

CRIMINAL LAW JOURNAL

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EDITORIAL

Australia's ongoing response to the terrorism threat 69

ARTICLES

Preventative detention in Australian law: Issues of interpretation – *Claire Macken*

This article examines the statutory interpretation of terms in Div 105 of the *Criminal Code Act 1995* (Cth). This division is the regime for preventative detention orders (PDOs), an Executive order permitting a person to be taken into custody and deprived of his/her personal liberty for the purpose of either preventing an imminent terrorist act or preserving evidence of a past terrorist act. The organisation of this article corresponds with three key features of a PDO from this description: "detention"; "Executive"; and "preventative purpose". To consider the interpretation of Div 105, this article relies on statutory principles of interpretation, and most notably, the recent authority of *Thomas v Mowbray* (2007) 81 ALJR 1414; [2007] HCA 33. 71

Proscribing terrorist organisations: Legislation and practice in five English-speaking democracies – *Roger Douglas*

It is scarcely surprising that the increased salience of terrorism has led to legislation criminalising the activities of terrorist groups. But such legislation can give rise to problems, one of which relates to the identification of terrorist groups. Should this be a matter for the courts in each case where it arises as an issue, or should it be a matter for the Executive? Another problem is that at least some terrorist groups combine their terrorist activities with political advocacy and charitable work. Should such innocent activities be protected on the basis that freedom of speech and association must be defended, or should they be punished on the basis that "innocent" contributions can strengthen the capacity of terrorist activities to engage in terror? This article examines the way in which five English-speaking democracies – Australia, Canada, New Zealand, the United Kingdom and the United States – have responded to these questions. The article begins with a comparison between the five legislative regimes, followed by a summary of offences based on the defendant's association with a proscribed organisation. It then examines the use made of the proscription powers and the degree to which relevant laws are the basis for criminal prosecutions. It finishes with a brief analysis of what lessons can be drawn, and of what information is needed in order to be plausibly dogmatic in assessing the legislation. 90

German perspectives on the right to life and human dignity in the "war on terror" – *Saskia Hufnagel*

The purpose of this article is to examine, from a comparative perspective, how security concerns have limited three distinct human rights in Germany and Australia: the right to a fair trial, the right to life and the right to human dignity. Since human rights are rarely absolute, the "war on terror" has required legislatures and courts to determine the reasonable limits and qualifications to these rights. The German approach diverges from Australia in relation to the paramount constitutional status of the right to human dignity.

Consequently, this German hierarchy of rights produces different outcomes in relation to the range and scope of permissible counter-terrorism measures. This is apparent in the ruling of the German Constitutional Court which declared void legislative powers authorizing the use of lethal force against hijacked aircraft. Similar powers inserted into the *Defence Act 1903* (Cth) would not be amenable to similar challenge on grounds that they violate the right to human dignity. Notwithstanding these legal differences, the German authorities have sought to overcome these constitutional inhibitions by resort to untested doctrines such as the suprastatutory state of emergency, suggesting the difference between the two systems is not as marked as it first appears. 100

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