THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA

Report by Imad Abdul-Karim – 2007 Churchill Fellow

The investigation and prosecution of terrorism related offences

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1. INTRODUCTION AND ACKNOWLEDGMENTS

The topic of my Fellowship is the investigation and prosecution of terrorism related offences in the public interest.

I wish to acknowledge and thank the Churchill Trust for the opportunity to undertake this Fellowship. I also acknowledge the valuable and very considerable assistance and support provided to me by those I visited, my work colleagues and my family.

2. EXECUTIVE SUMMARY

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The object of my Fellowship was to examine issues that arise in the investigation and prosecution of terrorism related offences. Those types of investigations and prosecutions are challenging. The criminal investigations into alleged terrorism related offences often blur the line between intelligence gathering and criminal prosecutions. The legal issues raised are often complex. At the same time there is a legitimate public interest in these matters being investigated fairly.

The Fellowship involved visiting relevant agencies in the United Kingdom, Canada and the United States with the intention of identifying work practices that can be adopted and applied in Australia to improve the work in this field. The details of the organisations visited are set out in section 6 of my report. Although the manner in which terrorism investigations and prosecutions are conducted in Australia is not deficient, there is always room for improvement. The opportunity to visit and learn from relevant agencies overseas was invaluable. I believe that terrorism investigations and prosecutions in Australia can be developed by: firstly, ensuring that early focus is brought to matters; secondly, disclosure management; thirdly, charge management and finally, better use of information technology to assist in the investigation and prosecution of terrorism related cases. The conclusions outlined in this report are intended as a model, and are not meant to be a criticism of present practice.

This report will be widely circulated. I have already spoken with colleagues on some aspects of this report and intend to provide a seminar later on in the year.

Finally, I note that the views expressed in this report are mine.
3. REPORT

4. INTRODUCTION TO THE REPORT

The counter terrorism laws (which were introduced as a result of the events of 11 September 2001) and the increased powers for intelligence and law enforcement agencies in relation to terrorism generated controversy in Australia and overseas. Some commentators have questioned whether terrorism related investigations and prosecutions are being conducted fairly and in the public interest.

The investigation and prosecution of terrorism related offences must be conducted in a manner that ensures accountability to the Australian community. It is necessary that the public have confidence in the way in which terrorism laws are enforced for these laws to be seen as fair and necessary for the welfare of Australians and the international community.

The theme of the Fellowship was to examine issues that present particular challenges in effectively investigating and prosecuting terrorism related offences. Terrorism related proceedings are often lengthy and very complex. Crown disclosure obligations often raise difficult national security issues. In particular, the Fellowship examined how comparable authorities in other jurisdictions are dealing with these issues and what work practices can be discussed to develop procedures in Australia.

I wish to acknowledge the valuable assistance of the staff of the United States Department of Justice, Federal Bureau of Investigations, Public Prosecution Service of Canada and the Crown Prosecution Service of the United Kingdom. It was the willingness and generosity of time of those individuals that made this Fellowship successful.

5. SPECIFIC ISSUES EXAMINED

The following issues were considered in detail:

1. The unique nature of terrorism offences;
2. Pre-charge consultation between the prosecution and the investigative agencies;
3. Disclosure;
4. Use of technology in terrorism cases; and
5. Dealing with the media.

6. FELLOWSHIP PROGRAM

The organisations that I visited were:

1. The Federal Bureau of Investigations – 21 September 2007 until 7 October 2007; California, USA;
2. **The United States Department of Justice** – 8 October 2007 until 14 October 2007 Washington DC, USA;
3. **The Public Prosecution Service of Canada** – 15 October 2007 until 19 October 2007; Ottawa, Canada; and

The US, Canada and the UK have all enacted counter terrorism laws which are similar to the laws enacted in Australia.

**The structure for investigating and prosecuting terrorism related offences in the USA**

Terrorism investigations in the USA are conducted by the Federal Bureau of Investigations. However, prosecutors are involved at a very early stage in the investigation and provide guidance to the police on how to structure an investigation so as to sustain a fair prosecution.

The USA has established an Anti-Terrorism Advisory Counsel (ATAC) which is mandated by the US Attorney General. This is an umbrella organisation of local, state and federal agencies as well as representatives from the private sector that coordinates activities, develops policy and implements strategic plans to combat terrorism. There is an ATAC in each State. The purpose of the ATAC is to:

1. Facilitate intelligence and information sharing among federal, state and local authorities and with relevant private sector participants;
2. Prevent and disrupt terrorism activity within the state through aggressive investigation and prosecution;
3. Ensure that the organisational structure and plans exist to effectively prepare for, and respond to any future terrorist incident in the state; and
4. Provide relevant training to its members in order to better equip them to perform their anti-terrorism responsibilities more effectively.

The investigation and prosecution component is represented by a Joint Terrorism Task Force (JTTF). This task force is a collaborative federal, state and local law enforcement entity that investigates terrorism activity and individuals who may be engaged in such activity with the goal of preventing and/or aggressively disrupting that activity and, when in the national security interests of the United States, bringing federal prosecutions. At the inception of each terrorism investigation the ATAC Coordinator assigns the investigation to an Assistant US Attorney.

**The structure for investigating and prosecuting terrorism related offences in Canada**

In Canada there are two terrorism related prosecutions currently before the courts. These are the only prosecutions currently conducted under the terrorism laws enacted in Canada as a result of the terrorist attacks in the USA on 11 September 2001.
The Canadian Parliament has enacted a number of ‘safe guards’ in relation to certain terrorism legislation. For example, offences relating to what might be loosely called ‘terrorist financing’ can only be commenced with the consent of the Attorney General.\(^1\) This requires the Federal Public Prosecution Service of Canada to prepare a submission and a recommendation based on the available evidence. This necessarily requires the Public Prosecution Service to become involved in the terrorism investigation prior to charges being laid.

The Federal Public Prosecution Service has a lawyer who is based at the police headquarters. This lawyer is employed by the Public Prosecution Service not the police and is independent of the police. The lawyer assists the police in giving advice on complex and long term investigations which are conducted by the police including terrorism investigation. The role of the lawyer includes:

- Provision of legal assistance to the police;
- Input into the formation of the police’s operational plan;
- Assist in disclosure management;
- Facilitate the police’s burden with respect to case management; and
- Charge management.

The Federal Public Prosecution Service of Canada and the Royal Mounted Police have a community liaison unit which deals with community issues in relation to important prosecutions including terrorism prosecution. The role of the community liaison unit is to help certain sections of the community (who may be directly or indirectly affected by a particular prosecution) understand the prosecution process. This assists in ensuring that those responsible for important criminal investigations and prosecutions are accountable to the community, thereby maintaining public confidence in the criminal justice system and ensuring that the manner in which the criminal law is enforced absorbs, reflects and is consistent with general community standards.

The structure for investigating and prosecuting terrorism related offences in the United Kingdom

All terrorism related charges have to be approved by the Crown Prosecution Service (CPS). This is a policy that the CPS developed in relation to all complex matters. The CPS consults with the police and informs the intelligence agencies as to what charges the CPS proposes to approve. The CPS works with the police at an early stage in the investigation and give advice to the police as required. The CPS works with the police to ensure a strong and accurate brief is prepared by the police.

The CPS also assists the police in obtaining detention warrants. (These warrants authorise the police to detain a person suspected of being involved in terrorism activities to be held in custody for a period up to 28 days without charge.)

\(^1\) See section 83.24 of the *Criminal Code* (Canada).
7. THE UNIQUE NATURE OF TERRORISM OFFENCES

On one level, terrorism related investigations and prosecutions are identical to other types of criminal cases. Terrorist related activity is investigated by the police and the trials are conducted in the same courts, using the same personnel who operate under the same rules of procedure and evidence that apply to other criminal activity. However, it is the subject matter of terrorism cases that distinguishes terrorism investigations and prosecutions from other criminal matters. By their very nature, acts of terrorism kill, harm and threaten a large number of people. Because acts of terrorism have the potential to adversely impact on the lives of a large number of people, the public has a substantial interest in understanding the evidence presented in terrorism trials. The public obtains its knowledge about terrorism investigations and prosecutions primarily from the media. Furthermore, terrorism trials may also invoke significant foreign interest. The international community observes how terrorism trials are conducted in Australia to assess our claims of fairness.

To the extent possible, terrorism trials should be conducted in open court. Informed public debate about terrorism is dependent on a free and vigorous media being able to transmit information to the public and have access to the court process.

There is debate in the US and the UK as to whether the existing criminal justice system can adequately deal with the threat of terrorism. Some have argued that the criminal justice system cannot adequately respond to the challenge of international terrorism, for the following reasons:

1. Terrorism prosecutions confound two separate arms of the government – the intelligence community and the policing community. By dealing with terrorism in the criminal justice system Parliament have shifted national security (as opposed to police) functions from the ambit in which executive discretion was necessarily broad to the ambit in which executive action is heavily regulated by the courts.

2. The fair trial requirements such as disclosure of information to the defence potentially give terrorist groups valuable intelligence that identifies police methodology and sources of information. This furthers the agenda of militant groups who are intent on overthrowing democratic regimes and in this sense terrorism trials are not in the overall public interest.

These tensions have also prompted some to suggest that the structure of such trials – including the role of the trial judge and jury – ought to be changed to reflect the reality of often lengthy and complex proceedings.

I do not believe that there should be any fundamental change to the way in which terrorism investigations and prosecutions are conducted in Australia. It is appropriate to have the same laws apply to terrorism investigations and prosecutions that apply to other criminal investigations. It is also important that terrorism prosecutions be conducted in

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2 See for example the foreign interest in the conduct of the investigation relating to Dr Mohammed Haneef.

the same courts that hear all other alleged serious criminal activity. This promotes confidence in and a sense of legitimacy in the criminal justice system. On the other hand, special laws, and reliance on new tribunals, may lead to cynicism and mistrust in both the trial process as well as the result. However, it is important to recognise that terrorism is a specialised form of criminality that poses peculiar difficulties in terms of policing and criminal process because of its significant international links, capacity to intimidate and sophistication. Furthermore, terrorism prosecutions are usually based upon evidence which may be the product of intelligence sources and activity.

All of the individuals I visited were consistent in their view that terrorism trials must be conducted speedily, efficiently, accurately and fairly. Accordingly, terrorism related investigations and prosecutions need to overcome two challenges:

1. Terrorism investigations and prosecutions need to be manageable in terms of length and complexity.
2. The trial process and the result of the proceedings need to be seen as fair and legitimate, both by the Australian and the international communities. Community participation in terrorism prosecutions, through the jury system, enhances public confidence and the legitimacy of terrorism prosecutions and investigations.

A process that is seen to be fair, open and manageable will more likely be viewed as legitimate and effective in the fight against terrorism. The importance of having manageable trials is not confined to terrorism cases; it extends to all complex prosecutions such as corporate crime and complex fraud. If there is a push to try to manage all complex trials this will not have the disadvantage of isolating terrorist trials for special treatment. A trial that is manageable in size and easily understood is less likely to result in wrongful convictions or an appellate court ordering a retrial. It is appropriate for the same process that applies to all serious matters to be adopted in relation to terrorism related prosecutions.4

8. PRE-CHARGE CONSULTATION BETWEEN THE PROSECUTION AND THE INVESTIGATIVE AGENCIES

The individuals I visited in all jurisdictions favoured a closer working relationship between the prosecutors and the investigative agencies in relation to terrorism offences. They see the enforcement of terrorism laws as a continuum. At one end, the police investigate the alleged criminal activity and, if satisfied that an offence has been committed, charge the alleged offenders. At the other end, the prosecution is responsible for independently, neutrally and fairly presenting the prosecution case in court. Although the prosecution and the investigative agencies have separate responsibilities, inevitably they must work together to ensure that the terrorism laws are effectively enforced.

In Australia, the investigative agencies have autonomy in deciding who to investigate and for what suspected crimes. They decide how to structure an investigation and which investigative tools to use. The involvement of the prosecutor is not generally required as

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4 Bruce MacFarlane QC “Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis”.

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a matter of law prior to the laying of terrorism charges. However, all of the individuals who I visited in the USA, Canada and the UK were of the view that the involvement of the prosecutor at this stage is desirable. Pre-charge consultation reduces the risk of errors in the charging process and ensures that the correct level of criminality is reflected in the charges. This in turn will lead to savings in time and expense within the criminal justice system which will help maintain a high level of public confidence in how the terrorism laws operate in Australia.

All of the individuals I visited were of the view that the role of the prosecutor at the pre-charge and charge stage is vital. High quality decisions taken at an early stage of an investigation determine whether there is a case against an accused and, if there is, go on to shape the nature of that case. There are two roles for the prosecutor here. First, prosecutors can advise the police about what is required to build a strong case; they can provide advice about lines of enquiry which can generate the best evidence. Secondly, prosecutor can refuse to allow into the criminal justice system cases that cannot meet the evidential test as set out in the prosecution policy.

The prosecution services in the USA, Canada and England have a more expanded pre-charge consultation function than the pre-charge consultation function of the Commonwealth Director of Public Prosecutions (CDPP). The more expanded pre-charge function of the overseas prosecution services is in part due to the different statutory regime which governs the overseas prosecution services.

**Position in the UK and Canada**

The CPS and the police have set up guidelines in relation to terrorism investigations and prosecutions. These guidelines cover areas such as the role of the prosecutor prior to charges being laid, preparation of briefs of evidence and management of disclosure issues.

Investigations into potential terrorist offences are carried out by the police. The prosecution of all terrorist offences is conducted by the CPS Counter Terrorism Division which is based in London.

The CPS provides guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of enquiry, evidential requirements and assistance in any pre-charge procedures including applications for detention orders. The prosecutors at the CPS are proactive in identifying, and where possible, addressing deficiencies in the evidence. The decision on whether to charge a suspect with terrorism offences is made in consultation with the prosecutor.

In the UK, the investigators direct the way terrorism investigations are conducted. However, prosecutors generally become involved in the evidential building of a case from its early stages. Prosecutors advise the police on what is required to build a strong case; they provide advice about lines of enquiry which can generate the best evidence and in some cases they interview key witnesses to ensure that they are reliable and credible.
The individuals I visited at the CPS were of the view that the involvement of the prosecutor at this stage has a number of advantages including:

- Not approving charges that do not have reasonable prospects of conviction. One consequence of this is that a suspect may not be required to attend court unless there is sufficient evidence to convict that person on the charges which are before the court, and it is in the public interest to prosecute the matter.
- The prosecutor can help the police pursue lines of enquiry which generate the best evidence. This will ensure that best evidence is put before the court.
- This will assist the investigative agencies to use their resources appropriately.

The CPS also provides advice to the investigators on the preparation of the brief, including:

- Providing advice in the planning stages on how to structure the brief;
- Providing input during the course of an investigation on areas in the brief that need to be improved or addressed; and
- Providing advice on the use of electronic briefs.

Four main arguments support the process of “charge approval” by the CPS in relation to terrorism offences:

1. This is fairer to the accused;
2. It ensures that only cases with a reasonable prospect of conviction will proceed;
3. It is more efficient because this process reduces the risk of mistakes occurring in the laying of charges; and
4. The decision whether to prosecute is more objective.

In Canada the Public Prosecution Service has set up a similar pre-charge consultation process to that used in the UK (which is outlined above).

Suggestions for further consideration

In the UK and Canada there has been a move away from the traditional position of clear separation and independence between the prosecutor and the investigator. Co-operation and effective consultation between the investigators and the prosecution is essential to the effective enforcement of terrorism laws. Below I set out some principles which may foster an effective working relationship between prosecutors and investigators in relation to terrorism investigations and prosecutions. These principles are not meant to be a criticism of present practice in Australia nor do I suggest that these principles are not observed in part or at all presently:

1. That a protocol for the investigation and prosecution of terrorism cases be set up between the investigative agencies and the CDPP.
2. Maintain the independence of the investigative agencies and the CDPP. However prior to charges being laid, in an appropriate matter the CDPP may give guidance
as to how a terrorism investigation should be structured to ensure a sustainable prosecution. At the end of an investigation, the role of the CDPP is to provide the investigators with a fair and objective assessment of the strength of the case and the appropriateness of proceeding.

3. Investigators are entitled to investigate terrorism offences and carry out their duties in accordance with the law and general standards, practices and policies established by the investigative agencies. During a terrorism investigation, investigators are entitled - and encouraged - to consult with the prosecution about the evidence, the offence and proof of the case in court. However, investigators should have the discretion to lay terrorism charges according to their best judgment.

4. I do not recommend that the CDPP approve all terrorism charges before they are laid as is the situation in the UK and the US. Applying this policy in Australia might lead to:
   a. The erosion of police independence,
   b. The making of decisions behind closed doors rather than in open court, and
   c. A pre-empting by the prosecution of the role to be played by the courts in the criminal trial process.

5. Where terrorism prosecutions are to proceed, they must be financially and legally manageable. The CDPP can assist the investigators by:
   a. Identifying aspects of the operational plan that may present difficult problems of proof, particular disclosure obligations, or lead to unwieldy prosecutions; and
   b. Analysing whether the operational plan takes account of significant resourcing issues.

6. It should be emphasised that the prosecutor’s role is to provide legal advice when advice is sought. This will involve advising investigative agencies as to how investigative choices will impact on any future prosecution. The assistance given by the prosecution to investigators includes:
   a. Providing advice on the legality of investigative measures used by the police;
   b. Assisting in the development of a strategic plan that will result in a manageable prosecution; and
   c. Where appropriate, reviewing or assisting in the drafting of search warrants or other applications.

In any terrorism investigation and prosecution it is appropriate for the investigative and prosecution agencies to develop a plan for the investigation and prosecution process. This plan should include the following:

- The nature of the investigation, likely length of the trial and the key evidence in the case;
- The likely resource demands of the case on each agency from the start of the investigation until the conclusion of the prosecution. This should include an
analysis of whether those demands can be satisfied throughout the prosecution process;
- The general contours of the prosecution, including the number of potential accused and charges, and the number of prosecutions;
- Particular legal challenges likely to arise; and
- An assessment of how effectively information is being managed, so that disclosure will be able to be made as soon as practicable.

9. DISCLOSURE

In any large investigation (including terrorism investigations) disclosure management assists in obtaining a successful prosecution.

UK disclosure laws

The duties and responsibilities of the prosecution in relation to disclosure are governed by the *Criminal Procedure and Investigations Act* 1996 (UK) as amended by the *Criminal Justice Act* 2003 (UK). This legislation created a staged approach to disclosure — initial prosecution disclosure, defence disclosure, continual review by the prosecution. The legislation also provides for a code of practice for regulating action the police must take in recording and retaining material obtained in the course of a criminal investigation and disclosing this material to the prosecution for a decision on disclosure.

Under UK laws, the initial duty of the prosecutor to disclose is as follows:

The prosecutor must:

a. Disclose to the accused "*any prosecution material ... which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused*";

or

b. Giving the accused a written statement there is no material within the description of paragraph “a” above.

"*Prosecution material*" is defined as material:

a. Which is in the prosecutor’s possession, and came into his possession in connection with the case for the prosecution against the accused; or

b. Which the prosecutor has inspected in connection with the case for the prosecution against the accused.

There is a compulsory disclosure obligation on the accused person. The accused person must give a “defence statement” which is in writing to the court and the prosecutor: see section 6A of the *Criminal Procedure and Investigations Act* 1996 (UK). The defence statement includes the following:

a. The nature of the accused’s defence, including any particular defences on which he/she intends to rely.

b. Indicate the matters of fact on which he/she takes issue with the prosecution;
c. Set out why he/she takes issue with the prosecution; and
d. Indicate any point of law which he/she wishes to take.

It is submitted that the statutory disclosure regime in the UK is appropriate in that it ensures that disclosure issues are dealt with at an early stage in the prosecution process.

In the UK and Canada the investigative agencies prepare the disclosure material during the course of the investigation and whilst the brief of evidence is being prepared. In these jurisdictions, planning and thought is given to developing a disclosure strategy and incorporating it into the investigative plan. Disclosure material is organised and prepared during the investigative phase of the case, and served on the accused at an early stage. This reduces the impediments to bringing the case before the court in a timely manner.

The prosecution services in the US, Canada and the UK assist the investigative agencies in disclosure management in the following ways:

- Providing advice on the general obligations to disclose as set out in the case law and the prosecution policy;
- Putting in place systems and arrangements with investigative agencies which limit the risk of damage to the integrity of the prosecution process;
- Providing advice and guidance on the structure of the disclosure management strategy to ensure that the materials generated and collected by the investigators are in a form that meets prosecution needs and legal requirements; and
- Providing advice on the scope of disclosure that is required in the particular case.

Suggestions for further consideration

The CDPP assists the investigative agencies in disclosure management. It is appropriate for the existing cooperation between the CDPP and the investigative agencies in relation to disclosure management in terrorism prosecutions to continue. Through early cooperation with investigative agencies, the CDPP can assist the investigative agencies in preparing the disclosure material. Early administrative and technological cooperation between the CDPP and the investigative agency will save time and money.

It is appropriate for a settled procedure to be followed in relation to disclosure at an early stage of terrorism investigations. This procedure may be adopted in relation to all complex criminal investigations.

10. USE OF TECHNOLOGY IN TERRORISM CASES

The use of technology in the investigation and prosecution of terrorism prosecutions varied from one jurisdiction to another. The technologies of greatest interest in terrorism cases included those related to pre-trial case preparation, remote appearances and the presentation of evidence in court.
Major terrorism cases are potentially highly complex. There may be thousands of physical or electronic documents or files and evidence from hundreds of police and civilian witnesses. Because terrorism cases ought to be tried as speedily as possible once the accused has been charged, it is important that persons involved in the pre-trial investigative and trial preparation phases recognise that should the case go to trial, some of the material collected may have to be presented in court as evidence. In terrorism cases efficient prosecution requires a relatively early agreement between the prosecution and the investigative agencies on what is the best technology to use in the preparation of the brief of evidence and the presentation of the case in court.

11. DEALING WITH THE MEDIA

The media plays a significant role in helping the community to determine whether the investigation and prosecution of terrorism related offences are functioning effectively. Terrorism investigations and prosecutions have received media coverage in Australia, the US, Canada and the UK. The media informs the public of any terrorism investigation or prosecution. The tone and content of the media’s coverage will significantly influence how the public will react and will help define their experience of the investigation. Furthermore, terrorists require media coverage to further their cause and to create a climate of fear and intimidation. This would directly impact on how most Australians perceive the ongoing risks of terrorism.  

There have also been significant changes within the news media which directly impact on the investigation and prosecution of terrorism related incidents. In addition to the traditional news sources such as newspapers, newsmagazines, radio and television networks, the Internet has become an increasingly important source of news. As a result, news now spreads at extraordinary speed.

It is important that those involved in the investigation and prosecution of terrorism related offences appreciate the influence of the media in any terrorism investigation and prosecution. The United States Department of Justice; the Public Prosecution Service of Canada; and the CPS all have a proactive policy in dealing with the media. For example, the CPS has a media unit consisting of approximately 12 staff. The staff working in the media unit has a background in journalism and prepare all media briefings to the CPS. The media unit develops a media strategy in relation to all terrorism prosecutions.

Suggestions for further consideration

I think that it is appropriate for persons involved in the investigation and prosecution of terrorism related matters to recognise the importance of the Internet as a news source. The following principles should govern the approach to communications with the media:

1. It is axiomatic that all comments which potentially prejudice the right of an accused to a fair trial must be avoided. Any dealings with the media should protect the accused’s right to a fair trial.

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2. Any information given to the media should be provided to foster understanding, not to create sensation.

3. It is important to recognise that journalists have a job to do and that they will pursue a story irrespective of whether or not the investigative or prosecution agencies assist them. In appropriate cases it may be better to respond to their questions rather than allow speculation.

4. Any media comment should be timely. Misinformation left uncorrected damages the reputation of the criminal justice system.

5. The public may not understand the complexities of the criminal justice system and the separation between the investigative agencies and the prosecution. Media comment should aim to educate the public.

12. CONCLUSIONS

The manner in which terrorism investigations and prosecutions are conducted in Australia is not deficient. The opportunity to visit and learn from relevant agencies overseas was invaluable in ‘fine tuning’ the practice in Australia. It is submitted that the recommendations discussed in this report are not meant to be a criticism of the practice in Australia but are intended to assist in ensuring that the investigation and prosecution of terrorism related offences in Australia continue to be seen as fair and effective. The recommendations include the following:

1. **The CDPP consent to all terrorism related prosecutions:** As noted on page 11 above, I do not recommend the CDPP approve all terrorism charges before they are laid. However, the *Criminal Code* (Cth) may be amended to ensure that any terrorism related prosecution under Ch 5 of the *Criminal Code* must not be commenced without the consent of the Commonwealth Director of Public Prosecutions (CDPP). A person may be arrested for, charged with, or remanded in custody or on bail in connection with such an offence before the necessary consent has been given. This is a practice that already exists in relation to some offence provisions under Commonwealth laws such as conspiracy offences.

2. **Maintain the independence of investigative agencies and the CDPP:** While maintaining the independent role of the prosecutor and the investigator, developing a closer working relationship between prosecutors and investigators in relation to terrorism investigations prior to charges being laid.

3. **Disclosure management at an early stage of the police criminal investigation:** It is appropriate to ensure, through early administrative cooperation between the prosecution and the investigative agencies, that the investigative file will satisfy the needs of the prosecution team readying the material for disclosure. Early administrative and technological cooperation between the prosecution and the investigative agency will save time and money.

4. **Use of technology:** There should be early agreement between the prosecution and the investigative agencies on the scope of using information technology in the preparation of the brief of evidence and the presentation of the case in court.

5. **Media policy:** Subject to the overriding duty to ensure that trials are fair, it is appropriate to provide the media with timely, complete and accurate information
to enhance public understanding of, and confidence in the administration of justice. Public confidence in the terrorism laws (and in the administration of justice) depends on access to full and accurate information. A misinformed media can convey misleading messages, thereby undermining public confidence.

Imad Abdul-Karim
March 2008