



'Let the Punishment Match the Offence':¹ Determining Sentences for Australian Terrorists

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Abstract

To date, 38 men have been charged with terrorism offences in Australia. Twenty-six have been convicted. The article commences with an overview of the factual circumstances leading to these convictions. This provides important background for the following discussion of a largely unexplored issue in Australian anti-terrorism law and policy, namely, the difficulties faced by the Australian courts in adapting traditional sentencing principles to the (for the most part, preparatory) terrorism offences enacted by the Commonwealth Parliament after the 9/11 terrorist attacks. Of particular interest are how the courts determine the objective seriousness of these offences and the respective weight placed upon deterrence (both specific and general) and the rehabilitation of convicted terrorists.

Keywords

Anti-terrorism, sentencing, objective seriousness, deterrence, rehabilitation.

Introduction

Prior to the 9/11 terrorist attacks in the United States, Australia had no national anti-terrorism laws. A decade on, 54 such laws have been enacted by the Australian Parliament (Williams 2011: 1144). These laws represent a significant deviation from the traditional reactionary approach of the criminal law. Instead, they aim to pre-empt the commission of terrorist acts in the first place. To this end, Australia's anti-terrorism laws not only criminalise the commission of terrorist acts; they also establish a long list of preparatory, group-based and financing offences.

The terrorism offences have been aggressively enforced. A senior counter-terrorism officer with the Australian Federal Police testified in October 2007 that this organisation was directed to 'lay as many charges under the new terrorist legislation against as many suspects as possible because we wanted to use the new legislation' (Neighbour 2007). Thirty-eight men, all but one of them Muslim, have been charged with terrorism offences in Australia to date. The charges against the men have resulted in 26 convictions (nine guilty pleas and seventeen convictions at

trial). The primary purpose of this article is not to analyse Australia's terrorism trials. Instead, it will examine a largely unexplored issue in anti-terrorism law, that is, the principles relevant to the sentencing of convicted terrorists in Australia (see Pyne 2011; Diab 2011). It is, of course, impossible to examine this issue without some background. Therefore, this article will give a broad overview of the categories of terrorism offences in Australia and the cases against the convicted men.

For the most part, the legislative framework for the sentencing of terrorism offences is identical to the framework for the sentencing of 'ordinary' criminals. A clear exception to this is the legislative requirement in s 19AG of the *Crimes Act 1914* (Cth) (*Crimes Act*) that persons convicted of terrorism offences (with the exception of the association offence in s 102.8 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*)) be sentenced to no less than three-quarters of the head sentence. This has undoubtedly contributed to the significant length of terrorism sentences in Australia as compared with other countries such as Canada (Diab 2011: 275-277). This article will not discuss the issue of parole in any detail. Instead, it will examine how the Australian courts have considered and balanced competing sentencing principles in the anti-terrorism context.

Subsection 16A(1) of the *Crimes Act* codifies the common law principle of proportionality by providing that the sentence or order imposed by the court must be 'of a severity appropriate in all the circumstances of the offence' (*Wong v R* (2001) 207 CLR 58 at [71]). This principle sets the upper limit of the sentence that may be imposed. However, in determining the precise sentence, the court must have reference to the non-exhaustive list of matters set out in subsec 16A(2). These matters include: the nature and circumstances of the offence; any injury, loss or damage resulting from the offence; contrition shown by the convicted person for the offence; deterrent effect of the sentence; adequate punishment for the offence; and the prospect of rehabilitation. This is not a mathematical exercise. The court must take these matters into account only to the extent that they are known and, most importantly for current purposes, relevant. This draws our attention not only to the statutory framework but also to the way in which judges have exercised the discretion they are accorded within that framework.

The starting point in sentencing anyone, terrorist or otherwise, must be to identify the 'gravity of the offence viewed objectively': 'without this assessment the other factors requiring consideration in order to arrive at the proper sentence cannot properly be given their place' (*R v Dodd* (1991) 57 A Crim R 249 at 354). This article will consider how the courts have determined the objective gravity of the new terrorism offences. It will then go on to consider one matter that has been given particular weight (deterrence) and one matter that has been largely ignored (rehabilitation) by the Australian courts in sentencing terrorists. This provides us with an insight, albeit an incomplete one, into the difficulties faced by Australian courts in adapting traditional sentencing principles to the anti-terrorism context and in balancing the various matters relevant to the sentencing exercise.

Convictions of Australian terrorists²

At the core of Australia's anti-terrorism legislative framework is the offence of engaging in a terrorist act (s 101.1, *Criminal Code*). The definition of a 'terrorist act' in s 100.1 of the *Criminal Code* requires that the action be done or the threat of action made with the intention of advancing a 'political, religious or ideological cause' and of coercing an Australian or foreign government or intimidating the public. Furthermore, the action must cause a minimal level of harm, being serious physical harm, serious damage to property, a person's death, the endangering of a person's life, serious risk to the health or safety of the public, or serious interference with, disruption or destruction of an electronic system. There is an exception for advocacy, protest, dissent or industrial action which is not intended to cause serious physical

harm or death, endanger a person's life or create a serious risk to the health or safety of the public.

Given the recent enactment of specific anti-terrorism legislation and Australia's fortunate history of being relatively free from terrorist attacks, it is unsurprising that no one has thus far been charged with the offence of engaging in a terrorist act. Instead, the focus of law enforcement and intelligence agencies has been upon the pre-emption of terrorist acts. To this end, Div 101 of the *Criminal Code* makes it an offence to engage in preparatory conduct, including possessing a thing connected with preparation for a terrorist act (s 101.4, *Criminal Code*) and doing an act in preparation for a terrorist act (s 101.6, *Criminal Code*). Division 102 makes it an offence to participate in a variety of ways in the activities of a declared terrorist organisation. For example, it is an offence to direct those activities (s 102.2, *Criminal Code*) and to train with (s 102.5, *Criminal Code*) or provide support or resources to (s 102.4, *Criminal Code*) a terrorist organisation. Division 102 also creates status offences for membership of (s 102.3, *Criminal Code*) and association with (s102.8, *Criminal Code*) a terrorist organisation. There are also two distinct regimes criminalising the financing of terrorism (Div 103, *Criminal Code*; *Charter of the United Nations Act 1945* (Cth) (*Charter Act*)).

As noted in the Introduction, 26 men have been convicted of terrorism offences in Australia. This section will briefly set out the factual background to these convictions and the sentences that were imposed. As many of the men were convicted of multiple offences, this section will discuss the convictions in chronological order (rather than by category of offence).

*Faheem Lodhi*³

In May 2003, Willie Brigitte, who was alleged to have trained at a Lashkar-e-Taiba (LeT) camp in Pakistan, arrived in Australia from France. Lodhi met and collected Brigitte from Sydney International Airport. The trial judge, Whealy J, was not able to ascertain exactly what happened between Lodhi and Brigitte over the next few months; however, he was 'satisfied beyond reasonable doubt that the relationship was not an innocent one'. In October 2003, the Australian authorities received a tip-off from their French counterparts and Brigitte was detained and deported. Six months later, in April 2004, Lodhi was arrested.

At trial, Lodhi was acquitted of knowingly making a document connected with preparation for a terrorist act (s 101.5(1), *Criminal Code*), namely, aerial photos of Australian defence force establishments. He was, however, convicted of three other terrorism offences under Div 101 of the *Criminal Code*. First, knowingly possessing a thing connected with preparation for a terrorist act (s 101.4(1), *Criminal Code*), namely, a document in the Urdu language about how to make bombs. This offence carried a maximum penalty of 15 years imprisonment and Lodhi was sentenced to 10 years. Second, knowingly collecting documents connected with preparation for a terrorist act (s 101.5(1), *Criminal Code*), namely, two maps of the electrical supply system in Sydney. The maximum penalty and the sentence imposed were the same as for the first offence. Finally, doing an act in preparation for a terrorist act (s 101.6, *Criminal Code*), namely, seeking information about the availability of materials that could be used to make bombs. This offence carried a maximum penalty of life imprisonment and Lodhi was sentenced to 20 years. This sentence was to be served concurrently with the other two sentences of 10 years apiece.

*Belal Khazaal*⁴

A former Qantas baggage handler, Belal Khazaal, was charged in June 2004 with offences related to the writing of a book entitled *Provisions on the Rules of Jihad – Short Wise Rules and Organisational Structures that Concern Every Fighter and Mujahid Fighting against the Infidels*. This book was described by the prosecution as a 'DIY terrorist manual' (O'Brien 2008b). It outlined techniques for assassination, such as letter bombs and 'cake-throwing', a checklist for jihadist assassins and suggested possible targets, such as political and military leaders from

western democracies (O'Brien 2008a; Wilkinson 2005). The offences with which Khazaal was charged were, first, knowingly making a document in connection with preparation for a terrorist act (s 101.5(1), *Criminal Code*) and, second, attempting to incite others to commit the offence of engaging in a terrorist act in s 101.1 of the *Criminal Code*.

Defence counsel argued that Khazaal was merely a journalist who had done no more than collect publicly available information and compile a reference book. However, this was belied by the publication of the book on an extremist website and the extensive editing done by Khazaal. In particular, he had dedicated the book to 'all mujahedeen everywhere, all martyrs of Islam, prisoners languishing in the prisons of tyrants, be it infidels, apostates or hypocrites, Christians, Jews, or Infidels, idolater and apostate' (O'Brien 2008c). Khazaal was convicted of the first offence. However, the prosecution was unable to prove to the satisfaction of the jury the mental element required for the second offence, namely, that the defendant *intended* to incite others to commit a terrorist act. He was sentenced to 12 years imprisonment (with a nine year non-parole period).

*Operation Pendennis convictions*⁵

In November 2005, 13 men were arrested in raids in Melbourne and charged with a range of terrorism offences. These offences related to their participation in, and support of, an informal terrorist organisation based in Melbourne and led by Abdul Nacer Benbrika. The alleged purpose of this organisation was to engage in a holy jihad in order to persuade the then Howard government to withdraw Australian troops from Iraq.

One of the charged men, Izydeen Atik, pled guilty in July 2007 to knowingly being a member of a terrorist organisation (s 102.3(1), *Criminal Code*) and knowingly providing support or resources – himself – to a terrorist organisation (s102.7(1), *Criminal Code*). He subsequently provided evidence on behalf of the prosecution at the trial of the remaining 12 men. For the first offence, which carried a maximum penalty of 10 years imprisonment, Atik was sentenced to five years imprisonment. At trial, seven of the remaining 12 men were also convicted of this offence. They were each sentenced to between four and five years imprisonment. Although the jury was unable to reach a verdict in relation to Shane Kent, he pled guilty after trial and received a sentence of four years and six months. For the second offence, which carried a maximum penalty of 25 years imprisonment, Atik was sentenced to seven years imprisonment. Three other men were found guilty of this offence at trial and sentenced to either seven or eight years imprisonment.

In addition to the above, a number of the men were convicted of further offences:

- Benbrika was convicted of knowingly directing the activities of a terrorist organisation (s 102.2(1), *Criminal Code*). The maximum penalty for this offence was 25 years imprisonment and Benbrika was sentenced to 15 years;
- Aimen Joud, Ahmed Raad and Ezzit Raad were convicted of attempting to knowingly make funds available to a terrorist organisation (ss 102.6(1) and 11.1, *Criminal Code*). The maximum penalty for this offence was 25 years and the men were sentenced to either four or five years imprisonment;
- Benbrika and Joud were convicted of knowingly possessing a thing connected with preparation for a terrorist act (s 101.4(1), *Criminal Code*). The maximum penalty for this offence was 15 years and Benbrika and Joud were each sentenced to five years;
- Kent pleaded guilty to recklessly making a document connected with preparation for a terrorist act (s 101.5(2), *Criminal Code*). The maximum penalty for this offence was 10 years and Kent was sentenced to two and a half years.

Operation Hammerli convictions⁶

Also in November 2005, nine men were arrested in Sydney on charges related to those of the Operation Pendennis accused. They were each charged with conspiracy to do an act in preparation for a terrorist act (ss 11.5 and 101.6, *Criminal Code*). Five of the men were convicted at trial on the basis of a mosaic of circumstantial evidence, including attendance at training camps in Australia and overseas, making inquiries to purchase large quantities of chemicals, possession of ammunition, firearms, explosives, common possession of instructional and extremist material within the group, and use of code names and words. The offence carried a maximum penalty of life imprisonment and the men were sentenced to between 23 and 28 years.

The remaining four men pleaded guilty to lesser offences prior to trial. These offences carried maximum penalties of between 10 years and life imprisonment. Mirsad Mulahalilovic pleaded guilty to the offence of recklessly possessing a thing (ammunition) connected with preparation for a terrorist act (s 101.4(2), *Criminal Code*). He was sentenced to four years and eight months imprisonment. Khaled Sharrouf pleaded guilty to the offence of knowingly possessing a thing (six clocks and 140 batteries) connected with preparation for a terrorist act (s 101.4(1), *Criminal Code*). He was sentenced to five years and three months imprisonment. Mazen Touma also pleaded guilty to two counts of knowingly possessing a thing connected with preparation for a terrorist act (a collection of documents and other items including detonators and lengths of copper pipes) (s 101.4(1), *Criminal Code*). He was sentenced to eight years for each count. Touma also pleaded guilty to two counts of doing an act in preparation for a terrorist act (acquiring substantial quantities of ammunition and attempting to make explosive devices) (s 101.6, *Criminal Code*). He was sentenced to fourteen years for each count. It is not clear what offences the final man, Omar Baladjam, pleaded guilty to. However, it has recently been revealed that Baladjam was sentenced to 14 years imprisonment (Jopson 2012).

Tamil Tigers⁷

In mid-2007, Arumugan Rajeevan, Aruran Vinayagamoorthy and Sivarajah Yathavan were charged with terrorist organisation offences, namely, knowingly being members of (s 102.3, *Criminal Code*), making funds available to (s 102.6(1), *Criminal Code*), and providing support or resources to a terrorist organisation (s 102.7(1), *Criminal Code*), and making an asset available to a proscribed entity contrary to s 21 of the *Charter Act*. The prosecution case was that the three men used the Melbourne-based Tamil Co-ordination Committee to raise monies – amounting to at least \$700,000 – for the Liberation Tigers of Tamil Eelam (LTTE) under the guise of fundraising for tsunami relief. The terrorist organisation charges were withdrawn in March 2009 probably because of difficulties faced by the prosecution in proving that the LTTE 'is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' (Robinson 2007). This left only the offence under the *Charter Act*. At the time, this offence carried a maximum penalty of five years imprisonment (since increased to 10 years). The three men pleaded guilty in December 2009. Vinayagamoorthy pleaded guilty to two counts. He was sentenced to one year for the first count (providing electronic components) and 18 months for the second (making monies available) but was released on a good behaviour bond of four years. Yathavan and Rajeevan pleaded guilty to one charge each of making monies available. They were sentenced to one year imprisonment apiece but, like Vinayagamoorthy, were released on a good behaviour bond of three years.

Operation Neath convictions⁸

Five men were arrested in August 2009 and charged with conspiracy to do an act in preparation for a terrorist act (ss 11.5 and 101.6, *Criminal Code*). It was alleged by the prosecution that they were planning to engage in a suicide attack upon Holsworthy Army Barracks in Sydney. Three of the men – Wissam Fattal, Saney Aweys and Nayef El Sayed – were convicted in December 2010. Fattal's role in the conspiracy was to conduct preliminary reconnaissance at Holsworthy Army

Barracks, and he subsequently had a number of conversations with his close friend, El Sayed, about the ease with which an attack could be undertaken. Aweys, a Somali man and member of the same mosque as Fattal and El Sayed, contacted a sheikh in his home country to inquire as to whether it would be permissible to engage in a terrorist attack on an army barracks in Australia. The offence carried a maximum penalty of life imprisonment and each man was sentenced to 18 years imprisonment. An appeal against conviction and sentence is pending (Iaria 2012).

Objective seriousness of the offence

Terrorism is universally acknowledged as being an extraordinary act of violence. As the Ontario Court of Appeal stated in *R v Khawaja* (2010) ONCA 862 at [231]:

To be sure, terrorism is a crime unto itself. It has no equal. It does not stop at, nor is it limited to, the senseless destruction of people and property. It is far more insidious in that it attacks our very way of life and seeks to destroy the fundamental values to which we ascribe – values that form the essence of our constitutional democracy.

There are two primary points of distinction between terrorism and ordinary criminal offences. First, a terrorist's intention extends beyond the commission of an individual act of violence for a personal reason, such as revenge or money. The commission of a terrorist act is part of a more systematic and public agenda. To fall within the definition of a 'terrorist act', it is necessary that an individual intend to: (a) advance a political, religious and ideological cause; and (b) coerce or influence by intimidation an Australian or foreign government or the public. Pyne has pointed out that, although terrorist acts were committed and prosecuted in Australia well before the introduction of specific terrorism offences after 9/11, the courts 'did not embark upon a lengthy examination of the ideology of the defendant' in sentencing (Pyne 2011: 167). By contrast, the elements of the new terrorism offences now call upon sentencing courts to give particular attention to the offender's public intention. In each Australian terrorism trial, the relevant intention has been identified as religious in nature, more specifically, to advance an Islamic jihadist cause. Sentencing courts have held a particularly dim view of such religious intentions, stating that '[t]he fanaticism that is demonstrated by the current terrorists is undoubtedly different in degree to that shown by sectarian terrorists [who] ... were not prepared to blow themselves up for their cause' (*R v Barot* [2007] EWCA Crim 1119 at [54] (Phillips LC)). Therefore, Pyne questions whether 'we are singling out terrorism as outrageous and worthy of condign punishment not based on the dangerousness of an offender's actual conduct, but because we disapprove of the ideas he or she holds' (Pyne 2011: 172). The second distinction is that terrorist acts have the potential (and, in many cases, are intended) to endanger large sections of the community and cause mass loss of life.

These two distinctions have led Australian courts to adopt, as their starting point, the idea that all terrorism-related offences are serious in nature and the sentences imposed must reflect this. Justice Whealy stated in *Lodhi v R* (2006) 199 FLR 364 at [91]-[92]:

[T]he obligation of the Court is to denounce terrorism and voice its strong disapproval of activities such as those contemplated by the offender here. ... In my view, the courts must speak firmly and with conviction in matters of this kind. This does not of course mean that general sentencing principles are undervalued or that matters favourable to an offender are to be overlooked. It does mean, however, that in offences of this kind, as I have said, the principles of denunciation and deterrence are to play a substantial role.

This does not, however, explain how courts are to distinguish between different terrorism offences. This issue will be examined in the remainder of this section.

Maximum penalty

Australia's terrorism offences are deliberately expressed in broad language and cover a multitude of sins. For this reason, it is often possible to categorise preparatory acts as falling within several different offences. To take the example of a person providing \$1,000 to the LTTE, this conduct could be prosecuted under: (a) s 101.6 of the *Criminal Code* (doing an act in preparation for a terrorist act); (b) s 102.6 (providing funds to a terrorist organisation); (c) any of the four specific financing offences in Div 103; or (d) s 21 of the *Charter Act* (giving an asset to a proscribed entity). Given the considerable overlap in the substantive content of these offences, it is striking that the maximum penalties differ significantly from offence to offence. The offence of doing an act in preparation for a terrorist act carries a maximum penalty of life imprisonment. In contrast, the *Charter Act* offence carries a maximum penalty of only ten years imprisonment.

The High Court has repeatedly stated that sentencing judges should take into account the legislated maximum penalty in determining what sentence to impose. For example, in *Markarian v R* (2005) 79 ALJR 1048 at [31], the High Court stated:

[C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all other factors, a yardstick.

Given this, it is unsurprising that prosecutors have generally chosen to rely upon those offences that carry the greatest maximum penalty. This increases the possibility that a lengthy period of imprisonment will be imposed after conviction (*R v Lodhi* (2006) 199 FLR 364 at [69]). The three most recent terrorism trials, Operation Hammerli, Operation Neath and the aborted Operation Pendennis No. 2, have each involved prosecutions for conspiring to do an act in preparation for a terrorist act (ss 11.5 and 101.6, *Criminal Code*). The third of these trials was permanently stayed as an abuse of process in 2011 (*R v Benbrika and Ors* [2011] VSC 342 at [2]). As noted above, this offence carries the same maximum penalty as does the offence of actually engaging in a terrorist act, namely, life imprisonment. In *R v Fattal and Ors* [2011] VSC 681 at [3], Justice King stated that a person convicted of this offence would almost certainly receive a lengthy sentence:

The offence, of which you have all been convicted, carries a maximum penalty of life imprisonment, which is an indicator of the seriousness with which Parliament views offending of this type. Other offences that come within the category of life imprisonment include matters such as murder, treason and some large commercial quantities of trafficking and importing of drugs.

Nature of the planned terrorist act

Selection of a terrorist target

All of Australia's terrorism trials have involved preparatory offences. The extent to which sentencing judges should take into account the planned terrorist act, as opposed to concentrating upon the acts taken in preparation, is a vexed issue. In *Lodhi v R* [2007] NSWCCA 360 at [230], Spigelman CJ (with whom McClellan CJ at CL and Sully J agreed) stated that 'an evaluation of criminal culpability required analysis not only of the [preparatory] act itself but an examination of the nature of the terrorist act contemplated particularly in the light of the appellant's intentions or state of mind'.

The problem with this approach is that the early intervention by law enforcement agencies often means that convicted terrorists will not yet have selected a particular target. As Spigelman CJ stated in *Lodhi v R* (2006) 199 FLR 303 at [65]-[66]:

Each of the offence sections is directed to the preliminary steps for actions which may have one or more effects. By their very nature, specific targets or particular effects will not necessarily, indeed not usually, have been determined at such a stage. ... It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do.

The only case in which the prosecution specified a terrorist target in the indictment was that of Operation Neath. In addition to evidence of Fattal's preliminary reconnaissance at Holsworthy Army Barracks, the prosecution relied upon an intercepted telephone conversation between Aweys and a Somali sheik on 10 July 2009. Aweys said to the sheik that 'they want to enter into the military forces are stationed, the barracks. Their desire is to fan out as much as they could until they would be hit' (Munro 2010). In sentencing the three men in *R v Fattal and Ors* [2011] VSC 681 at [5], King J described the planned terrorist attack in the following terms:

The Crown case was that you three, together with others, were preparing and planning for an attack on the Holsworthy Army Base in New South Wales. It was to be carried out by possibly six persons, who may or may not have included each of you. The attack was to be with guns, and the basic plan was to enter the army base and using the guns that had been obtained, to then shoot as many persons on the base as could be shot before each of those persons attacking were themselves killed. ... That is the decision that the jury gave.

It is not possible to calculate, in a mathematical sense, exactly how much of the 18 year sentence was attributable to the nature of the planned terrorist attack. However, the 'evil' nature of this plan and the 'horrific' consequences if the planned terrorist attack had eventuated were mentioned by King J as relevant factors in sentencing (*R v Fattal and Ors* [2011] VSC 681 at [85]).

The sentencing of the Operation Pendennis terrorists also provides some guidance as to the impact that the selection of a target might have upon the sentence imposed. Atik testified at trial that Benbrika had honed in on several terrorist targets. These were the Melbourne Cricket Ground during the AFL or NAB Cup Grand Finals or the Crown Casino on Grand Prix weekend (*R v Benbrika and Ors* [2009] VSC 21 at [39]). For the purposes of sentencing, Whealy J refused to rely upon this evidence. His Honour concluded that 'much of the material [Atik] provided to the police, before he was sentenced, including his account of the targets conversation with Benbrika was untrue and designed purely to serve his own ends'. However, his Honour stated in *R v Benbrika and Ors* [2009] VSC 21 at [46] that:

Had Atik's evidence as to the proposed targets been accepted, and had knowledge of those targets been proved against the prisoners other than Benbrika, their criminality in belonging to the terrorist organisation would have been commensurately greater than has been proved without Atik's evidence.

Intended harm

More commonly, the prosecution has been forced to limit itself to evidence about the nature of the harm that the planned terrorist act is intended to cause. The range of harms captured by the Australian definition of a 'terrorist act' in s 100.1(2) of the *Criminal Code* is broad. At the least serious end is causing serious damage to property or seriously interfering with, disrupting or destroying an electronic infrastructure. At the most grave end is causing serious physical harm to a person or a person's death. In the United Kingdom case of *R v Byrne* (1975) 62 Cr App R 159

at 163, the Court held that '[c]learly conduct which is likely to endanger life is more grave than conduct which is likely to cause serious injury to property'. However, in many cases, an assessment of the harm intended to be caused by convicted terrorists is not as black and white as this comment suggests. This confusion is apparent in Whealy J's sentencing of both Lodhi and the Operation Hammerli terrorists. In each case, his Honour stated that the intention of the men was, at the very least, to cause serious damage to property. It had not been proven beyond a reasonable doubt that the definite intention of the offenders was to cause serious physical harm to other persons. However, the fact that they intended to use explosives to commit an act of violence, combined with their extremist mindset, meant that they must at the very least have 'contemplated' (*R v Lodhi* (2006) 199 FLR 364 at [36]) or 'countenanced' (*R v Elomar and Ors* [2010] NSWSC 10 at [60]) the causing of physical harm. For this reason, Whealy J accepted in each case that the offences fell 'only marginally short of the most serious case' (*R v Elomar and Ors* [2010] NSWSC 10 at [69]; *R v Lodhi* (2006) 199 FLR 364 at [46]-[48]).

Proximity

An examination of the planned terrorist act – or at least the harm likely to be caused by that act – cannot be the sole factor relied upon by Australian courts to determine the objective seriousness of an offence. If that were the case, a terrorist who had only engaged in very preliminary activities would be subject to the same penalties as a terrorist who had successfully carried out a terrorist act. To mitigate this problem, it might be possible for the courts to take into account the proximity between the preparatory acts and the commission of a terrorist act. This would 'ensure that the sentence is based on what the offender actually did, not what he or she might have done' (Pyne 2011: 173).

An examination of proximity would also be consistent with the approach taken to sentencing for the traditional inchoate offences of attempt and conspiracy. For example, in relation to sentencing for conspiracy, 'any considerations which advert to the *content* and *duration* and *reality* of the conspiracy are to be taken into account' (*R v Kane* (1975) VR 658 at 661 (Gowans J, with whom McInerney and Nelson JJ agreed)). However, in *Lodhi v R* [2007] NSWCCA 360 at [229], the New South Wales Court of Criminal Appeal pointed out that '[t]he proximity between the criminal act and the commission of the substantive offence is necessarily more remote' for the preparatory terrorism offences. This is because in enacting the preparatory terrorism offences in Division 101, the Australian Parliament made a deliberate decision to 'enable intervention by law enforcement agencies to prevent a terrorist act at a much earlier time than would be the case if they were required to wait for the commission of the planned offence or for an unsuccessful attempt to commit it' (*Lodhi v R* [2007] NSWCCA 360 at [229]). If sentences were downgraded as a result of the preparatory acts being distant from the commission of a terrorist act, a consequence may be that law enforcement agencies would delay arrests until more evidence is available. This would undermine the pre-emptive purpose of the legislative scheme. Therefore, the Court of Criminal Appeal continued in *Lodhi v R* [2007] NSWCCA 360 at [229]:

[Proximity] does not determine the objective seriousness of such an offence. It does not follow that as long as the preparatory acts relied upon to constitute the offences are in their infancy criminal culpability must necessarily be low. The main focus of the assessment of objective seriousness must be the offender's conduct and the offender's intention at the time the crime was committed.

In light of the sentencing of Lodhi, Pyne concluded that the courts were reluctant 'to mitigate penalties for the new terrorism offences because the impugned conduct is far removed from any actual terrorist act' (Pyne 2011: 172). This is not entirely correct. It is true that the courts do not regard proximity as a determinative factor. Nevertheless, it is a 'relevant' factor (*Lodhi v R* [2007] NSWCCA 360 at [229]). At first instance in the Lodhi trial, Whealy J regarded the making

of inquiries about chemicals as the most serious of the three offences because this 'brought him that much closer to the carrying out of an act of terror than did the other preliminary actions for which he has been convicted' (*R v Lodhi* (2006) 199 FLR 364 at [69]). His Honour adopted the same approach in sentencing the Operation Hammerli terrorists in *R v Elomar and Ors* [2010] NSWSC 10 at [68]:

[T]he conspiracy was advanced to such an extent that it could not be said its outcome was remote. ... The materials were to hand and recipes for the construction of explosives were available. It certainly could not be said that the prospect of a terrorist act or acts was completely indeterminate as to when it would occur.

A comparison of the latter sentencing judgment with that of King J in sentencing the Operation Neath terrorists in *R v Fattal and Ors* [2011] VSC 681 reveals how the progress made towards the commission of a terrorist act may affect the sentence. Justice King concluded that the plan of the Operation Neath terrorists was 'not attenuated with all of the steps that have been taken by those involved in [the Operation Hammerli trial, including stockpiling weapons and explosive material and engaging in training camps] and, accordingly, in my view does not warrant sentences of a level approximating those [sentences]' (at [96]). The plan of the Operation Neath terrorists had 'not advance[d] to any significant degree' (at [87]). For example, Fattal's visit to Holsworthy Army Barracks was '[i]n terms of preparation or planning ... of little or no use' (at [91]). He had no writing materials or camera to record what he saw at the barracks and, in walking only to the first gate, would have obtained very little information about the level of protection of the barracks.

Assuming that proximity is a relevant factor, the next question is how exactly the courts are to calculate this. It is obvious that they must consider the number and nature of the particular preparatory acts and the period of time over which they were committed. In *R v Elomar and Ors* [2010] NSWSC 10, Whealy J took into account two other matters in sentencing the Operation Hammerli terrorists. First, the convicted men carried out their tasks in clear defiance of the authorities. They did not cease their activities upon the authorities becoming suspicious, but rather moved them underground (at [64]). Therefore, 'there is no reason to doubt that, absent the intervention of the authorities, the plan might well have come to fruition in early 2006 or thereabouts' (at [68]). The second matter was the strength of their shared extremist mindset. This mindset was characterised by a hatred of non-believers, intolerance towards the Australian government and its policies, and a conviction that Muslims were obligated to pursue violent jihad so as to overthrow liberal, democratic societies and replace them with Sharia law (at [63]). His Honour concluded in relation to this mindset that:

The driving fanaticism behind the collective mindset of the conspiracy would have ensured that events moved quickly once sufficient material had been assembled, and the authorities' surveillance thwarted or at least diminished (at [68]).

Yet another matter that emerges from the case law is the sophistication or amateurish nature of the plan. In other words, the practical likelihood that the convicted men would have, without the intervention of the authorities, committed the planned terrorist act. In *Lodhi v R* (2007) 179 A Crim R 470 at 530, Price J said that '[t]he inter-relationship between the seriousness of the intended consequences and the real prospects of achieving them is a factor to be weighed in the light of all the circumstances'. Similarly, in sentencing the Operation Neath terrorists in *R v Fattal and Ors* [2011] VSC 681 at [87], King J said that 'by far, the most ameliorating factor that you have, is the amateurish level at which you were all operating'. However, in sentencing other convicted terrorists, judges have raised serious doubts about whether much weight should be given to this factor. This is because even an amateurish plan is capable of causing considerable

damage and even death (*R v Lodhi* (2006) 199 FLR 364 at [54]; *R v Elomar and Ors* [2010] NSWSC 10 at [68]). As pointed out by Bongiorno J in *R v Benbrika and Ors* [2009] VSC 21 at [67], 'terrorist acts as they have been experienced in modern times are often carried out by amateurs whose principal attribute has not been skill but rather a zealous or fanatical belief in some ideology or other which seeks to promote itself by the use of violence'. Therefore, this third matter should be treated with caution by sentencing courts.

Group-based offences

Sentencing courts have indicated that it is appropriate when sentencing for a group-based offence, whether a terrorist organisation offence in Div 102 of the *Criminal Code* or a conspiracy charge, to consider the nature and history of the informal group or official organisation. The Victorian Court of Appeal in *Benbrika and Ors v R* (2010) 29 VR 593 at [555] drew a distinction between a group consisting of a 'rag-tag collection of malcontents' and an organisation, such as Al Qaeda, 'with a proven record of committing the worst terrorists acts imaginable'. Whilst any activities engaged in with the intention of advancing the commission of a terrorist act cannot 'be regarded as less than very serious' (at [557]), nevertheless 'the activities of the former class of organisation are less likely to result in the commission of a terrorist act than the latter' (at [555]). Furthermore, the moral culpability of an individual who becomes involved with an organisation of the latter class is likely to be greater because 'logic and common sense imply the probability that the offender will be committed to the terrorist philosophy and objectives of the organisation before being admitted to its membership, and so they will go into it with their eyes wide open' (at [556]). Therefore, the nature of the organisation is a factor that should be taken into account by a sentencing judge in deciding what range of sentence to impose.

In *R v Benbrika and Ors* [2009] VSC 21 at [235], Bongiorno stated that the seriousness of the terrorist organisation offences, and especially the membership offence, are 'principally dependent upon what the objectives of the organisation are, its capacity and how it intends to achieve those objectives'. Nevertheless, this does not mean that each of the members of a terrorist organisation has the same level of criminal culpability. Another factor at sentencing is the particular role played by each individual in the activities of the organisation. At one end of the spectrum was Benbrika:

The essence of Benbrika's criminality, ... lies in his exercising an enormous influence over the young men who followed him, and imbuing, or seeking to imbue in them, a fanatical hatred of non-Muslims and, even, those vast majority of Muslims who abhor violence as much as anyone else. The degree of his criminality, both with respect to his membership and direction of the organisation, must be judged in light of the fact that the existence of the organisation and his leadership of it created a significant risk that a terrorist act would be committed in this community (at [68]).

At the other end of the spectrum was the youngest member of the group, Abdullah Merhi. The Victorian Court of Appeal found in *Benbrika and Ors v R* (2010) 29 VR 593 at [582] that his role in the organisation, and thus the objective seriousness of his offending, was significantly less than that of the other convicted men.

The role of deterrence

Subsection 16A(2) of the *Crimes Act* explicitly requires that specific deterrence be taken into account in sentencing. Specific deterrence aims to dissuade the individual offender from committing further offences of a similar nature by imposing sanctions which demonstrate the adverse consequences of criminal activity. Courts have, however, struggled with the issue of whether convicted terrorists will actually be deterred by the imposition of harsh sentences (see, for example Whealy 2010: 35). The Court of Appeal for England and Wales in *R v Barot* [2007]

EWCA Crim 1119 explained why deterrence may be ineffective in the anti-terrorism context. It stated at [45] that:

Terrorists who set out to murder innocent citizens are motivated by perverted ideology. Many are unlikely to be deterred by the length of the sentence that they risk, however long this may be. Indeed, some are prepared to kill themselves in order to more readily kill others.

Harsh sentences will almost certainly not deter someone who is willing and plans to kill himself in the course of committing a terrorist act. The so-called 'Underwear Bomber,' for example, pled guilty in October 2011 to attempting to blow himself up on a trans-Atlantic airliner, and referred to the bomb as 'a blessed weapon to save the lives of innocent Muslims' (Oberman 2011).

However, it is important to remember that not all terrorists are suicide bombers. As Whealy J has rightly pointed out in an extra-judicial comment, 'terrorists cannot adequately function without followers, acolytes or assistants' (Whealy 2010: 34.). The factual circumstances underlying the conviction of terrorists in Australia demonstrate that the terrorism offences cover a broad spectrum of offenders. Therefore, specific deterrence will be most relevant as a sentencing factor when an individual has merely been reckless or has committed a terrorism offence of a lower order. The latter might include 'people who simply have sympathies for the activities of an organisation like the LTTE, or who are willing to have them benefit from fundraising efforts even though there is in addition a humanitarian goal to those efforts' (*R v Thambathurai* [2010] BCSC 1949 at [19]).

In any event, even where the convicted terrorist is unlikely to be deterred from future acts, this does not mean that *general* deterrence should not be considered. In contrast to specific deterrence, general deterrence is not mentioned in s 16A(2). Nevertheless, the proportionality test spelt out in s 16A(1), as well as the continuing relevance of common law sentencing principles, mean that general deterrence will still be taken into account by a court in sentencing an individual for a federal offence (*DPP v El Karhani* (1990) 21 NSWLR 370). General deterrence is not aimed at the specific individual, but rather seeks to deter prospective offenders by instilling in them the fear of incurring similar sanctions. This has a particular importance in the anti-terrorism context because of the emphasis on pre-empting terrorist attacks rather than punishing them after the fact. Once again, we must keep in mind that not all those in the community who might commit a terrorist act are fanatics whom it is impossible to deter. As the Court of Appeal explained in *R v Barot* [2007] EWCA Crim 1119 at [45]:

It is ... important that those who might be tempted to accept the role of camp followers of the more fanatic, are aware that, if they yield to that temptation, they place themselves at risk of very severe punishment.

In both judicial and extra-judicial commentary, Whealy J has expressed a personal view that heavy sentences 'probably do not' deter individuals from committing terrorist acts (Whealy 2010: 36). In fact, his Honour has suggested that not only may sentences be ineffective as a deterrent but 'there is some danger that the imposition of stern sentences, no matter that is may be completely justified, has the capacity to inflame resentment and may encourage young Muslim men into an extremist position' (Whealy 2010: 36). This is supported by Pyne, who states that '[l]engthy imprisonment may be counterproductive when, in the case of suicide bombers, they perceive that they have no option but death or life in prison' (Pyne 2011: 178). Nevertheless, in *R v Lodhi* (2006) 199 FLR 364 at [92], Whealy J argues that 'the court's duty is nevertheless a duty to denounce serious criminality' and 'a stand must be taken':

The community is owed this protection even if the obstinacy and madness of extreme views may mean that the protection is a fragile or uncertain one. ... There is also a need to recognise that the imposition of a substantial sentence may have a personal impact as a deterrent on this offender so that upon his release he will, it is cautiously hoped, be unlikely or less likely to re-offend. In addition to general deterrence, the need to deter this man from future offences is a potent factor in the sentencing process.

Prospects of rehabilitation

The final issue that this article seeks to address is the extent to which sentencing courts have taken into account an offender's prospects of rehabilitation. That is, the likelihood that the values of the offender can be changed and he or she returned to the community as a law-abiding citizen. The standard approach taken in both Australian and foreign terrorism trials seems to be that rehabilitation is (at most) a subsidiary factor at sentencing (*R v Martin* [1998] EWCA Crim 3046 at [480]; *Lodhi v R* [2007] NSWCCA 360 at [274] (Price J); *R v Khawaja* [2010] ONCA 862 at [201]; Pyne 2011: 177-178). This approach is not particularly surprising. It reflects the trend over the last decade or two for courts to downplay the relevance of rehabilitation to the sentencing process, especially where the offence is serious (Edney and Bagaric 2007: 66). Further, it is consistent with the emphasis placed by the courts on the 'immutable' (*R v Thambathurai* [2011] BCCA 137 at [22]), 'inflexible' and 'intransigent' (*R v Elomar and Ors* [2010] NSWSC 10 at [63]) extremist beliefs motivating someone to commit or prepare to commit a terrorist act. In *R v Elomar and Ors* [2010] NSWSC 10 at [63], Whealy J stated:

This criminal enterprise was not in any sense motivated, as criminal activities so often are, by a need for financial gain or simply private revenge. Rather, an intolerant and inflexible fundamentalist religious conviction was the principal feature for the commission of the offence. This is the most startling and intransigent feature of the crime. It sets it apart from other criminal enterprises motivated by financial gain, by passion, anger or revenge.

The assumption underlying comments such as this is that terrorists cannot be rehabilitated. Or, at least, the very slight chance that they may be rehabilitated does not justify the risk to the community of releasing them earlier than would otherwise have been appropriate. Whether this assumption is correct is an open question. At last count, 13 convicted terrorists had been released (eight of the nine Pendennis terrorists; two of the nine convicted Operation Hammerli terrorists; and the three Tamil Tigers) (Jopson 2012). The short period of time these men have been in the community since their release means that it is not possible to determine whether they have in fact been rehabilitated or will reoffend. However, studies conducted overseas reveal that the prospects of rehabilitation may not be as dim as suggested by the Australian courts. In Saudi Arabia, for example, it is claimed that rehabilitation programs established for Guantanamo Bay detainees have had a success rate of 80 to 90 percent (Seifer 2010; see also, International Centre for the Study of Radicalisation and Political Violence 2010: 47-58). Singapore's rehabilitation programs have also achieved considerable success, with two thirds of detained individuals being released after, on average, only four years detention (Roach 2011: 140-142). These rehabilitation programs, as with those in other countries, have concentrated upon religious re-education. The underlying assumption is that those who engage in terrorism are motivated by misinformation about the tenets of Islam and its attitude towards violence.

In *R v Khawaja* [2010] ONCA 862 at [200], the Ontario Court of Appeal noted that the absence of any evidence of remorse on the part of the offender or that he no longer subscribes to violent jihad is not merely 'a neutral factor' in sentencing. It 'should [be] treated as a significant indicator of his present and future dangerousness'. This approach is extremely problematic as it seems to undermine the accepted approach that the prosecution bears the onus of proving

aggravating factors at sentencing beyond a reasonable doubt (*R v Olbrich* (1999) 199 CLR 270; see also Edney and Bagaric 2007: 142-145). Fortunately, the more traditional approach to the identification of aggravating factors was demonstrated by Whealy J in *R v Touma* [2008] NSWSC 1475 at [146]:

At the very least, it can be said, in the present matter, that I am by no means satisfied beyond reasonable doubt that the offender has refused to budge from his former extremist view.

It continues to be the case in Australia that an absence of evidence that a person has moved away from their extremist views is a neutral (and not an aggravating) factor at sentencing. This does not answer, however, the critical question of what evidence the Australian courts will require to be satisfied that a person has good prospects of rehabilitation.

In sentencing the Operation Hammerli terrorists who had pled guilty prior to trial, Whealy J found that their guilty pleas could be taken, to a degree, 'to express remorse and acceptance of responsibility', as well as 'a drawing back by the offender from the extremist views that motivated the commission of the offences' (*R v Touma* [2008] NSWSC 1475 at [144]). In *R v Sharrouf* [2009] NSWSC 1002 at [49], Whealy J accepted that overall 'the offender has reasonable prospects of rehabilitation'. Similarly, in *R v Mulahalilovic* [2009] NSWSC 1010 at [70], Whealy J stated that 'the plea must be taken to indicate that the offender is unlikely to be, or represent, a danger to the community on release'. Far less weight has, however, been given to statements made by convicted terrorists to psychologists or other persons to the effect that they had renounced their extremist views. Justice Whealy noted in *R v Touma* [2008] NSWSC 1475 at [144] that 'considerable caution' must be taken in judging the prospects of rehabilitation and whether there has in fact been a movement away from extremist views because 'the present state of [the defendant's] mind has not been explored or tested in any way' (see also *R v Lodhi* (2006) 199 FLR 364 [74]). In other words, the offenders had not given evidence at the sentencing hearing and therefore the prosecution was unable to cross-examine them as to their current mindset.

The sentencing of the Operation Neath terrorists also provides some insight on this point. Justice King noted in *R v Fattal and Ors* [2011] VSC 681 at [60]-[61] that evidence had been given by an Islamic chaplain who had been providing religious education to Aweys since his incarceration in August 2009. The chaplain said that he had observed significant changes in Aweys' attitude towards the use of violence in the name of Islam. However, King J did not regard this evidence as being of any weight on the question of rehabilitation, saying that it fell well short of evidencing that Aweys no longer held extremist views. Her Honour instead focused at [82]-[83] on the fact that:

None of you, not one, gave instructions to his counsel to say to this court, that you recanted from any extremist view that you held. That you no longer supported jihad, or terrorism, as being appropriate for pursuing the course of the Muslim faith. That is a significant factor because, each of you, whilst you hold those views remains a danger to the members of this community, and thus, protection of the community remains a very significant factor in sentencing you, as does personal deterrence.

Even if such instructions were given, it is questionable whether they would be regarded as a mitigating factor at sentencing. It would be understandable for the sentencing judge to have serious doubts about the self-serving nature of this evidence.

Finally, in *R v Benbrika and Ors* [2009] VSC 21 at [117], Bongiorno J noted that the age of an offender 'is relevant to the possibility of his rehabilitation'. Some guidance on this point might

be taken from the Canadian courts. In that jurisdiction, it has been held that the relevance of an offender's youth is not 'obliterated' because he or she has been convicted of a terrorism offence (*R v Gaya* (2010) ONSC 434 at [64]). Nevertheless, the youth of an offender should be given less weight in the anti-terrorism context than in sentencing other serious criminal offenders. This is, first, because of the general rule that the more serious the offence, the less weight the youth of an offender should be given. As noted in *R v Khawaja* [2010] ONCA 862 at [43], 'short of actually committing mass murder, the [crime of terrorism] ranks extremely high on the scale of serious offenders'. Second, '[a]nother reason for taking a more punitive approach to useful first offenders who might be tempted to commit terrorist crimes is to let them know, in clear terms, that their youth and lack of criminal antecedents will count for little in ameliorating the severity of their sentences' (at [46]). Third, their impressionability and prior good character means that '[y]outhful first offenders present as attractive recruits to sophisticated terrorists' (at [47]). It is therefore critical to hand down harsh sentences to this vulnerable group in order to warn them away from being involved in terrorism. Finally, the extremist mindset of terrorists means that it is difficult to describe an offender's commission of a terrorism-related offence as merely being a youthful mistake.

Conclusion

Despite the limited jurisprudence in the anti-terrorism context, Australian courts have been quick to develop principles to be applied to the sentencing of convicted terrorists. The precise content of these principles is, in some cases, still unclear. However, three points may be derived from the jurisprudence.

First, the overwhelming determinant of the sentence handed down in a terrorism case is the objective seriousness of the offence. The starting point has been that *all* terrorism offences are serious. The maximum penalty set out in the legislation also provides some guidance. The courts will also, if the information is available, take into account the target of the planned terrorist act, the damage that the terrorists intend to cause and the proximity between the preparatory acts and the commission of a terrorist act.

Second, sentences imposed in respect of convicted terrorists are likely to be lengthy. This will be especially so where they have been convicted of conspiracy to do an act in preparation for a terrorist act. For such offences, Australian courts have handed down sentences of between 18 and 28 years. This presents a sharp contrast to the sentences handed down for comparable conduct where the charges were laid under other sections in Div 101 or under Div 102. Because of this there is a very strong possibility that, in the future, prosecutors will decide to charge persons with this offence rather than the other (less serious) terrorism offences in Divs 101 and 102 of the *Criminal Code*.

Third, factors that are typically taken into account during the sentencing process assume a secondary importance in the anti-terrorism context. These factors include the convicted person's age, family situation, employment history and criminal record. In *R v Lodhi* (2006) 199 FLR 364, Whealy J identified a number of features of Lodhi's life and circumstances that were in his favour. However, far from relying upon these factors to mitigate his sentence, Whealy J stated that these factors 'make it difficult to understand why a young man of excellent personal background, with a considerable professional work ethic, would have contemplated carrying out the very serious criminal actions that have brought him to his present position in these proceedings' (at 377). Most significantly, Australian courts have taken the view that the extremist views of terrorists mean that their prospects of rehabilitation are negligible at best. It is only where the convicted person pleads guilty that the courts have been willing to accept that he has moved away from those extremist views. As Price J stated in *Lodhi v R* [2007] NSWCCA 360 at [274]:

Rehabilitation and personal circumstances should often be given very little weight in the case of an offender who is charged with a terrorism offence. A terrorism offence is an outrageous offence and greater weight is to be given to the protection of society, personal and general deterrence and retribution.

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1 Marcus Tullius Cicero, *De Legibus*.

2 For a detailed discussion of Australia's terrorism prosecutions, see Nicola McGarrity, "'Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34 *Crim LJ* 92.

3 The facts set out in this section are taken from *R v Lodhi* (2006) 199 *FLR* 364.

4 The facts in this section are taken from *R v Khazaal* [2009] *NSWSC* 1015.

5 The facts set out in this section are taken from *R v Atik* [2007] *VSC* 299, *R v Benbrika and Ors* [2009] *VSC* 21; *R v Kent* [2009] *VSC* 375; *Benbrika and Ors v R* (2010) 29 *VR* 593.

6 The facts set out in this section are taken from *R v Mulahalilovic* [2009] *NSWSC* 1010; *R v Sharrouf* [2009] *NSWSC* 1002; *R v Touma* [2008] *NSWSC* 1475; *R v Elomar and Ors* [2010] *NSWSC* 10.

7 The facts set out in this section are taken from *Vinayagamoorthy v DPP (Cth)* (2007) 212 *FLR* 326; *R v Vinayagamoorthy and Ors* [2010] *VSC* 148.

8 The facts set out in this section are taken from *R v Fattal and Ors* [2011] *VSC* 681.

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