IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S344 of 2011

BETWEEN

THE QUEEN
Appellant

and

BELAL SAADALLAH KHAZAAL
Respondent

APPELLANT'S SUBMISSIONS

[APP B = application book; AB = appeal book]

10 **Part I: Certification**

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. On 10 September 2008 the respondent was found guilty by a jury in the Supreme Court of New South Wales of an offence of making a document connected with assistance in a terrorist act knowing of that connection, contrary to s.101.5(1) of the Criminal Code Act 1995 (*"the Code"*). The jury was unable to reach a verdict on the second count in the indictment which charged an attempt to urge the commission by others of an offence, namely, engaging in a terrorist act contrary to s.101.1(1) of the Code. [APP B 156]

20 3. On 25 September 2009 the respondent was convicted by the learned trial judge, Latham J, and sentenced to a term of imprisonment of 12 years to date from 31 August 2008 with a non-parole period of 9 years expiring on 31 August 2017: *R v Khazaal* [2009] NSWSC 1015. [APP B 176-192]

4. On 28 June 2010 the respondent filed a notice of appeal pursuant to the Criminal Appeal Act 1912 (NSW) in the Court of Criminal Appeal (NSW) (*"the CCA"*) against both his conviction and sentence. The respondent's appeal (on conviction and sentence) was heard by the CCA on 6 October 2010, the court delivering judgment on 9 June 2011: *Khazaal v R* [2011] NSWCCA 129. [APP B 193-194]

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5. In relation to conviction appeal ground 4 the CCA by majority (Hall and McCallum JJ) allowed the appeal. Ground 4 asserted that Latham J had erred in holding that the respondent had failed to discharge the evidential burden provided for by s.101.5(5) of the Code and in consequence declining to direct the jury that the Crown was required to prove beyond reasonable doubt that the document in question (*"the book"*) was intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. [APP B 195]

6. McClellan CJ at CL would have dismissed both the conviction and sentence appeals. Hall J would have allowed the conviction appeal on grounds 1, 3 and 4, set aside the respondent's conviction and ordered by way of directions that the parties provide written submissions (with respect to ground 3)[1] on the question as to whether the appropriate order of the court was an order of acquittal or an order that there be a new trial on count 1. McCallum J agreed with McClellan CJ at CL as to grounds 1, 2 and 3 but in respect of ground 3 her Honour, in delivering reasons described as differing slightly from those given by McClellan CJ at CL, disagreed with the conclusion of the Victorian Court of Appeal in *Benbrika & Ors v The Queen* [2010] VSCA 281 with respect to the meaning of the words *"connected with"* as used in s.104.4(1)(b) of the Code. In relation to ground 4 McCallum J would have allowed the appeal, quashed the conviction and ordered a new trial.

7. Therefore the decision of the CCA by majority was that the appeal was allowed on ground 4, the conviction quashed and a new trial ordered. The CCA did not decide the respondent's appeal against sentence. [APP B 195ff esp 256 at [176]]

8. The issues raised by the appellant are solely concerned with conviction appeal ground 4. Those raised by the respondent in his notice of contention are addressed from paragraph 40. The questions raised by the appellant are:

   (1) Did the majority in the CCA err in finding that the respondent had discharged the evidential burden on him under subsection 101.5(5) of the Code having regard to the definition of *'evidential burden'* in subsection 13.3(6) of the Code?

   (2) Did the majority in the CCA err in finding that, at the close of the evidence in the trial, there was evidence that suggested a reasonable possibility that the making of the subject document (*'the book'*) by the respondent was not intended to facilitate assistance in a terrorist act so as to engage the defence in subsection 101.5(5) of the Code?

   (3) Did the majority in the CCA err in upholding the respondent's appeal against his conviction of the offence in count 1 in the indictment, quashing the conviction and ordering a re-trial?

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1 Which asserted that Latham J had erred in directing the jury in relation to count 1 in the indictment that the words *"connected with"* were simply to be given their ordinary meaning.

Part III: Section 78B notices

9. The appellant considers that notice is not required pursuant to s.78B of the *Judiciary Act 1903 (Cth)*.

Part IV: Judgment below

10. There is no authorised report of the judgment of the CCA. Its internet citation is *Khazaal v R* [2011] NSWCCA 129. [APP B 195-346]

Part V: Relevant facts

11. Between 20 and 23 September 2003 the respondent downloaded from the internet material of a religious and *"jihadist'* nature and compiled an electronic book entitled *'Provisions on the Rules of Jihad – Short Judicial Rulings and* Organisational *instructions for Fighters and Mujahedeen Against Infidels'* (*"the book"*). After downloading the selected material, which was in Arabic, the respondent placed the chapters in a designated order, edited parts of it and renumbered the footnotes. He inserted a dedication and a foreword. Using a pseudonym (Abu Mohamed Attawheedy) the respondent submitted the book, which he described as *'urging for jihad'*, to the administrators of a website connected with al-Qaeda (*"the Almaqdese website"*), which contained a number of other publications composed by leaders of known terrorist groups. The respondent informed the website that he had prepared the book in haste following a request from *'the brothers'* and, when submitting it for publication, expressed the hope that it would be published on the website or anywhere else the administrators of the website saw fit. For ease of publication the respondent re-formatted the book from A5 to A4 size. The book was duly published on the website. [APP B 177 & 203]

12. At his trial, there was no dispute that the respondent intentionally made the book; the dispute (in relation to the s.101.5(1) offence) concerned the book's connection with a terrorist act and the respondent's knowledge of that connection. [APP B 6 at [4]]

13. The respondent had a journalist's card and had contributed regularly to a publicly available Islamic affairs magazine entitled *'Nida ul-Islam'* or *'The Call of Islam'*, which was published by the Islamic Youth Movement and was freely available to the public. The respondent was largely responsible for the content of the magazine.[2] [APP B 209]

14. The book included material referring to targeting foreign governments, including the presidents, foreign ministers, ministers of defence and *'high ranking generals'* of the governments of America, Britain, France, Germany, Australia, Canada, Russia, India and other NATO countries. Parts of the book promoted

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2 The content was in both Arabic and English.

methods of assassination and the commission of acts of violence in the name of restoring the nation of Islam. Chapter 10 of the book was entitled *'Reasons for Assassination'* and this and other chapters commenced with the respondent's own commentary endorsing the substance of the chapter. [APP B 177 & 203]

15. Detail of the content of that part of the book dealing with assassination is set out in the reasons of McClellan CJ at CL at [6]-[13]. [APP B 203-208] [APP B 203-208]

16. At [389]-[390] Hall J noted various passages from the *"Dedication"* and *"Introduction"* of the book including the following from the second half of the Introduction:

> *'This is but a short message I hastily prepared in response to a request from brothers working to support this religion. I was requested to prepare it, in this fashion, to serve as a reference to all brothers or small cells desiring to support this religion.*
>
> *With God's help I set on its compilation and I completed it in a few days. I am however convinced that had I sufficient time and had I been settled in my residence I would have produced a better job than this work which has been conceived in haste. However, better 'haste' than never. I pray to the Almighty that this essay would be of benefit to everyone working to support this religion. I seek the Almighty's reward and I seek martyrdom for his sake. I do so running towards it not running away from it.*
>
> *I beseech my brothers who read this message to pray that I may attain martyrdom.*
>
> *Abu Mohamed Attawheedy*
>
> *18/9/2003'* [APP B 320-321]

17. In sentencing the respondent Latham J found that the jury was satisfied beyond reasonable doubt that:

(i) the respondent was aware that the acts described in the book were directed at various people including diplomats, military personnel and holders of public office, and

(ii) he was aware of the purpose of those acts, namely, the advancement of the Muslim religion in the world, including the dominance of that religion in Arabia and/or the establishment of a Muslim nation in that region and/or the expulsion of Jews, Christians and other non-Muslims from that region, and

(iii) he was aware that the acts were intended to coerce or influence by intimidation one or more of the governments of this country, the government of a foreign country, or to intimidate the public or a section of the public, and

(iv) he was aware that the acts, if carried out, would cause serious physical harm or death to persons, or endanger a person's life, or cause serious damage to property or create a serious risk to the health or safety of the public, and

(v) he was either aware that the acts were not advocacy, protest, dissent or industrial action, or, he was aware that the acts were intended to cause the types of harm referred to in (iv).[3] [APP B 177-178]

Part VI: Argument

Evidence

18. The particular factual matters in the evidence relied on by the respondent as sufficient to discharge the evidential burden on him in relation to an exception or excuse capable of constituting a defence under s.101.5(5) are summarised by Hall J at [388]. These matters were crystallised by Hall J into four points at [439] as follows: [APP B 317-320]

(1) The respondent was a career journalist, a researcher and a publisher.

(2) He had acquired and built up a library which was used as his research facility.

(3) He had a strong interest in the Islamic religion.

(4) He had written and published articles on a range of issues, in particular, on the benign Islamic issues. [APP B 332-333]

There is no dispute about the above. Indeed McClellan CJ at CL at [127] identified the same four aspects of the evidence as those relied on by the respondent as discharging the evidentiary burden upon him. [APP B 242]

19. McCallum J at [481] accepted the summary of the material pointed to by the respondent as that set out in Hall J's judgment. However her Honour made clear that the finding that the defence had been engaged was based on her Honour's own examination of all the material in question. [APP B 344]

The approach of the trial judge

20. In her judgment on the issue Latham J at [2] noted that the respondent's application was for the following direction:

> *"... in the event that the jury are satisfied beyond reasonable doubt of the essential ingredients of the offence, the summing up should contain a direction to the jury that, if there is a reasonable possibility that the accused did not make the book with the intention of facilitating assistance in a terrorist act, then they must be satisfied beyond reasonable doubt that the making of the book was intended to facilitate assistance in a terrorist act."* [2] [APP B 6 & 7]

The respondent submitted that no other direction was necessary. The application acknowledged that it was only open to the jurors to consider the defence if they were satisfied beyond reasonable doubt that the Crown had proved the essential elements of the offence. Latham J recognised this in her finding at [4]. [APP B 6 & 7]

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[3] The jury must have been satisfied of the above matters beyond reasonable doubt because otherwise, consistent with Latham J's oral and written directions of law, the respondent would not have been convicted of count 1.

21. Consistent with both her Honour's oral and written directions to the jury as to the elements of the offence, in the context of the statutory definition of terrorist act, the respondent's application fell for consideration upon the assumption that the matters set out herein at [17](i)-(v) herein were found by the jury to have been proved to the requisite standard.[4] The judgments of Hall and McCallum JJ do not recognise this, even implicitly. Their Honours' failure to appreciate this aspect led them to misunderstand the meaning underlying Latham J's findings at [21]-[22] of her judgment. [APP B 10]

22. In turn these findings were underpinned by her Honour's conclusion of fact at [20] that the respondent's status as a journalist and researcher and the circumstances under which he made the book were not objectively inconsistent with an intention to facilitate assistance in a terrorist act. It is submitted that Latham J's rulings at [23] that the defence had not been engaged but if it had the evidentiary burden placed on the accused had not been discharged were correct. [APP B 10 &11]

23. The proposition advanced by the respondent in the CCA, as identified by Hall J at [396], was that if he was able to point to evidence that suggested a reasonable possibility that the making of the book was intended to assist in education on the topic of Jihad then the evidential burden had been satisfied.

However Hall J's ruling as to the test to be applied in determining whether the evidential burden had been satisfied was differently expressed at [432]: [APP B 322]

> *"The issue was whether or not the evidence to the effect that the (respondent) was a career journalist who had an established history of researching matters associated with the Islamic religion and any other of the matters set out above was sufficient to 'suggest' as a reasonable possibility that (his) intention in making the book was not that asserted by the Crown."*

It is submitted that the test as stated by Hall J is erroneous, in particular because it was no part of the Crown case on count 1 that the appellant had *any* intention in making the book. [APP B 331]

24. Hall J's conclusion, at [441], was that it could not be said the evidence pointed to was incapable of suggesting, as a reasonable possibility, that the respondent acted as a professional journalist with an intention that was not one to facilitate assistance in a terrorist act as that expression is to be understood under the Code. His Honour disagreed, at [435], with Latham J as to the relevance of the respondent's claimed intention in making the book corresponding with the Crown case. His Honour ruled that whether or not an evidentiary aspect corresponds with the Crown case is not a relevant matter to a judgment being made as to whether or not the evidence does or does not suggest a reasonable possibility that a matter exists or does not exist. [APP B 332 & 333]

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4 Had the Crown failed to prove any of these matters to the requisite standard the jury, in compliance with Latham J's directions, must have acquitted the respondent of count 1.

25. McCallum J, at [481] identified as the hypothesis sought to be left to the jury by the respondent, that the book was *"... not a terrorist manual, but rather a collection of works on the topic of jihad, published over many centuries, some controversial, others not, some by authors of great repute, and some in a form of Arabic which would not today be readily comprehensible to an ordinary Arabic speaker."*[5] At [485] her Honour found: *"There was ample evidence from which a jury could conclude that the appellant's intention was to support his religion by preparing and publishing a properly-sourced collection of writings including religious rulings and other pieces condoning, and indeed encouraging, the ritual of assassination."* [APP B 334 & 345]

The approach of the Chief Judge at Common Law

26. McClellan CJ at CL found, at [128], that the evidence relied on by the respondent was insufficient to discharge the evidentiary burden which fell upon him because to discharge that burden the evidence pointed to had to suggest a reasonable possibility that the making of the particular document was not intended to facilitate assistance in a terrorist act. His Honour found the evidence to which attention had been drawn by the respondent to be entirely neutral in relation to that issue. Apart from the book itself, without the respondent giving evidence or there being other evidence from which his intention could be inferred, the evidential burden could not be discharged. [APP B 243]

It is plain that his Honour concluded, as did Latham J, that the respondent's background as a journalist interested in the Islamic religion and its advancement said nothing one way or the other as to his intention in making the book.

27. It is submitted that McClellan CJ at CL and Latham J were correct. It is further submitted that the content of the book, especially chapter 10, speaks for itself. The matters pointed to by the respondent as engaging the defence were more consistent with him being a journalist interested in the Islamic religion (as he propounds it to be) whose intention was to support the religion by justifying and encouraging the assassination of the targets in Chapter 10 as the *means* of advancement of the religion.[6] Thus the evidence was incapable of engaging the defence and Latham J rightly declined to allow it to be considered by the jury.

28. The soundness of the reasoning of McClellan CJ at CL and Latham J is illustrated by considering the direction the trial judge will be obliged to give to the jury if the majority in the CCA are upheld on ground 4. Latham J's directions as to the meaning of terrorist act and the elements of count 1 were accepted by the respondent as correct. Applying the direction sought by the respondent as set out at [20] herein, the requisite direction would appear to be as follows:

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5 The evidence (of the Crown translator, Dr Gamal) concerning the form of Arabic referred to did not relate to Chapter 10. It related to some of the articles of antiquity in the first half of the book.

6 It is difficult to construe McCallum J's finding at [485] referred to at [24] herein as having a different meaning.

Directions as to count 1 as per Latham J's written directions (a) to (e)(i)-(v)

BUT

(vi) *If the above elements are proved beyond reasonable doubt you must not find the accused guilty of the offence charged in count 1 unless you find the Crown has also proved beyond reasonable doubt that in making the book the accused intended to facilitate assistance in a terrorist act.*

29. Such a direction, or any variation of it, would not be reconcilable with the directions as to the elements of the offence, in particular those at paragraph (e)(i)-(v). Proof beyond reasonable doubt that the respondent, in making the book, was aware that it was connected with assistance in a threat of action against the targets of assassination in Chapter 10 and was aware of the intention by the threat of such action to advance a religious cause and was aware of the intention by the threat of such action to coerce or influence by intimidation one or more of the parties in (e)(iii) and was aware that the threat of such action, if carried out, would cause death or risk of death etc as set out in (e)(iv), of itself must constitute proof beyond reasonable doubt that he intended to facilitate assistance in a terrorist act.

Two questions arose

30. The respondent's application before Latham J for the direction set out at [19] herein gave rise to two questions, namely whether the s.101.5(5) defence had been engaged and, if so, whether the respondent had discharged the evidential burden on him as a prerequisite to the defence being left to the jury. As McClellan CJ at CL pointed out at [113], the respondent's submissions to the CCA did not address Latham J's finding that the defence was not engaged but were concerned with the issue of the evidence necessary to discharge the evidential burden. Latham J's conclusion that the defence had not been engaged, which the appellant submits should be upheld by this Court, was based on her Honour's reasons at [13]-[22]. In the CCA Hall and McCallum JJ separately reasoned to the conclusion that Latham J's construction of the statutory provisions was erroneous. It is submitted that the suggested direction set out above illustrates the correctness of Latham J's finding that the defence had not been engaged. [APP B 239] [APP B 8-10] [APP B 325-32 & 341-44]

31. While it is accepted that the respondent only had to point to evidence suggesting a reasonable possibility that his intention in making the book was not to facilitate assistance in a terrorist act, the evidence relied on had to have the capacity of doing so. It could not be, as McClellan CJ at CL correctly found, entirely neutral as to the respondent's intention in making the particular document. It had to suggest, as Latham J correctly found, more than a *mere* possibility that in making the book the respondent lacked the proscribed intention.

32. The appellant does not cavil with Hall J's acceptance at [394] that slender evidence will suffice to satisfy an evidential burden in relation to a negative state of affairs. However the respondent's case identified by Hall J at [396] was that the evidence suggested a reasonable possibility that the making of the book was intended to assist in education on the topic of jihad. This proposition confronts the problem identified by Latham J at [9] in that it ignores the nature of the book's contents, in particular the endorsement of assassination and other violent acts carried out in the cause of *'jihad'*. It is submitted that a similar error was made by McCallum J at [485] in identifying, based on the evidence, the suggestion of a reasonable possibility that the respondent's intention was to support his religion by preparing and publishing a properly-sourced collection of writings including religious rulings and other pieces condoning, and indeed encouraging, the ritual of assassination. [APP B 322] [APP B 7] [APP B 345]

33. In each instance the reasonable possibility said to be suggested by the evidence must be evaluated in the context of the contents of the book, particularly chapter 10. Hall J took up the Crown's example, put to Latham J, of the terrorism consultant or adviser to government and law enforcement agencies who collects and collates material advocating the commission of terrorist acts in the course of his or her employment but without any intention to facilitate assistance in a terrorist act. His Honour did so to illustrate the relevance of a person's occupation as bearing on his or her intention in collecting or compiling a document. This analysis overlooks both the content of the particular document, i.e. the book, and the distinction between a person who merely collects another's document and one who makes the particular document, including the manner of its collation and editing, and is therefore responsible for its content and also its place and manner of publication, as occurred here.[7] [APP B 245]

34. The evidence established that the respondent, in making the book, both selected and associated himself by personal endorsement with the content of Chapter 10 and its advocacy of assassination as the *means* of advancement of the Muslim religion. Hall and McCallum JJ failed to confront the issue arising under s.101.5(5) namely, that the intention suggested to be open as a reasonable possibility was a terrorist intention as defined in s.100.1(1) of the Code. On the facts of this case and having regard to the definition, their Honours' approach cannot be reconciled with supporting a religion by the making and publication of a document that knowingly encourages assassination. The definition of terrorist act captures an action or threat of action done or made with the intention of advancing a political, *religious* or ideological cause. It is difficult to regard supporting a religion by the above conduct as falling outside the definition (assuming the other criteria in the definition are satisfied, which by the jury's verdict on count 1 is the case here).

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[7] The terrorism consultant postulated by the Crown does not make and publish a document personally *"advocating the* ruthless *slaughter of innocent persons in the name of religion"*, per McClellan CJ at CL [135]. [APP B 245]

35. Hall J's remarks at [441] appear to accept that it is a legitimate exercise of professional journalism to make and bring about the publication on a terrorist website under a false name of a document such as the book. The appellant submits that on the facts of this case it is not open as a reasonable possibility for the respondent's conduct to be that of a professional journalist acting with an intention that was not to facilitate assistance in a terrorist act. [APP B 333]

36. McCallum J's finding at [485] that there was a reasonable possibility suggested by the evidence that the book was not intended by the respondent to facilitate assistance in a terrorist act accepts his proposition cited at [484], which her Honour encapsulates as the respondent supporting his religion by including in the book religious rulings and other pieces condoning and encouraging the ritual of assassination. [APP B 345] [APP B 344]

37. At [486] McCallum J accepted a submission put by counsel to the trial judge that for the purpose of s.101.5(1) *"the mere urging of a terrorist act is not sufficient"*; whilst such conduct might be criminalised under s.101.1 it would not be captured by s.101.5(1). McCallum J found that this argument alone pointed to a reasonable possibility that the book was intended for some purpose different from that identified in s.101.5(5) – albeit one that sounded in count 2 on the indictment. It is submitted that her Honour's acceptance of the argument, relevant to count 1, that the urging of a terrorist act was not sufficient to make out the offence is misconceived. While it is not an element of the count 1 offence that a person urges a terrorist act the fact of urging a terrorist act is relevant to whether a document is connected with assistance in a terrorist act and the maker knows of that connection. A person who makes a document urging a terrorist act may readily be seen as one who knows the document is connected with assistance in a terrorist act if it is established, as here, that the document (objectively) is connected with assistance in a terrorist act. [APP B 345]

38. To the extent that any of the evidence pointed to by the respondent suggested a reasonable possibility that the book was intended by him to support his religion, as separately identified by Hall and McCallum JJ, it is difficult to see how a religion which encourages its followers to assassinate the non-believers targeted in the chapter *"Reasons for Assassination"* by the means detailed therein is not itself a religion which threatens action with the intention of advancing a religious cause, being a threat made with the intentions set out in paragraph (c) of the definition of terrorist act.[8] Although there is evidence the respondent made the book with the intention of supporting his religion, that fact does not engage the s.101.5(5) defence where the chosen means of support is the assassination of non-believers.

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8 It is not the appellant's case, nor was it put by the Crown below, that the Islamic religion advocates violence. The appellant's position throughout is fairly summarised by McClellan CJ at CL at [135] which focuses on the manner in which the respondent has sought to use the Islamic religion to justify his conduct.

39. The intention of supporting one's religion does not engage the defence if the acts of support constitute a terrorism offence or where the religion is relied on as justifying the commission of terrorist acts. Any so called religion which urges the commission of terrorist acts in support of its advancement cannot provide its supporters, whether journalists, clerics or laypersons, with the s.101.5(5) defence if they, in turn, in order to advance their religious cause, knowingly make a document which objectively is of assistance in a terrorist act.

Notice of contention

40. The respondent's arguments in support of his contentions are not yet known to the appellant.

41. The contentions concern the phrase *"connected with"* in s.101.5(1) raised before the CCA with respect to conviction appeal ground 3. Consideration of the contentions as to Latham J's directions should commence with the relevant direction sought by the respondent at his trial, which was in the following terms (as set out in Vol 2 of the CCA Appeal Book at 555-6):

> *"You must be satisfied beyond reasonable doubt that the book was connected with assistance in a terrorist act. The words 'connected with' mean that the book must itself have been capable of directly assisting in the commission of a terrorist act. A mere remote connection will not suffice. The word 'assistance' is, of course, a word that is used in everyday language and is to be understood in that sense, that is aiding, making easier or facilitating."* [APP B 225-226]

In his submissions to the CCA on conviction appeal ground 3 the respondent departed significantly from the direction he had sought at his trial, as pointed out by McClellan CJ at CL at [64]-[68]. The matters of contention now seek to depart further from the application made to the learned trial judge.

42. A fundamental issue with respect to ground 3 is whether Latham J erred in failing to accede to the respondent's application to direct the jury in the terms he sought. The respondent was not granted leave by the CCA pursuant to rule 4 of the Criminal Appeal Rules to argue that Latham J had erred, not in failing to give the direction sought, but in failing either to re-formulate the direction or to formulate a direction not sought. The position is analogous to that discussed by McHugh J in *Papakosmas v R* (1999) 196 CLR 297 at [72] in that there is only an error of law if the trial judge erroneously declines to give directions in the terms sought by the applicant. The problem was succinctly addressed by Simpson J in *Vickers v R* [2006] NSWCCA 60 at [74] as to what would be an *"extraordinary"* burden cast upon a trial judge in the circumstances there discussed, which by analogy applies to the position confronting Latham J. In *Vickers* Simpson J also discussed the proviso under s.6 of the Criminal Appeal Act (NSW) 1912 at [104]-[115] in the context of *Weiss v R* (2005) 80 ALJR 442 at [42]-[43].

Benbrika

43. It is assumed that the respondent will seek to support his contentions by relying, inter alia, on the decision of the Victorian Court of Appeal ("the VCA") in *Benbrika & Ors v R* [2010] VSCA 281. There attention was directed to the meaning of the cognate expression *"connected with preparation for a terrorist act"* in s.101.4(1) of the Code. The learned trial judge in *Benbrika,* in directing the jury as to the elements of that offence, had addressed the meaning of the phrase *"connected with"*, but not as part of this cognate expression. On the other hand, Latham J in directing the jury as to the elements of the count 1 offence, did not limit the direction to the words *"connected with"* but addressed the meaning of the phrase *"connected with assistance in an action or threat of action"* in the context of the evidence.[9] This is a critical distinction.

44. The VCA in *Benbrika* at [323] held that the words *"connected with"* take their meaning according to the context in which they are used. The court rejected the proposition that there must be a *direct* connection with a terrorist act. At [315] the VCA addressed the process of determining whether the requisite connection exists as follows:

> *What will determine whether the requisite connection exists? It seems to us that, as a matter of ordinary language, a thing cannot be said to be 'connected with preparation for a terrorist act' unless:*
>
> *(a) a terrorist act is proposed or contemplated (whether or not a decision has been made as to what kind of terrorist act it will be);*
>
> *(b) some activity in preparation for that terrorist act is underway, or is proposed, or contemplated (whether or not a decision has been made as to what kind of activity it will be) ('preparatory activity'); and*
>
> *(c) the thing is being used, or is intended to be used, in aid of that preparatory activity.*

At [316] the court held the requirement that some preparatory activity be underway or in contemplation follows from the key words *'connected with preparation'*. This emphasises the significance of construing the cognate expression *'connected with preparation for a terrorist act'*.[10]

45. At [316] the court held that the *'connection'* which s.101.4(1) requires is not a property of the thing itself but a function of the intentional purpose which must be shown to have existed (at the time of possession), with respect to both the terrorist act and the use of the thing. The VCA disagreed, at [323]-[324], with the

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9 Latham J's directions are, relevantly, set out in McClellan CJ at CL's reasons at [65]: [APP B 225].

10 As expressly recognised by McClellan CJ at CL at [91] the question, relevant to count 1, was not whether the words *"connected with"* gave rise to ambiguity, but whether the words *"the document is connected with ... assistance in a terrorist act"* gave rise to ambiguity: [APP B 232].

English cases such as *R v Zafar* [2008] QB 810, undertaking a careful analysis of *Zafar* at [325]-[334] in doing so.

The approach of McClellan CJ at CL

46. His Honour summarised the respondent's arguments at [63]-[78] and the appellant's arguments at [79]-[85]. His Honour's remarks at [89] are especially pertinent, in particular as to why Part 5.3 of the Code is intended to operate expansively. At [98] his Honour identified a specific problem in *Benbrika* which is not present in this case. There the thing possessed was an inanimate object and Benbrika's possession of it may have been innocuous. The thing alone could not determine whether there was the relevant connection. For this reason the VCA said that before Benbrika could be found to have committed the offence charged there had to be a terrorist act for which preparatory activity was, at least, in contemplation; this highlighted the problem with the trial judge's direction in *Benbrika*. McClellan CJ at CL adopted as correct the statement of the VCA in *Benbrika* at [324] to the effect that the relevant question is not whether there is a *'direct'* connection between the thing and the act of preparation. [APP B 224-230] [APP B 231] [APP B 234] [APP B 234]

47. At [101] his Honour pointed out that the (count 1) charge confronting the respondent was making a *"document connected with assistance in a terrorist act."* The connection was found within the document itself which described methods of assassination, being terrorist acts, organisation of effective assassination teams and identified prospective targets for assassination. This was sufficient to identify the fact that the document itself described a variety of terrorist acts from which the jury could conclude that the document was connected with assistance in a terrorist act. Proof of a separate terrorist act was not required. His Honour found (correctly) that Latham J had appropriately confined the jury's deliberation to the issues raised at the trial and directed its attention to the content of the document which the respondent was proved to have created. As McClellan CJ at CL said, Latham J's direction was faithful to the words of the section and placed the words *"in connection with"* in their appropriate context. No gloss was placed on those words (contra *Benbrika*). [APP B 235]

The approach of Hall J

48. His Honour summarised the arguments of the parties (respondent: [308]-[317]; appellant: [318]-[328] before discussing *Benbrika* at [334]-[357]. At [362] Hall J found that s.101.5(1)(b) *"... presupposes that a terrorist act is in contemplation or that a decision has been made in favour of such an act or acts have been or will be taken by someone towards the commission of a terrorist act. Additionally, the appellant must have knowledge of one or more such acts. It is both the making of the document and the maker's knowledge of facts concerning a terrorist act or acts which is fundamental to the criminality of an offence under that provision."* At [364] his Honour left to one side for the purposes of consideration a document that explicitly refers to it having been made for the purpose of preparing for or assisting in a particular or proposed or contemplated terrorist act. His Honour plainly considered that the book was not such a [APP B 294-306] [APP B 308]

document. It is submitted that in this respect Hall J was in error.[11] Both McClellan CJ at CL and McCallum J correctly found that a jury was entitled to conclude to the requisite standard that the contents of the book sufficiently established a connection with a proposed or contemplated terrorist act: at [101] and [465]. [APP B 235 and 340]

49. At [361] Hall J stated that a document containing material indicating support for the concept of *"terrorism"* in a broad or unspecified way is not a document that is relevantly connected with a terrorist act (within the meaning of the Code), even if the book in question (or some parts of it) may be seen to be capable of being a source of inspiration or information to a *"would-be"* terrorist. His Honour clearly was of the view that the book falls into this category. It is submitted that in this respect Hall J was in error. In particular, there is no ambiguity in Chapter 10 in relation to the justification for assassination, the targets for assassination, the means of assassination and the duty of true Muslims to carry out acts of assassination in support of the Islamic religion. This is not, as Hall J concluded, *"... support for the concept of 'terrorism' in a broad or an unspecified way."* It is a call to terrorist arms knowingly made by the respondent, caused to be put up on a terrorist website by him, with his personal endorsement of the carrying out of any and all of the multiple acts of terrorism in Chapter 10 against specific targets by specific means as a religious duty.

50. At [369] Hall J set out six propositions elucidating his opinion as to the interpretation of s.101.5(1)(b), including the establishment of the requisite connection between making a document and assistance in a terrorist act if there is evidence that the document was made for the purpose of it being used in aid of the commission of (including the preparation for) a terrorist act. The effect of these propositions was crystallised by his Honour at [370]. Hall J found that Latham J's directions in relation to the meaning of the expression *"is connected with"* were erroneous in failing to provide information or guidance to the jury on the particular meaning attaching to the statutory formulation. There needed to be a direction that to establish the relevant connection, it was necessary that there be evidence, and that the jury was satisfied on that evidence, that the book was connected with assistance in a terrorist act that, at the time of making the book, was either proposed or contemplated or to an activity that was proposed, contemplated or was under way in relation to a terrorist act. [APP B 310-311]

51. It is submitted that his Honour's construction of the phrase *"is connected with"* in s.101.5(1)(b) should not be accepted and the separate but basically consistent opinions thereon of Latham J, McClellan CJ at CL and McCallum J should be preferred. Alternatively, should this Court finds that Hall J's interpretation is correct, it is submitted his Honour erred in failing to find that the content of the book of itself satisfied the tests propounded and that Latham J's directions

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[11] At [366] Hall J addressed the circumstance that where there is no explicit or sufficient evidence from the contents of the document of the requisite connection there must be evidence that satisfies the requirements referred to in *Benbrika:* [APP B 309].

previously referred to, especially those in paragraph (e)(i)-(v), were adequate to satisfy the relevant test.

The approach of McCallum J

52. At [451] her Honour, on ground 3, agreed with McClellan CJ at CL for reasons that differ slightly from those given by his Honour. Her Honour's starting point in considering the alleged misdirection with respect to the words *"connected with"* was to identify, at [454], the physical and fault elements in the s.101.5 offence. In this case there is no issue in relation to the *'default'* element of the physical element of the offence, namely that the respondent intended to make the book.[12] At [456] McCallum J identified the importance of the content of the elements of the offence being informed by the definition of terrorist act in s.100.1 of the Code i.e. an act done with certain specified intentions. However those intentions are not fault elements of the offence but rather they identify the character of the action that falls within (2) of the definition of terrorist act.[13] [APP B 335] [APP B 336]

53. At [460] McCallum J respectfully disagreed with the conclusion of the VCA in *Benbrika* at [315] as to the requirements necessary to be satisfied for a thing to be said to be connected with preparation for a terrorist act. It is submitted that her Honour's findings at [461]-[463] that, in effect, a document such as the book can be said to satisfy the requirement that it be *"connected with ... assistance in a terrorist act"* within the meaning of s.101.5 without requirements such as those identified in *Benbrika* being satisfied should be upheld by this Court. That is, *Benbrika*, properly understood, does not stand for the propositions identified by Hall J at [362]-[373] with respect to the 101.5 offence of *making* a document such as the book. [APP B 338] [APP B 338-339] and 308-312]

54. The VCA in *Benbrika* had no occasion to address the qualitative difference between mere possession of an inanimate object and the making of a document which, necessarily, is an act of a different character, investing the maker with knowledge of its content *at the time* it is made. On the facts of this case the book could not have been made without the respondent intentionally selecting its content, determining its compilation and formatting, and composing his words of personal endorsement. The respondent therefore knew both the content of the book at the time it was made and of its connection with assistance in a terrorist act. Evidence of what was done during the process of making the book can also be, and was, evidence of the respondent's knowledge of that connection.

55. Alternatively, should this Court decide that McCallum J's approach in disagreeing with the conclusion of the VCA in *Benbrika* as identified above was not open, it is submitted the Court will uphold McClellan CJ at CL's position that

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12 Intention being the *'default'* element pursuant to ss.5.1 and 5.6 of the Code as no fault element is specified in respect of the first physical element of the offence i.e. the making of the document.

13 Per Spigelman CJ (McClellan CJ at CL and Sully J agreeing) in *Lodhi v R* [2006] NSWCCA 121 at [80]-[91].

Benbrika is distinguishable from this case for the reasons previously submitted and therefore the grounds of contention should be dismissed.

Conclusion

56. McClellan CJ at CL was correct in finding, at [101], that the book itself described a variety of terrorist acts from which the jury could conclude that the document was connected with assistance in a terrorist act (proof of a specific act not being required). His Honour also correctly found that, having regard to Latham J's directions, they were acts contemplated by the respondent. His Honour's acceptance, at [102]-[104], of the correctness of Latham J's approach, in the context of the evidence, was appropriate [APP B 235-236]

57. In relation to all of the errors of the trial judge contended for, but particularly with respect to contention 4, it is submitted that Latham J's directions satisfied the requirements of proper directions as to the elements of the count 1 offence and, in their terms, encompassed a requirement for the jury to consider whether the commission of terrorist acts had in fact been in the contemplation of the respondent (whether by himself or others). This submission is supported by reference to paragraph 17 herein and the written and oral directions of the learned trial judge to the jury which, on its verdict on count 1, precludes the possibility that terrorist acts were not in the respondent's contemplation at the time he made the book.

Part VII: Applicable constitutional provisions, statutes and regulations

58. (i) There are no applicable constitutional provisions.

(ii) The applicable statutory provisions as they existed at the relevant time are sections 5.1, 5.6, 13.1, 13.3, 13.4, 100.1 (as to the meaning of *"terrorist act"*), 100.4, 101.4 and 101.5 of the Criminal Code Act 1995 (Cth). Copies of those provisions are attached as Annexure "A". Those provisions, relevantly, are still in force, in that form, at the date of making these submissions, save that by the Anti-Terrorism Act (No. 127/2005), Schedule 1, Item 3, subsection 101.5(3) was repealed and substituted by a new subsection 101.5(3) which took effect on 4 November 2005. A copy comprises the last page of the annexure. There are no relevant transitional provisions.

(iii) There are no applicable regulations.

Part VIII: Orders sought

59. (1) That the appeal be allowed.

(2) That the order of the court below quashing the respondent's conviction of the offence in count 1 in the indictment be set aside.

(3) That the respondent's conviction of the offence in count 1 in the indictment be restored.

(4) That the appellant pay the respondent's costs of the proceedings in this court.

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Dated: November 2011

ANNEXURE "A"

Section 5.1. Fault elements

Scope: 24 May 2001 current to 31 October 2011

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

Example: [repealed]

Section 5.6. Offences that do not specify fault elements

Scope: 24 November 2000 current to 31 October 2011

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Section 13.1. Legal burden of proof--prosecution

Scope: 1 January 1997 current to 31 October 2011

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Code:

legal burden, in relation to a matter, means the burden of proving the existence of the matter.

Section 13.3. Evidential burden of proof--defence

Scope: 1 January 1997 current to 31 October 2011

(1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(5) The question whether an evidential burden has been discharged is one of law.

(6) In this Code:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Section 13.4. Legal burden of proof--defence

Scope: 1 January 1997 current to 31 October 2011

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or

(b) the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

Section 13.5. Standard of proof--defence

Scope: 1 January 1997 current to 31 October 2011

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

Section 100.1. Definitions

Scope: 29 May 2003 to 14 December 2005

(1) In this Part:

Commonwealth place has the same meaning as in the Commonwealth Places (Application of Laws) Act 1970.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies

express amendment of the provisions of this Part or Chapter 2 means the direct amendment of the provisions (whether by the insertion, omission, repeal, substitution or relocation of words or matter).

funds means:

(a) property and assets of every kind, whether tangible or intangible, movable or immovable, however acquired; and

(b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such property or assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.

organisation means a body corporate or an unincorporated body, whether or not the body:

(a) is based outside Australia; or

(b) consists of persons who are not Australian citizens; or

(c) is part of a larger organisation.

referring State has the meaning given by section 100.2.

terrorist act means an action or threat of action where:

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

  (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

  (ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

  (i) an information system; or

  (ii) a telecommunications system; or

  (iii) a financial system; or

  (iv) a system used for the delivery of essential government services; or

  (v) a system used for, or by, an essential public utility; or

  (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and

(b) a reference to the public includes a reference to the public of a country other than Australia.

Criminal Code Act 1995 (No. 12) / The Criminal Code / Chapter 5 - The security of the Commonwealth / Part 5.3 - Terrorism / Division 100 - Preliminary / Section 100.4. Application of provisions (consolidated to: 2005-12-15)

Section 100.4. Application of provisions

Scope: 29 May 2003 current to 31 October 2011

(1) Part generally applies to all terrorist acts and preliminary acts
Subject to subsection (4), this Part applies to the following conduct:

(a) all actions or threats of action that constitute terrorist acts (no matter where the action occurs, the threat is made or the action, if carried out, would occur);

(b) all actions (preliminary acts) that relate to terrorist acts but do not themselves constitute terrorist acts (no matter where the preliminary acts occur and no matter where the terrorist acts to which they relate occur or would occur).

Note: See the following provisions:

(a) subsection 101.1(2);

(b) subsection 101.2(4);

(c) subsection 101.4(4);

(d) subsection 101.5(4);

(e) subsection 101.6(3);

(f) section 102.9.

(2) Operation in relation to terrorist acts and preliminary acts occurring in a State that is not a referring State
Subsections (4) and (5) apply to conduct if the conduct is itself a terrorist act and:

(a) the terrorist act consists of an action and the action occurs in a State that is not a referring State; or

(b) the terrorist act consists of a threat of action and the threat is made in a State that is not a referring State.

(3) Subsections (4) and (5) also apply to conduct if the conduct is a preliminary act that occurs in a State that is not a referring State and:

(a) the terrorist act to which the preliminary act relates consists of an action and the action occurs, or would occur, in a State that is not a referring State; or

(b) the terrorist act to which the preliminary act relates consists of a threat of action and the threat is made, or would be made, in a State that is not a referring State.

(4) Notwithstanding any other provision in this Part, this Part applies to the conduct only to the extent to which the Parliament has power to legislate in relation to:

(a) if the conduct is itself a terrorist act--the action or threat of action that constitutes the terrorist act; or

(b) if the conduct is a preliminary act--the action or threat of action that constitutes the terrorist act to which the preliminary act relates.

(5) Without limiting the generality of subsection (4), this Part applies to the action or threat of action if:

(a) the action affects, or if carried out would affect, the interests of:

(i) the Commonwealth; or

(ii) an authority of the Commonwealth; or

(iii) a constitutional corporation; or

(b) the threat is made to:

(i) the Commonwealth; or

(ii) an authority of the Commonwealth; or

(iii) a constitutional corporation; or

(c) the action is carried out by, or the threat is made by, a constitutional corporation; or

(d) the action takes place, or if carried out would take place, in a Commonwealth place; or

(e) the threat is made in a Commonwealth place; or

(f) the action involves, or if carried out would involve, the use of a postal service or other like service; or

(g) the threat is made using a postal or other like service; or

(h) the action involves, or if carried out would involve, the use of an electronic communication; or

(i) the threat is made using an electronic communication; or

(j) the action disrupts, or if carried out would disrupt, trade or commerce:

(i) between Australia and places outside Australia; or

(ii) among the States; or

(iii) within a Territory, between a State and a Territory or between 2 Territories; or

(k) the action disrupts, or if carried out would disrupt:

(i) banking (other than State banking not extending beyond the limits of the State concerned); or

(ii) insurance (other than State insurance not extending beyond the limits of the State concerned); or

(l) the action is, or if carried out would be, an action in relation to which the Commonwealth is obliged to create an offence under international law; or

(m) the threat is one in relation to which the Commonwealth is obliged to create an offence under international law.

(6) To avoid doubt, subsections (2) and (3) apply to a State that is not a referring State at a particular time even if no State is a referring State at that time.

Criminal Code Act 1995 (No. 12) / The Criminal Code / Chapter 5 - The security of the Commonwealth / Part 5.3 - Terrorism / Division 101 - Terrorism / Section 101.5. Collecting or making documents likely to facilitate terrorist acts (consolidated to: 2003-05-29)

Section 101.5. Collecting or making documents likely to facilitate terrorist acts

Scope: 29 May 2003 to 3 November 2005

(1) A person commits an offence if:

(a) the person collects or makes a document; and

(b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and

(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

PenaltyImprisonment for 15 years.

(2) A person commits an offence if:

(a) the person collects or makes a document; and

(b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and

(c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

PenaltyImprisonment for 10 years.

(3) A person commits an offence under subsection (1) or (2) even if the terrorist act does not occur.

(4) Section 15.4 (extended geographical jurisdiction--category D) applies to an offence against this section.

(5) Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

(6) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Section 101.5. Collecting or making documents likely to facilitate terrorist acts

Scope: 4 November 2005 current to 31 October 2011

(1) A person commits an offence if:

(a) the person collects or makes a document; and

(b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and

(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

PenaltyImprisonment for 15 years.

(2) A person commits an offence if:

(a) the person collects or makes a document; and

(b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and

(c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

PenaltyImprisonment for 10 years.

(3) A person commits an offence under subsection (1) or (2) even if:

(a) a terrorist act does not occur; or

(b) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or

(c) the document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

(4) Section 15.4 (extended geographical jurisdiction--category D) applies to an offence against this section.

(5) Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

(6) If, in a prosecution for an offence (the prosecuted offence) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the alternative offence) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.