot be questioned while they could have been detained in police lock ups and questioned in Canada. In Australia, compelled questioning would be authorised under the ASIO scheme whereas Canadian officials might have had an incentive to use preventive arrests as a means to question suspects without the immunity and publicity protections that, as discussed above, accompanied investigative hearings. In any event, both investigative hearings and preventive arrests in Canada have now expired and are no longer available. What are effectively control orders, however, are still used with respect to non-citizens under security certificates and could be imposed on citizens through a peace bond provision that has not expired.

VI NATIONAL SECURITY CONFIDENTIALITY

A common challenge facing Australia and Canada is reconciling the traditional rights of accused to know and challenge the case against them with the state's concerns to protect secrets especially in relation to sources and methods and intelligence received from foreign sources. The challenge is particularly acute in both countries given their similar division between policing and security intelligence agencies and the extensive reliance that each country must place on intelligence received from foreign agencies.¹¹⁴ As will be seen, both countries have addressed these challenges with new legislation that has many similarities, but also some intriguing differences.

A Section 38 of the *Canada Evidence Act*

Section 38 of the *Canada Evidence Act*¹¹⁵ was amended in 2001 to require all participants to notify the Attorney-General of Canada if they anticipated using information that if disclosed could injure national security, international relations or national defence or any information that was being safeguarded by the government of Canada. The Attorney-General could authorise the disclosure of such information including imposing conditions on its disclosure or could apply to the Federal Court of Canada to obtain a non-disclosure order. The Federal Court would then determine whether the public interest in disclosure outweighs the harm of disclosure. It also has an ability to place conditions on the disclosure.¹¹⁶ The Federal Court is a separate administrative court in Canada with special facilities for the safeguarding of classified information, but this procedure

113 *Re Vancouver Sun* [2004] 2 SCR 332.

114 See *Ruby v Canada* [2002] 4 SCR 3, [44]; *Charkaoui v Canada* [2007] SCC 9, 68 for the Supreme Court's recognition that Canada is a net importer of intelligence.

115 RSC 1985, c C-5 ('*Canada Evidence Act*').

116 *Canada Evidence Act*, s 38.06.

risks delaying and fracturing criminal trials that are conducted in separate provincial or superior courts.¹¹⁷ Although successful negotiations between the prosecution and the defence (who received initial access to information on an undertaking of confidentiality that applied even with respect to their clients¹¹⁸) made resort to the Federal Court unnecessary in the Air India prosecution, the two ongoing terrorism prosecutions in Canada could be disrupted and delayed by the need to litigate national security confidentiality issues in the Federal Court.

The procedures for litigating national security confidentiality in the Federal Court have been controversial. Mandatory statutory restrictions on publicising Federal Court proceedings under s 38 have been found to be an unjustified violation of freedom of expression under the *Charter*.¹¹⁹ These mandatory restrictions have been read down so that they only apply when the Attorney-General of Canada exercises its statutory right under s 38.11(2) to make *ex parte* representations to the Court about why the evidence has not been disclosed. The constitutionality of this provision is itself in some doubt. Although the Supreme Court has upheld the right of the Attorney-General to make *ex parte* submissions with respect to national security confidentiality under access to information legislation,¹²⁰ it has more recently ruled that mandatory *ex parte* procedures for security certificates used to detain non-citizen terrorist suspects were unconstitutional because they prevented the detainee from knowing the case to meet and because there were other less rights-invasive means to allow adversarial challenges to state claims of secrecy.¹²¹ Section 38 proceedings probably fall in between access to information and detention procedures in terms of their impact on the affected person and the constitutionality of the government's right to make *ex parte* submissions remains to be finally determined. One judge has recently held that the ability of the Crown to make *ex parte* submissions in s 38 proceedings does not violate the *Charter* while also indicating that judges could appoint security cleared *amicus curiae* to challenge the government's case for secrecy and non-disclosure.¹²²

If the Federal Court orders non-disclosure on a s 38 application, then the criminal trial judge must follow that order, but can make any order that is necessary to protect the accused's right to a fair trial, including entering a stay of proceedings that will stop the case.¹²³ The Supreme Court has commented that s 38, unlike security certificates under immigration law, makes no provision for the

117 See, eg, *R v Ribic* [2003] 185 CCC (3d) 129 (Fed CA).

118 See Michael Code and Kent Roach, 'The Role of the Independent Lawyer and Security Certificates' (2006) 52 *Criminal Law Quarterly* 85, 106-107.

119 See especially *Toronto Star v Canada* 2007 FC, 128. See also *Ottawa Citizen Group Inc. v Canada (Attorney-General)* [2004] FC 1052, [34]-[45]. (FCTD); *Ruby v Canada* [2002] 4 SCR 3; Jeremy Patrick-Justice, 'Section 38 and the Open Court Principle' (2005) 54 *University of New Brunswick Law Journal*, 218, 227.

120 *Ruby v Canada* [2002] 4 SCR 3.

121 *Charkaoui v Canada* [2007] SCC 9. These less drastic means included the use of special security cleared special advocates as well as disclosure to the affected person's lawyer subject to an undertaking not to disclose the secret information to the client. Note that the Court gave Parliament one year to devise a system that would allow adversarial challenge.

122 *Attorney General of Canada v Khawaja* 2007 FC 463, 57.

123 *Canada Evidence Act* s 38.14.

use of information that has not been disclosed.¹²⁴ If the Federal Court orders disclosure, the Attorney-General can trump this court order with a certificate under s 38.13 of the *Canada Evidence Act* prohibiting disclosure. This certificate can only be cancelled or varied by the Federal Court on the basis that the information covered by the Attorney-General's certificate was not obtained in confidence from a foreign entity or does not relate to national defence or national security.¹²⁵

The Canadian procedure for determining the validity of national security confidentiality claims is an unwieldy process that involves splitting issues between the criminal trial court and the Federal Court. If the Federal Court orders disclosure, this order can be trumped by a certificate issued by the Attorney-General of Canada but if the Federal Court orders non-disclosure, the trial judge at the criminal trial retains the discretion to stay the criminal trial if a fair trial is not possible. There are no explicit provisions to allow the accused's lawyer to obtain a security clearance or to allow a security cleared special advocate to see and challenge evidence that is not disclosed to the accused because of national security confidentiality.¹²⁶

B Australia's *National Security Information (Criminal and Civil Proceedings) Act*

In 2004, Australia enacted the *National Security Information (Criminal and Civil Proceedings) Act* which, like s 38 of the *Canada Evidence Act*, requires participants to notify the Attorney-General in advance with respect to the disclosure of information, including witnesses, that may harm national security.¹²⁷ The Attorney-General can allow the evidence to be disclosed subject to conditions. The conditions imposed by the Attorney-General explicitly include the use of summaries and substitutions.¹²⁸ The Attorney-General's certificate can be reviewed and altered in closed proceedings before the relevant trial court.¹²⁹ The trial court must adjourn while either party appeals a ruling on what can and cannot be disclosed.¹³⁰

Although the above procedures can delay terrorism trials, they are superior to Canadian procedures because they allow national security confidentiality claims to be determined by the trial judge, as opposed to a judge in a separate court. The

¹²⁴ *Charkaoui v Canada* [2007] SCC 9, 77.

¹²⁵ *Canada Evidence Act* ss 38.13(8)-(9).

¹²⁶ An ad hoc procedure was used in one case in which a security cleared lawyer employed by the government but separate from the prosecuting team asked questions that were given to him by the accused's lawyers to witnesses in a s 38 proceeding where both the accused and the accused's lawyer were excluded: *R v Ribic* (2003) 185 CCC (3d) 129 (Fed CA). More recently Lutfy CJ has stated that 'the Court's ability, on its own initiative or in response to a request from a party to the proceeding, to appoint an amicus curiae on a case-by-case basis as may be deemed necessary attenuates the respondent's concerns with the ex parte process': *Attorney General of Canada v Khawaja* 2007 FC 463, 57.

¹²⁷ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 24. For a critical overview of the act see Patrick Emerton, 'Paving the Way for Conviction without Evidence' (2005) 4 *Queensland University of Technology Law and Justice Journal* 1.

¹²⁸ *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 26.

¹²⁹ *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 31.

¹³⁰ *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 26.

Australian trial judge can re-visit initial decisions that information need not be disclosed in light of the evolving demands of the trial. The Australian law is also superior because it provides for adversarial challenges to governmental claims of national security confidentiality. Although the accused can be excluded from the challenge of the Attorney-General's certificate, the accused person's lawyer can only be denied access if he or she has not obtained an appropriate security clearance.¹³¹ The Australian legislation, unlike the Canadian legislation,¹³² guarantees that the affected person will be able to make representations with respect to any non-disclosure order.¹³³ Although concerns have been raised that the requirement that the accused's lawyer obtain a security clearance harms choice of counsel and independence of the bar,¹³⁴ the accused's own lawyer should have a better understanding of his or her own client's case than a special advocate or *amicus curiae* who does not represent the affected person.¹³⁵

The Australian approach is not without flaws. The Attorney-General's certificate is deemed conclusive on whether disclosure is likely to prejudice national security.¹³⁶ The legislation attempts to tilt the judge's balancing of national security and due process by providing that the 'greatest weight' should be accorded to risks to national security.¹³⁷ This fits into the pattern observed above of Australian legislation attempting to place more restrictions on judicial discretion and to attempting to resolve ambiguous issues in favour of the state. A constitutional challenge to this provision has been rejected on the basis that 'the legislation does no more than to give the Court guidance as to the comparative weight it is to give one factor when considering it alongside a number of others. Yet the discretion remains intact and ... in a proper case the Court will order disclosure or a form of disclosure other than that preferred by the Attorney-General'.¹³⁸

The Australian law,¹³⁹ like the Canadian one,¹⁴⁰ explicitly preserves the right for trial courts to stay proceedings if the non-disclosure of classified information makes it impossible to conduct a fair trial. At the same time, retired Australian High Court Justice McHugh has argued that the Attorney-General's ability to

131 *National Security Information (Criminal Proceedings) Act 2004* (Cth) ss 29, 39.

132 See *Canada Evidence Act* ss 38.06(1)&(3), 38.08 allowing judge to deny the accused the opportunity to make representations but also providing for automatic review by the Federal Court of Appeal.

133 *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 29(4).

134 See Lynch and Williams, above n 17, 82; Phillip Boulten, *Counter-Terrorism Law in Practice* (2006) LawLink NSW <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_counterterrorism> at 17 March 2007.

135 If special advocates are brought into the Canadian system, a crucial issue will be whether they can seek information from the affected person after they have seen the secret information. In Canada, security cleared counsel working for review bodies and public inquiries have been allowed to consult with the affected person after they have seen the secret information. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, above n 10, 291-293. For a decision indicating that special counsel could be appointed under the Australian regime, see *R v Lodhi* [2006] NSWSC 571.

136 *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 27(1).

137 *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 31(8).

138 *R v Lodhi* [2006] NSWSC 571, [108].

139 *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 19(2).

140 *Canada Evidence Act* s 38.14.

deem threats to national security and the legislative direction to give greatest weight to risks of national security constitute an usurpation of the judicial power.¹⁴¹

C Summary

Both Australia and Canada have taken significant steps to protect national security confidentiality and in both countries this will increase the length and difficulty of terrorism prosecutions. The Australian legislation attempts to tilt the balance towards the protection of secrets by requiring judges to give greater weight to risks involving national security than to fair trial considerations, but this provision has been upheld in Australia as consistent with judicial discretion.¹⁴² At the same time, the Canadian legislation allows the Attorney-General to trump and contradict a court order that secrets should be disclosed by issuing a certificate under s 38.13 of the *Canada Evidence Act*. The Australian legislation, unlike the Canadian legislation, allows a judge to require that a defence lawyer receive a security clearance before being allowed to see secret evidence, but it is likely that Canada will soon explore alternative mechanisms such as security clearances and/or undertakings of confidentiality or the use of special advocates as a means to maximize adversarial challenge of evidence that is kept secret for reasons of national security. These are less restrictive alternatives to the present Canadian practice of simply denying the lawyer access to the secret information.

VII PROSCRIBED TERRORIST ORGANISATIONS

The system for listing terrorist groups is a crucial feature of both Australian and Canadian anti-terrorism laws because it triggers offences against various forms of support and participation in a terrorist organisation. Although both countries allow for executive designation of terrorist organisations without prior notice to the group being listed and contemplate that such designation will be conclusive in criminal trials which require proof of a terrorist organisation, there are some interesting differences. Consistent with common perceptions about the powers of courts and legislatures in each country, Canada allows judicial review of its proscription decisions while Australia allows legislative review.

A Canadian Proscription Procedures and Judicial Review

The Governor in Council in Canada lists terrorist organisations on the recommendation of the Minister of Public Safety and Emergency Preparedness. The grounds for listing are that the entity ‘has knowingly carried out, attempted to carry out, or participated in or facilitated a terrorist activity’¹⁴³ or are acting on behalf of or in association with such a group. A group that has been listed can

141 See McHugh, above n 71, 131 where he writes that the act ‘does not direct the court to make the order which the Attorney General wants. But it goes as close to it as it thinks it can’.

142 *R v Lodhi* [2006] NSWSC 571.

143 *Canadian Criminal Code* ss 83.05, 83.07.

apply for review by the Minister including in cases of mistaken identity. The Minister must also review the validity of the list of terrorist organisations every two years. After the Minister has made his or her decision, the applicant can also apply to the Federal Court for judicial review. At such proceedings, the applicant will have a reasonable opportunity to be heard and the judge will determine whether the listing decision was reasonable.¹⁴⁴ The judge can, however, consider intelligence reports in private and may only provide the applicant with a summary of information in those reports if the disclosure of the information would not injure national security or endanger the safety of any person.¹⁴⁵ Although this provision allows for judicial review, the affected group may have great difficulty challenging intelligence that is seen by the judge but not disclosed to them. A person representing a listed entity may also be liable for prosecution for various crimes involving support for a listed entity. Canadian law, unlike Australian law, does not have specific exemptions from support offences for those who provide legal assistance to terrorist organisations. No listing decision in Canada has been judicially reviewed¹⁴⁶ and Canada now lists 40 organisations under this procedure. The Senate Special Committee has recommended that the Department of Justice play a challenge role before proscription decisions are made and that security cleared special advocates play a role in challenging classified information in any judicial review taken after a group has been proscribed.¹⁴⁷

B Australian Proscription Procedures and Legislative Review

The parallel Australian procedure involves the Attorney-General advising the Governor in Council and provides that a listing decision will expire but can be renewed after two years and is also subject to executive reconsideration.¹⁴⁸ Unlike in the Canadian law, there is no reference to judicial review of the listing decision. At the same time, however, there are requirements that the Leader of the Opposition be briefed on some listing decisions¹⁴⁹ and that the Joint Parliamentary Committee on the security agencies shall review the listing decision and report to each House of Parliament and that Parliament could disallow the listing decision.¹⁵⁰ The lack of any similar legislative review in Canada reflects the fact that Canada does not have a Parliamentary intelligence committee with access to classified information. Legislative review is vulnerable to politicalisation, but it also has the potential to develop expertise within Parliament on listing and intelligence matters.

144 *Canadian Criminal Code* s 83.05(c).

145 *Canadian Criminal Code* s 83.05(6).

146 One listing decision of an individual made under regulations enacted under the United Nations Act was eventually reversed after a number of months and much harm to the individual who was wrongly included on the list: Alexandra Dosman, 'For the Record' (2004) 62(1) *University of Toronto Faculty of Law Review* 1.

147 Special Senate Committee on the *Anti-terrorism Act*, above n 26, 38-42.

148 *Australian Criminal Code* s 102.1(4).

149 *Australian Criminal Code* s 102.1(2A).

150 *Australian Criminal Code* s 102.1A(2).

The Security Legislative Review Committee has recommended that in addition to Parliamentary review, that listing decisions be made in the Federal Court or that the Attorney-General be advised by security experts.¹⁵¹ This recommendation suggests a lack of confidence in the present system of executive and legislative review. Although the Canadian system of judicial review would have greater independence from the government, those opposing the listing decision will often not have access to the critical intelligence reports and thus be unable to challenge them effectively. There are limits to both judicial and legislative review of proscription decisions.

VIII SPEECH ASSOCIATED WITH TERRORISM

Australian law diverges from Canadian law by enabling the proscription of organisations that advocate or praise terrorism and by providing enhanced and controversial sedition offences. One cause of this divergence is the role played by the *Charter*, but the existence of a constitutional bill of rights cannot explain all of the difference. Australia has been more active on the legislative front in recent years and its new laws targeting speech associated with terrorism follow trends initiated by United Nations *Security Council Resolution* 1624 (2005) which calls for laws against the incitement of terrorism and new British initiatives with respect to speech associated with terrorism.¹⁵²

A Canadian Approaches to Speech Associated with Terrorism

Canada's *Anti-Terrorism Act* 2001 amended existing hate literature provisions in the Criminal Code to make it easier to obtain court orders to delete hate literature from the internet.¹⁵³ In response to hate crimes against both Jews and Muslims, it added a new offence of hate motivated mischief to religious property.¹⁵⁴ Canada does not, however, have specific laws that enable a group to be proscribed as a terrorist group on the basis that it or its members advocate or praise terrorism.¹⁵⁵ A person may, however, engage in a terrorist activity on the basis that they either counsel or threaten a terrorist activity.¹⁵⁶ Any listing decision that was based on speech could be subject to judicial review on the basis that it constituted an unauthorised or unreasonable limit on freedom of expression. Although Canada still has sedition offences, they are largely seen as a

151 The Security Legislation Review Committee, above n 21, ch 9.

152 See above n 13; *Terrorism Act* 2000 (UK) c 11. On this and other trends in anti-terrorism law see Kent Roach, 'Sources and Trends in Post 9/11 Anti-Terrorism Law' above n 3.

153 *Canadian Criminal Code* s 320.1

154 *Canadian Criminal Code* s 430(4.1).

155 *Canadian Criminal Code* s 83.05(1)(b). In March 2007, a House of Commons recommended that glorification of terrorism for the purpose of emulation be made an offence: Standing Committee of the House of Commons on Public Safety and National Security, above n 26, 12.

156 *Canadian Criminal Code* s 83.01.

dead letter because if used, they could not be justified as a reasonable limit on the *Charter* right to freedom of expression.¹⁵⁷

B Australian Approaches to Speech Associated with Terrorism

The original round of Australian anti-terrorism laws did not include provisions targeting speech. In 2005, however, Australia enacted several laws targeting speech associated with terrorism. As a result of these amendments, Australian law allows organisations to be proscribed on the basis that they ‘advocate the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)’.¹⁵⁸ Advocate is defined as occurring if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment) ... to engage in a terrorist act.¹⁵⁹

Lynch and Williams have effectively criticised the above provision for being far too broad in allowing whole groups to be banned and membership and association with them to be made criminal on the basis of speech acts by one of the members of the group.¹⁶⁰ Such a provision would likely be struck down by Canadian courts as an unreasonable limit on freedom of expression and freedom of association especially in light of the more tailored alternatives of punishing individual speech acts that threaten or counsel terrorist activity.

The 2005 amendments also revised Australian sedition offences to include speech that urges persons to assist organisations or countries that are engaged in hostilities against the Australian Defence Forces or engaged in a declared or undeclared war against Australia.¹⁶¹ It remains to be seen whether this new law will be applied to the ‘war against terrorism’, but the Australian Law Reform Commission has already recommended repeal of the urging assistance of the enemy provision and repeal of the concept of sedition.¹⁶²

The new sedition offences also apply to speech that urges a group distinguished by race, religion, nationality or public opinion to use force and violence against other such groups in a manner that disrupts peace, order and good government.¹⁶³ In Canada, some similar speech could be covered by laws against the willful promotion of hatred against racial, religious and ethnic groups.

157 *Canadian Criminal Code* s 59. See, eg, *R v Zundel* [1992] 2 SCR 731; Kent Roach, ‘Old and New Visions of Security: Article 23 Compared to Post-September 11 Security Laws’ in Fu Hualing et al (eds), *National Security and Fundamental Freedoms* (2005) 125-129.

158 *Australian Criminal Code* s 102.1(2).

159 *Australian Criminal Code* s 102.1(1A).

160 Lynch and Williams, above n 17, 62-64.

161 *Australian Criminal Code* s 80.2.

162 Australia Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006) Recommendations 2, 11.

163 *Australian Criminal Code* s 80.2.

These laws have been held to be a reasonable limit on freedom of expression.¹⁶⁴ There has been some blurring of the anti-terrorism and anti-hate rationales for recent restrictions on expression in both Australia and Canada.¹⁶⁵ The anti-terrorism rationale for speech restrictions begs the question of whether speech prosecutions will be an effective means to prevent terrorism. Although terrorism might be prevented by prohibiting speech that provides concrete instructions about acts of terrorism, it is less clear that punishing speech that praises terrorism or urges intergroup violence will prevent terrorism. Indeed, such prosecutions could be counterproductive by contributing to a sense that the state's anti-terrorism efforts are directed at certain political and religious views as opposed to violence.¹⁶⁶

C Summary

Australian law is broader and more explicit than Canadian in limiting speech associated with terrorism. Australian law allows groups to be proscribed as terrorist groups on the basis of speech by some of their members that praise a terrorist act. With the exception of some provisions targeting hate speech and hate crimes, as well as the inclusion of threats and counseling of terrorism in its definition of terrorist activities in its *Anti-Terrorism Act, 2001*, Canada has not enacted new restrictions on speech associated with terrorism. It is likely that this reflects the need under the *Charter* to justify the proportionality of laws that limit freedom of expression, as well as Canada's sensitivity to laws that might be perceived as targeting Muslim minorities, resistance to anti-terrorism measures in civil society and the minority position of Canada's government. At the same time, however, the Canadian approach provides indirect means for limiting speech associated with terrorism that are less clear and candid than the Australian restrictions.

IX CONCLUSION

There are some important differences in Australia's and Canada's post 9/11 anti-terrorism laws. Many but not all of these differences can be related to the role played by the *Charter*. Defining terrorism in part on the basis of political and religious motive was from the start much more difficult in Canada than Australia. It has been made even more difficult by a recent decision that the political or religious motive requirement constitutes an unjustified violation of *Charter* freedoms of expression, religion and association.¹⁶⁷ Similar *Charter* concerns

164 *R v Keegstra* [1990] 3 SCR 697.

165 See Irwin Cotler, 'Terrorism, Security and Rights: The Dilemmas of Democracies' (2002) 14 NJCL 13; Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868.

166 See Kent Roach, 'National Security, Multiculturalism and Muslim Minorities' [2006] *Singapore Journal of Legal Studies* 405; Kent Roach, 'Must We Trade Rights for Security?' (2006) 27 *Cardozo Law Review* 2151, 2176-2184 for further argument. See also the Australia Law Reform Commission, above n 162, Recommendation 6.1, where the Commission recommended against the creation of an offence of encouragement or glorification of terrorism.

167 *R v Khawaja* [2006] OJ no 4245.

also explain Canada's decision not to criminalise membership in a terrorist organisation, not to punish reckless as opposed to knowing or intentional support for terrorism, and not to enact laws directed at speech that praises or urges the commission of terrorism, all which have been done in Australia. The *Charter* also helps to explain why investigative hearings in Canada were until their recent expiry subject to a rebuttable open court principle in stark contrast to Australia's broad restrictions on the publicity of operational information derived from both ASIO questioning warrants and preventive detention orders. The *Charter* also helps explain why defence lawyers and judges could play an active role in Canadian investigative hearings in contrast to their limited role under ASIO questioning procedures and why targets of Canadian investigative hearings enjoyed broad derivative use immunity with respect to their compelled statements and not the more limited use immunity provided under Australian law. Finally, the *Charter* may also help explain why proscription decisions in Canada can be subject to judicial review while they are subject to legislative review in Australia.

The *Charter*, combined with Canadian sensitivity to multiculturalism and the fact that Canada has not considered itself drastically affected by acts of terrorism, also may suggest why opposition to anti-terrorism laws has been more effective in Canada than Australia. The political costs of enacting new anti-terrorism laws or renewing existing ones authorising preventive arrests and investigative hearings have been high for Canadian governments. For all these reasons, Canada's recent minority Liberal and Conservative governments has not engaged in the frenzy of legislation seen in Australia under the Howard government.¹⁶⁸

Canadian legislation with respect to compelled self-incrimination, preventive detention, control orders and restrictions on speech associated with terrorism is generally less explicit than the comparable Australian legislation in spelling out the powers of the state. These Canadian legislative silences can be criticised for failing to provide clear legislative statements about the full extent of post 9/11 changes. At the same time, they also leave room for judicial discretion and reading in of due process and liberty enhancing norms that may be precluded by the more explicit Australian legislation.

Although the *Charter* undoubtedly makes an important difference, it should not be assumed that Australians have been completely powerless to resist anti-terrorism excesses in the absence of a constitutional bill of rights. Australians modified the British definition of terrorism to require that acts be designed to coerce or influence a government by intimidation and to exempt even unlawful protests and strikes from the definition of terrorism. The result was a definition of terrorism not fundamentally different than the Canadian definition. Attempts have also been made in Australia to control the excesses of the associating with terrorist organisations offence to allow for family connections and political speech and religious worship.

168 See Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics' (2003) 49 *Australian Journal of History and Politics* 355, on the relative ease of enacting anti-terrorism laws in Australia. This has increased after the 2004 election in which the Liberal Party gained a majority in the Upper House. In contrast, Canada has elected successive minority governments in both the 2004 and 2006 elections.

Conversely, it should not be assumed that the *Charter* guarantees that Canadian anti-terrorism law will always be more liberal and restrained than Australian law. Canadian law on national security confidentiality allows evidence to be used but not disclosed to the affected person with respect to the judicial review of proscription decisions. Canadian law, unlike Australian law, does not explicitly provide the affected person's lawyer with an opportunity to obtain a security clearance that will allow the lawyer to see secret evidence and challenge the government's claim to secrecy. Issues of national security confidentiality have to be litigated in a separate court in Canada and the Attorney-General of Canada retains the ability under s 38.13 of the *Canada Evidence Act* to reverse court orders for disclosure with a certificate that is subject to only the most limited form of judicial review. Similar issues are litigated in Australia before trial courts that have the ability to re-open during the trial any decision not to allow disclosure of national security information. The Supreme Court of Canada's recent decision in *Charkaoui* holding that mandatory ex parte provisions used in immigration security certificates were contrary to fundamental justice under the *Charter*¹⁶⁹ will, however, cause Canada to consider measures to allow for adversarial challenge of national security confidentiality claims. At the same time, that recent decision holds that long term detention or control orders will be constitutional if adversarial challenges and periodic reviews are available and does not revisit the Court's regrettable earlier indication that deportation to torture could be consistent with the *Charter* in 'exceptional circumstances'.¹⁷⁰ The *Charter* has restrained Canadian anti-terrorism law, but the courts have made some questionable decisions about what is consistent with the *Charter*.¹⁷¹

Although both Australia and Canada responded to 9/11 with broad new anti-terrorism laws, new provisions for the protection of national security information and new police powers, the Canadian response has generally been more restrained and more reflective of rights concerns while the Australian response has generally been more robust and reflective of security concerns. This trend has, if anything increased in recent years as Canadian courts have invalidated under the *Charter*, the political and religious motive requirement in the definition of terrorism and the mandatory ability of the government to present ex parte evidence for judges to use in security certificate cases. The differences between the two countries, however, cannot solely be attributed to the courts and the *Charter*. Canada's minority government has been unable to renew investigative hearing and preventive arrest powers or to enact new anti-terrorism laws, whereas the majority Howard government has enacted many new anti-terrorism laws.

169 *Charkaoui v Canada* [2007] SCC 9.

170 *Suresh v Canada* [2002] 2 SCR 3.

171 *Ibid.*