

# Counter-Terrorism Legislation and Far-Right Terrorism in Australia and the United Kingdom

## *Abstract*

Over the past two decades, since the 9/11 terrorist attacks on the United States, a number of countries have enacted new laws tailored specifically to the threat posed by Islamic extremist terrorism. This includes recent legislation that has criminalised behaviour associated with ‘foreign terrorist fighters’, such as the act of travel to, or fighting in, foreign conflicts. This legislative response reflects the enactment of earlier laws, with measures designed for prior iterations of the contemporary Islamic extremist terrorist threat, such as control orders and preventative detention orders, prohibitions on extremist speech and disseminating terrorist propaganda, and the criminalisation of terrorist training. Yet despite the focus on Islamic extremist terrorism, this is not the only terrorist threat that Western democracies face. The rise of far-right terrorism in recent years has, however, not seen the same recourse to new legislation as has been the case for Islamic extremist terrorism. Using Australia and the UK as case studies, this article assesses the extent to which counter-terrorism legislation has been used to deal with the particular threat posed by far-right terrorism. In doing so, it evaluates the lessons that might be learned from applying counter-terrorism legislation designed for one particular terrorist threat to other types of terrorism.

## *Keywords*

Far-right terrorism; terrorism offences; proscription; foreign terrorist fighters

## *Introduction*

In recent years, both the Australian and UK governments have recognised the growing threat from terrorism motivated by far-right ideologies. This recognition has been accompanied by the caveat that Islamic extremist terrorism remains the greatest threat to the state. For example, in the UK’s most recent counter-terrorism strategy, published in 2018, the government acknowledged that ‘Extreme right-wing terrorism is a growing threat’. It also stated that ‘Islamist terrorism is the foremost terrorist threat to the UK.’<sup>1</sup> Similarly, in a public speech in February 2020, the Director-General of Security, the Head of the Australian Security Intelligence Organisation (ASIO), acknowledged that ‘In Australia, the extreme right-wing threat is real and it is growing’. In the same speech, he highlighted that ‘Violent Islamic extremism of the type embodied by the Islamic State and al’Qaida and their off-shoots will remain our principal concern.’<sup>2</sup> Despite the focus on Islamic extremist terrorism, the threat posed by the far-right should not be underestimated. Far-right terrorism shares many of the same characteristics as Islamic extremist terrorism. It is organised, many individuals subscribe to its violent ideology, it operates at a domestic level and is also transnational in scope, individuals travel to foreign conflict zones to engage in fighting and learn terrorist skills to use once they have returned home, and it is deadly. However, in contrast to the typical response to Islamic extremist terrorism – which has seen the enactment of new and increasingly innovative laws designed to fill ever smaller gaps in the legal regimes for countering terrorism<sup>3</sup> –

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<sup>1</sup> HM Government, ‘CONTEST: The United Kingdom’s Strategy for Countering Terrorism’ (Cm 9608, 2018), 8.

<sup>2</sup> Director-General of Security, ‘Director General’s Annual Threat Assessment’, (ASIO, 24 February 2020) <<https://www.asio.gov.au/director-generals-annual-threat-assessment.html>> accessed 27 March 2020.

<sup>3</sup> See: Jessie Blackbourn, Deniz Kayis, and Nicola McGarrity, *Anti-Terrorism Law and Foreign Terrorist Fighters* (Routledge, Abingdon 2018).

far-right terrorism does not seem to illicit similar reactions.<sup>4</sup> One explanation for this might be that far-right terrorism is just not afforded the same political attention as its Islamic extremist counterpart. An alternative reason might be a perception that terrorism motivated by a far-right ideology can already be managed within the state's existing framework of anti-terrorism laws and policies or through the ordinary criminal justice system.

This article tests the latter proposition; that existing counter-terrorism law and policy is appropriately tailored to far-right extremist terrorism. It focuses on Australia and the UK. Each jurisdiction has had significant experience of enacting laws in response to Islamic extremist terrorism over the past two decades. Moreover, the trajectories and content of the counter-terrorism regimes of the two countries are remarkably similar. This is in part because of a significant incidence of transplantation between Australia and the UK, with each state drawing inspiration from innovative measures in the other jurisdiction to enact new counter-terrorism laws in their own.<sup>5</sup> What they also share in common is that, with the exception of the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth) in Australia, new laws have typically not been created in response to the changing threat picture associated with far-right terrorism.

The article examines how Australian and UK counter-terrorism legislation has been used to address the activities of far-right terrorists and incidents of far-right terrorism, both on domestic soil and abroad, over the past five years. It focuses on three areas of the criminal justice system: individual offences and sentencing regimes, the proscription of terrorist organisations and group-based offences; and criminal measures aimed at foreign incursions and foreign terrorist fighters. The article draws on open source data on far-right terrorist plots, attacks, and prosecutions, predominantly from government sources where available. It focuses only on acts that have been defined as far-right terrorism by Australian and UK authorities. It excludes, for example, incidents that have been prosecuted under racial or religious hatred legislation, or other 'ordinary' criminal justice measures.<sup>6</sup> It therefore offers only a partial picture of the full range of actions that a state might take in relation to acts of far-right terrorism, but, importantly for this article, reveals the extent to which counter-terrorism measures enacted primarily in response to Islamic extremist terrorism, are used to address the activities of far-right terrorists and incidents of far-right terrorism.

### *Individual Offences and Sentencing Regimes*

Both Australia and the UK have enacted expansive criminal justice regimes in respect of terrorist activity, including significant powers for police investigations, a wide range of terrorism and inchoate offences, and provisions regarding terrorist sentencing. Whilst these have not been enacted specifically for the threat from far-right terrorism, they have been used to address such terrorism in each jurisdiction.

Australia has not experienced a completed far-right terrorist attack in the past five years, so no charges of 'engaging in a terrorist act' have been laid under section 101.1 of the

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<sup>4</sup> There is one possible exception to this rule. The Australian Federal Parliament enacted the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth) in April 2019 in response to the livestreaming of the Christchurch terrorist attacks.

<sup>5</sup> See, for example: Kent Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000', in Sujit Choudhury, *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge 2011).

<sup>6</sup> For a Canadian approach to definitions of far-right terrorism see: Mike Nesbitt, 'Violent Crime, Hate Speech, or Terrorism? How Canada Views and Prosecutes Far-Right Extremism (2001-2019)' in this issue.

Criminal Code,<sup>7</sup> however, that does not mean that there is no significant threat. The Director-General of Security has stated that: 'In suburbs around Australia, small cells regularly meet to salute Nazi flags, inspect weapons, train in combat and share their hateful ideology. These groups are more organised and security conscious than they were in previous years.'<sup>8</sup> Furthermore, at least two far-right terrorist plots have been disrupted by the police in Australia, leading to prosecutions.

The first of these was in 2016, when 'Operation Fortaleza', an investigation conducted by the Victorian Joint Counter Terrorism Team, disrupted a plot<sup>9</sup> by Philip Galea to attack what he referred to as 'left wing' targets, including Melbourne's Trades Hall.<sup>10</sup> In December 2019, Galea was found guilty of committing two terrorism offences: collecting or making documents likely to facilitate terrorist acts, under section 101.5 of the Criminal Code Act 1995 (Cth) (Criminal Code), and doing an act in preparation for, or planning, a terrorist act under section 101.6.<sup>11</sup> These offences were introduced into a new Part 5.3 of the Criminal Code by the Security Legislation Amendment (Terrorism) Act 2002 (Cth), which was enacted as part of Australia's implementation of Security Council Resolution 1373/2001 after the 9/11 terrorist attacks on the United States. Galea has not yet been sentenced for these offences, though the former carries a maximum penalty of 15 years imprisonment, and the latter, life imprisonment.

The second plot was disrupted in March 2020.<sup>12</sup> At that time, the Australian Federal Police (AFP) reported that a 21-year-old man 'was attempting and planning to purchase or acquire military equipment, including firearms, and items capable of making improvised explosive devices.'<sup>13</sup> A second man was arrested a week later in relation to the same plot.<sup>14</sup> Both men were charged with the offence of doing an act in preparation for, or planning, a terrorist act and are currently awaiting trial.<sup>15</sup> It is perhaps unsurprising that individuals engaged in far-right terrorist activity have been charged with the offence of doing an act in preparation for, or planning, a terrorist act under section 101.6 of the Criminal Code. It is the most prosecuted terrorism offence in Australia (though prior to Galea it had only been used in relation to Islamic extremist

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<sup>7</sup> This is not particularly surprising; since this offence was incorporated into the Criminal Code by the Security Legislation Amendment (Terrorism) Act 2002 (Cth), only five individuals have been convicted of the offence of engaging in a terrorist act: James Renwick, *Independent National Security Legislation Monitor Annual Report 2018-2019* (Commonwealth of Australia, 2019), 36-37.

<sup>8</sup> Director-General of Security (n 2).

<sup>9</sup> AFP, 'Victorian man arrested in JCTT operation' (8 August 2016) <<http://web.archive.org/web/20190510013525/https://www.afp.gov.au/news-media/media-releases/victorian-man-arrested-jctt-operation>> accessed 28 February 2020.

<sup>10</sup> Australian Associated Press, 'Far-right extremist Phillip Galea found guilty of plotting terror attacks in Melbourne' *The Guardian* (5 December 2019) <<https://www.theguardian.com/australia-news/2019/dec/05/far-right-extremist-phillip-galea-found-guilty-of-plotting-terror-attacks-in-melbourne>> accessed 27 March 2020.

<sup>11</sup> Australian Associate Press (n 11).

<sup>12</sup> AFP, 'NSW south coast man charged with terrorism offences' (16 March 2020) <<https://www.afp.gov.au/news-media/media-releases/nsw-south-coast-man-charged-terrorism-offences>> accessed 27 March 2020.

<sup>13</sup> AFP (n 14).

<sup>14</sup> Australian Associated Press, 'Second man charged with terrorism over alleged rightwing plot on NSW south coast' *The Guardian* (21 March 2020) <<https://www.theguardian.com/australia-news/2020/mar/21/second-man-charged-with-terrorism-over-alleged-rightwing-plot-on-nsw-south-coast>> accessed 11 August 2020.

<sup>15</sup> Australian Associated Press (n 15).

terrorism).<sup>16</sup> The offence has attracted criticism that it broadens the scope of ordinary inchoate liability and facilitates the prosecution of actions far removed from any commission of harm.<sup>17</sup> But it is these features that makes it a particularly useful offence for prosecutors in comparison to other terrorism offences in the Criminal Code.

In contrast to Australia, the UK has experienced a number of far-right terrorist attacks over the past five years, as well as other far-right activities and plots that have been disrupted by police.<sup>18</sup> A range of terrorism offences have been used to prosecute the alleged perpetrators. According to the UK government, as at 30 December 2019, 41 individuals were in custody for 'extreme right wing' terrorism-related offences in Great Britain, though this figure includes people on remand as well as those serving a custodial sentence.<sup>19</sup> This was an increase of 13 from the previous year.<sup>20</sup> Far-right terrorists make up 18 per cent of the total terrorist prisoner population in Great Britain,<sup>21</sup> with 77 per cent of terrorist offenders in custody for Islamic extremist offences, and 5 per cent of terrorist offenders categorised as 'other'.<sup>22</sup>

An example of the type of far-right offending that results in a prison sentence can be seen in the recent case of a 16-year-old boy from Durham, who was a self-described neo-Nazi. The head of Counter Terrorism Policing North East stated:

The extreme right wing views and hateful rhetoric displayed by this teenager are deeply concerning and we cannot account for those who may have been susceptible to his influence or how they may act in the future.

His extensive repetitious internet searches, diary entries and escalating behaviour combined with his desire for notoriety highlight how dangerous he could have become had he not come to the attention of the authorities.

Whilst no single target for an attack was identified the handwritten expression of his mind set combined with his aspiration to commit violence towards others cannot be underestimated and could not go unprosecuted.<sup>23</sup>

The teenager was found guilty at trial of four terrorism offences: disseminating terrorist publications, contrary to section 2 of the Terrorism Act 2006 (UK); possessing material

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<sup>16</sup> For a list of terrorism prosecutions from 2006 to 2019, see: Renwick (n 8), 25-37. Note that taken as a group of offences, there have been more prosecutions for the various foreign terrorist fighters offences included in Division 119 of the Criminal Code. However, the preparation of terrorism offence is the most frequently prosecuted individual offence.

<sup>17</sup> Bernadette McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 *UNSW Law Journal* 354.

<sup>18</sup> See: Beyond the fringe politics, 'Terrorism from the UK Extreme Right - A Chronology of the 21<sup>st</sup> Century' <<https://beyondthefringepolitics.com/2019/10/18/terror-from-the-uk-extreme-right-a-chronology-of-the-21st-century/>> accessed 28 February 2020.

<sup>19</sup> HM Government, 'Table P.01', Operation of Police Powers under the Terrorism Act 2000: quarterly update to December 2019: annual data tables (HM Government, 2020). Note that this figure may include persons convicted prior to the five-year range used in this article. It also excludes individuals serving prison sentences for terrorism offences in Northern Ireland.

<sup>20</sup> Home Office, 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search' (5 March 2020), 18.

<sup>21</sup> The statistics relate to Great Britain, not to the United Kingdom, so they do not include terrorist prisoners in Northern Ireland.

<sup>22</sup> HM Government, 'Table P.01' (n 20).

<sup>23</sup> Counter Terrorism Policing, 'Durham Teenager Sentenced for Terrorism Offences' (7 January 2020) <<https://www.counterterrorism.police.uk/durham-teenager-guilty-of-terrorism-offences/>> accessed 3 April 2020.

for terrorist purposes, contrary to section 57 of the Terrorism Act 2000 (UK); engaging in the preparation of an act of terrorism, contrary to section 5 of the Terrorism Act 2006 (UK); and three counts of collecting or making a record of information likely to be useful to a person committing or preparing an act of terrorism, contrary to section 58 of the Terrorism Act 2000 (UK).<sup>24</sup> The last two of these offences, along with the offence of encouraging terrorism contrary to section 1 of the Terrorism Act 2006 have been used significantly in relation to the activities of far-right terrorists over the past five years. The teenager was thereafter sentenced to a custodial term of six years and eight months, followed by five years on licence.

Since the offence of preparation of terrorism was enacted in 2006 it has been one of the most consistently used offences in the UK's counter-terrorism regime. This is in large part due to the combination of two factors. First, the low threshold for prosecution. A person commits an offence 'if, with the intention of (a) committing acts of terrorism, or (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention'.<sup>25</sup> Second, the lengthy maximum sentence for the offence, namely, life imprisonment. In the past five years, 77 individuals have been convicted of this offence.<sup>26</sup> Importantly, however, only four of those were motivated by a far-right ideology.<sup>27</sup> This includes Ethan Stables, who was found guilty of the offence in February 2018 and sentenced to an indefinite hospital order under section 37 of the Mental Health Act 1983 (UK). Stables had been planning to carry out an attack at a gay pride night at a local pub.<sup>28</sup> The three others received lengthy prison sentences. In 2018, Conor Ward was sentenced to a discretionary life term with a non-parole period of six years. According to the sentencing judge, he had 'formed an intention to attack a mosque or mosques in Aberdeen which would have involved the use of some form of IED probably containing ball bearings'.<sup>29</sup> In the same year, Peter Morgan received a sentence of 15 years, with the custodial part to be 12 years followed by three years on licence, for attempting to build an improvised explosive device.<sup>30</sup> In May 2019, Jack Renshaw was sentenced to life imprisonment with a minimum term of 20 years for the offence of preparation of terrorism and the attempted murder of a UK MP.<sup>31</sup>

In contrast to the limited use of the preparation offence in relation to the activities of far-right terrorists, the offence of collecting or making a record of information likely to be useful to a person committing or preparing an act of terrorism has been extensively used in this context. In addition to the Durham teenager discussed above, at least ten other individuals have been convicted of the offence in the past five years, which, as a result of amendments made in February 2019, now carries a maximum sentence of 15 years

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<sup>24</sup> Counter Terrorism Policing (n 24).

<sup>25</sup> Terrorism Act 2006 (UK) s 5(1).

<sup>26</sup> HM Government, 'Table A.08a', (n 20).

<sup>27</sup> See: Beyond the fringe politics (n 19).

<sup>28</sup> BBC, 'Ethan Stables sentenced over gay pride attack plot' (30 May 2018) <<https://www.bbc.co.uk/news/uk-england-cumbria-44299561>> accessed 6 April 2020.

<sup>29</sup> *HMA v Conor Ward* (12 April 2018) <<http://www.scotland-judiciary.org.uk/8/1955/HMA-v-Connor-Ward>> accessed 6 April 2020.

<sup>30</sup> *HMA v Peter Morgan* (16 August 2018) <<http://www.scotland-judiciary.org.uk/8/2031/HMA-v-Peter-Morgan>> accessed 3 April 2020. Morgan was also convicted of the offence of collecting or making a record of information likely to be useful to a person committing or preparing an act of terrorism in section 58 of the Terrorism Act 2000 (UK).

<sup>31</sup> *R v Jack Renshaw*, Sentencing remarks of Mrs Justice McGowan (17 May 2019), [5]; [30] <<https://www.judiciary.uk/wp-content/uploads/2019/05/r-v-renshaw-sentence17.5.19.pdf>> accessed 6 April 2020.

imprisonment.<sup>32</sup> The sentences handed down in relation to far-right terrorists range from two years<sup>33</sup> to the maximum of 15 years,<sup>34</sup> depending on individual circumstances and any other offences of which they are convicted. The majority of the sentences have been for three to five years.<sup>35</sup> A total of 45 individuals have been convicted of the offence in the past five years, including the 11 noted above for far-right terrorism.<sup>36</sup>

The final offence that has been used in respect of far-right terrorism is that of encouraging terrorism. This offence was enacted in response to the 2005 London bombings, but was rarely used in its first eight years. In the last five years, there has been a steady stream of prosecutions and convictions,<sup>37</sup> including four in respect of far-right terrorists.<sup>38</sup> As with the offence discussed in the previous paragraph, the maximum sentence was increased from seven to 15 years imprisonment in February 2019.<sup>39</sup> Of the four far-right extremists who have been convicted of the encouragement offence in the past five years, two have

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<sup>32</sup> Terrorism Act 2000 (UK), s 58(4)(a). Prior to February 2019, the maximum sentence was 10 years. The amendment was made by the Counter-Terrorism and Border Security Act 2019 (UK), s 7(3).

<sup>33</sup> For example, in June 2019 David Dudgeon pleaded guilty to the offence and was sentenced to two years imprisonment with a 12-month supervised release order: *David Dudgeon v HMA* [2020] HCJAC 6, [2]. Relevant circumstances included his plea and his mental health. In September 2019, Pawel Golaszewski was found guilty of six counts of the offence and sentenced to two years and two months imprisonment: Crown Prosecution Service, 'Security guard with DIY terrorism guides jailed' (20 September 2019) <<https://www.cps.gov.uk/cps/news/security-guard-diy-terrorism-guides-jailed>> accessed 3 April 2020.

<sup>34</sup> In August 2018, Peter Morgan was sentenced to a 12 year custodial period, followed by three years on licence for committing the offence under section 58 of the Terrorism Act 2000 (UK), as well as the offence of preparation for terrorism under section 5 of the Terrorism Act 2006 (UK), which has a maximum sentence of life imprisonment: *HMA v Peter Morgan* (n 31).

<sup>35</sup> In January 2019, Shane Fletcher was sentenced to three years imprisonment for the offence (though he was also sentenced to 13 years for incitement to murder): Crown Prosecution Service, 'The Counter-Terrorism Division of the Crown Prosecution Service (CPS) - Successful prosecutions since 2016', *CPS* <<https://www.cps.gov.uk/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>> accessed 28 February 2020. Steven Bishop received a four year prison sentence for the offence (and explosives offences) in April 2019: Vikram Dodd, 'Man jailed for four years over plot to bomb south London mosque' *The Guardian* (10 April 2019) <<https://www.theguardian.com/uk-news/2019/apr/10/man-jailed-four-years-plot-bomb-south-london-mosque>> accessed 3 April 2020. Jacek Tchorzewski also received a four year prison sentence, after pleading guilty of ten counts of the offence in June 2019: CPS, 'Teenage neo-Nazi jailed over "how to make guns" guides' (20 September 2019) <<https://www.cps.gov.uk/cps/news/teenage-neo-nazi-jailed-over-how-make-guns-guides>> accessed 3 April 2020. Michal Szewczuk, pleaded guilty to five counts of the offence, as well as two counts of encouraging terrorism under section 1 of the Terrorism Act 2006. He was sentenced to four years and three months in prison: Counter Terrorism Policing, 'Two sentenced in extreme right wing investigation' (18 June 2019): <<https://www.counterterrorism.police.uk/two-sentenced-in-xrw-investigation/>> accessed 3 April 2020. In July 2018, Jack Coulson was sentenced to four years and eight months: Counter Terrorism Policing, 'Jailed for possessing terrorist content' (19 July 2018) <<https://www.counterterrorism.police.uk/jailed-for-downloading-extremist-material/>> accessed 3 April 2020. In February 2017, Sean Creighton was sentenced to five years imprisonment for this offence as well as other racial hatred offences: BBC, 'White supremacist jailed for five years over hate crimes', (23 February 2017) <<https://www.bbc.co.uk/news/uk-39065496>> accessed 2 September 2020. Kieran Cleary was also sentenced to five years imprisonment for this offence and other explosives offences: Counter Terrorism Policing, 'Bradford teenager sentenced for explosives and terrorism offences' (20 September 2019) <<https://www.counterterrorism.police.uk/bradford-boy-sentenced-for-explosives-and-terrorism-offences/>> accessed 3 April 2020.

<sup>36</sup> HM Government, 'Table A.08a' (n 20).

<sup>37</sup> HM Government, 'Table A.08a' (n 20).

<sup>38</sup> See: Beyond the fringe politics (n 19).

<sup>39</sup> Terrorism Act 2006 (UK), s 1(7)(a), amended by Counter-Terrorism and Border Security Act 2019 (UK), s 7(6).

received prison sentences of four years,<sup>40</sup> one received a six year prison sentence,<sup>41</sup> and one was subject to an 18 month detention and training order (as he was under 18 when the offence took place).<sup>42</sup> Two of the individuals were convicted for encouraging copycat terrorist attacks following the Christchurch terrorist attacks in March 2019.<sup>43</sup>

In addition to the criminal offences that have been used in Australia and the UK in respect of far-right terrorists, counter-terrorism sentencing and post-sentence regimes have also been applied to those convicted of relevant offences. Unlike Australia,<sup>44</sup> the UK does not have an offence of engaging in a terrorist act. Individuals who complete terrorist attacks which result in death (other than the death of the perpetrator) are prosecuted as murder. However, under the Counter-Terrorism Act 2008 (UK), when considering what sentence to impose, the Court must treat any 'terrorist connection' as 'an aggravating factor'.<sup>45</sup> Two people have been murdered in far right terrorist attacks in the UK in the past five years: Labour Member of Parliament Jo Cox was shot and stabbed to death in 2016; and, in 2017, Makram Ali was killed and many others were injured when a man drove a vehicle into pedestrians outside a London mosque during Ramadan.<sup>46</sup> The perpetrators of the two attacks were prosecuted and found guilty of murder.<sup>47</sup> In each case, terrorism was found to be an aggravating factor relevant to the sentence to be imposed.<sup>48</sup> In addition to the two murders, a third man has been prosecuted for the offence of attempted murder after stabbing a man in an attack in which he aimed to kill Muslims. The attack took place the day after, and was inspired by, the Christchurch terrorist attacks in New Zealand.<sup>49</sup> He pleaded guilty to the offence, and terrorism was considered to be an aggravating factor at sentencing.<sup>50</sup>

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<sup>40</sup> Michal Szewczuk pleaded guilty to two counts of encouraging terrorism (as well as five counts of and five counts of collecting or making a record of information likely to be useful to a person committing or preparing an act of terrorism, contrary to section 58 of the Terrorism Act 2000 (UK). He received a sentence of four years in prison: Counter Terrorism Policing, 'Two sentenced in extreme right wing investigation' (n 36). Morgan Seales received a sentence of four years in prison in October 2019 for encouraging copycat terrorist attacks after the Christchurch attacks: BBC, 'Pair jailed for inciting copycat terror attacks' (23 October 2019) <<https://www.bbc.co.uk/news/uk-england-tyne-50161137>> accessed 3 April 2020.

<sup>41</sup> Gabriele Longo was convicted and sentenced to six years imprisonment for encouraging copycat terrorist attacks after the Christchurch attacks: BBC (n 41).

<sup>42</sup> Oskar Dunn-Koczorowski was made subject to 18 month detention and training order on conviction for two counts of encouraging terrorism as he was under 18 when the offence took place: BBC, 'Teenage neo-Nazis jailed over terror offences' (18 June 2019) <<https://www.bbc.co.uk/news/uk-48672929>> accessed 3 April 2020.

<sup>43</sup> Morgan Seales and Gabriele Longo were convicted for encouraging copycat terrorist attacks after the Christchurch attacks: BBC (n 41). See also: John Ip. 'Law's response to New Zealand's "darkest of days"' in this issue.

<sup>44</sup> Criminal Code Act 1995 (Cth), s 101.1.

<sup>45</sup> Counter-Terrorism Act 2008 (UK), s 30(4).

<sup>46</sup> Crown Prosecution Service (n 36).

<sup>47</sup> Crown Prosecution Service (n 36).

<sup>48</sup> The offence of murder has not only been used against far-right terrorists; it has also been used to prosecute Islamic extremist terrorists who have killed persons during the course of a terrorist attack, such as the two men who were convicted of the murder of Lee Rigby in 2013. *R v Michael Adebolajo and Michael Adebowale* Sentencing remarks of Mr Justice Sweeney (26 February 2014) <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/adebolajo-adebowale-sentencing-remarks.pdf>> [accessed 31 March 2020].

<sup>49</sup> 'Vincent Fuller: White supremacist car park stabbing 'terrorist act', *BBC* (10 September 2019) <<https://www.bbc.co.uk/news/uk-england-surrey-49652977>> [accessed 28 February 2020]. See also: Crown Prosecution Service (n 36).

<sup>50</sup> Crown Prosecution Service (n 36).

Both Australia and the UK also have measures in place to deal with persons who have reached, or are about to reach, the end of their sentence. In the UK, many of the individuals convicted of the offences listed above were also subject to notification requirements under Part 4 of the Counter-Terrorism Act 2008 (UK).<sup>51</sup> These apply to persons who have served a sentence for terrorism offences<sup>52</sup> or offences with a 'terrorist connection', that is, offences where terrorism is considered an aggravating factor at sentencing.<sup>53</sup> They oblige an individual to provide the police within three days of their release (and then periodically on an annual basis<sup>54</sup>) with several pieces of information, such as their date of birth, national insurance number, home address and contact details, and financial information.<sup>55</sup> Any changes to these details must be reported to the police.<sup>56</sup> Notification requirements last for up to 30 years, depending on the gravity of the original offence.<sup>57</sup> Individuals convicted of terrorism offences have also been subject to other forms of non-terrorism post-sentence restrictions.<sup>58</sup>

In Australia, the Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016 (Cth) created a new continuing detention order regime.<sup>59</sup> Part 105A of the Criminal Code provides for individuals who have been convicted of serious terrorism offences<sup>60</sup> to continue to be detained in custody at the end of their sentence for a further period of up to three years, though new orders can be made on a rolling basis.<sup>61</sup> Continuing detention orders have not yet been used against persons convicted of far-right terrorism offences as none have reached the end of their sentence.

A number of the Australian States have also enacted additional post-sentence regimes for high risk offenders in the form of extended supervision orders.<sup>62</sup> The latter enable an extended supervision order to be made against any offender on their release from prison into the community if the Supreme Court of the relevant state or territory 'is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious terrorism offence if not kept under supervision under the order'.<sup>63</sup> An extended supervision order imposes conditions on the individual, such as a requirement to report regularly to a corrective services officer, an obligation to reside at a particular address, restrictions on association and participation in certain activities, mandatory participation in treatment and rehabilitation programmes, and wearing electronic monitoring devices. It may last up to five years in the first instance and may be renewed. Importantly, it is not

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<sup>51</sup> For example, Shane Fletcher was subject to notification requirements for a ten-year period and Sean Creighton to a fifteen-year notification requirement period. See: Crown Prosecution Service (n 36). See also: *R v Jack Renshaw* (n 32), [5]; [30].

<sup>52</sup> Counter-Terrorism Act 2008, s 41.

<sup>53</sup> Counter-Terrorism Act 2008, s 42.

<sup>54</sup> Counter-Terrorism Act 2008, s 49.

<sup>55</sup> Counter-Terrorism Act 2008, s 47.

<sup>56</sup> Counter-Terrorism Act 2008, s 48.

<sup>57</sup> Counter-Terrorism Act 2008, s 53.

<sup>58</sup> For example, David Dudgeon received a two-year prison sentence plus a 12-month supervised release order: *David Dudgeon v HMA* [2020] HCJAC 6, [2].

<sup>59</sup> Criminal Code Act 1995 (Cth) Div 105A.

<sup>60</sup> Criminal Code Act 1995 (Cth) s 105A.3(1).

<sup>61</sup> Criminal Code Act 1995 (Cth) ss 105A.3(2); 105A.7(6).

<sup>62</sup> See: Tamara Tulich, 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38 *UNSW Law Journal* 824.

<sup>63</sup> See for example: Terrorism (High Risk Offenders) Act 2017 No 68 (NSW), s 20(d); Tamara Tulich, 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38 *UNSW Law Journal* 824.



necessary for the offender to be serving a sentence for *terrorist* offences; an extended supervision order in New South Wales, for example, may be made against anyone who constitutes an 'eligible offender', defined as an individual aged 18 or over who is 'serving ... a sentence of imprisonment for a NSW indictable offence'.<sup>64</sup>

In December 2018, Ricky White, a member of Right Wing Resistance in Australia, was the first far-right extremist to be placed under an extended supervision order by the Supreme Court of New South Wales. He had reached the end of a prison sentence for non-terrorist crimes, including church arson and anti-Semitic threats against the Jewish museum in Sydney. In approving the extended supervision order, the Supreme Court of New South Wales found that White posed 'an unacceptable risk of committing a serious terrorism offence, namely, an offence consistent with his previously held white supremacist views.'<sup>65</sup> The extended supervision order is due to expire at the end of 2020.<sup>66</sup>

### *Proscription of Terrorist Organisation and Group-Based Offences*

The banning of terrorist organisations, and the enactment of offences that flow from the activities of individuals linked to such organisations, have been longstanding aspects of both Australia and the UK's counter-terrorism regimes. In the UK, the power to proscribe organisations was first enacted in the Northern Ireland (Emergency Provisions) Act 1973.<sup>67</sup> The current regime is contained in Part 2 of the Terrorism Act 2000. The Secretary of State can proscribe 'an organisation if he believes that it is concerned in terrorism'.<sup>68</sup> Once an organisation has been proscribed, then a number of offences are engaged. These include membership of a proscribed organisation,<sup>69</sup> supporting a proscribed organisation,<sup>70</sup> and wearing the uniform of, or publishing images of items of clothing associated with, a proscribed organisation.<sup>71</sup> Until 2001, only Northern Irish terrorist organisations were proscribed under the Act. However, the 9/11 terrorist attacks prompted the proscription of a number of Islamic extremist and international terrorist organisations, including al-Qaeda and the Kurdistan Workers' Party (PKK). In late 2016, the Secretary of State for the Home Department proscribed the first far-right organisation: National Action.<sup>72</sup> Since then, proscription orders have been made in respect of five other far-right organisations. In September 2017, Scottish Dawn and NS131 (National Socialist Anti-Capitalist Action) were proscribed.<sup>73</sup> In early 2020, 'System Resistance Network' was listed as a pseudonym for National Action, meaning that any group using that name was also deemed to be a proscribed organisation,<sup>74</sup> and two other far-right organisations were also proscribed: Sonnenkrieg Division and Feuerkrieg Division.<sup>75</sup>

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<sup>64</sup> Terrorism (High Risk Offenders) Act 2017 No 68 (NSW), s 7.

<sup>65</sup> *State of New South Wales v White* (Final) [2018] NSWSC 1943 (14 December 2018), [163].

<sup>66</sup> *State of New South Wales v White* (Final) [2018] NSWSC 1943 (14 December 2018), [1].

<sup>67</sup> Northern Ireland (Emergency Provisions) Act 1973 (UK), s 19; Prevention of Terrorism (Temporary Provisions) Act 1974 (UK) s 1.

<sup>68</sup> Terrorism Act 2000 (UK), s 3(4).

<sup>69</sup> Terrorism Act 2000 (UK), s 11.

<sup>70</sup> Terrorism Act 2000 (UK), s 12.

<sup>71</sup> Terrorism Act 2000 (UK), s 13.

<sup>72</sup> UK SI 2016 No. 1238, The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2016.

<sup>73</sup> UK SI 2017 No. 944 The Proscribed Organisations (Name Change) (No. 2) Order 2017.

<sup>74</sup> UK SI 2020 No. 169, The Proscribed Organisations Name Change Order 2020.

<sup>75</sup> UK SI 2020 No. 200, The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2020.

Since National Action was proscribed in 2016, 15 individuals have been prosecuted for the offence of belonging to a far-right proscribed organisation. The offence carries a maximum punishment of ten years imprisonment<sup>76</sup> and, of the 15 convictions so far, one individual has been sentenced to three years imprisonment plus ten years on licence,<sup>77</sup> 10 individuals have been sentenced to custodial periods of between five and eight years,<sup>78</sup> and four individuals are still awaiting sentencing.<sup>79</sup> It is striking that members of far-right organisations have been prosecuted for proscription offences to a degree not used in relation to Islamic extremist terrorists. Only 16 persons were convicted of the offence of belonging to a proscribed organisation in the period from 2001 to 2008, and there were no convictions at all from 2009 to 2014. The number of convictions picked up somewhat in 2014, when the offence was used to prosecute those suspected of membership of Islamic State, however, of the 23 convictions in the past five years, 15 have related to National Action.<sup>80</sup> This possibly reflects similarities between the centralised structure and organisation of contemporary far-right and historical Northern Irish terrorist organisations in the UK, in comparison to the more dispersed organisation and structure of Islamic extremist organisations.<sup>81</sup> This suggests that even though proscription was not a particularly suitable tool against Islamic extremist terrorist organisations,<sup>82</sup> it might be

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<sup>76</sup> Terrorism Act 2000 (UK), s 11(3); UK SI 2020 No. 743 The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 2) Order 2020.

<sup>77</sup> Daniel Ward admitted membership of National Action in January 2019: BBC, 'Neo-Nazi Daniel Ward who called for race war jailed' (19 July 2019) <<https://www.bbc.co.uk/news/uk-england-birmingham-49051424>> accessed 6 April 2020.

<sup>78</sup> In March 2018, a former British soldier was found guilty of membership of National Action in the first trial of a far-right terrorist for proscription offences. Corporal Mikko Vehvilainen was sentenced to eight years imprisonment for the offence. A month later, A second man, Alexander Deakin, was also sentenced to eight years imprisonment: Haroon Sidique, 'British soldier recruited for far-right group while in army', *The Guardian* (12 November 2018) <<https://www.theguardian.com/uk-news/2018/nov/12/british-army-solider-recruited-far-right-group-national-action>> accessed 6 April 2020. In July 2018, Christopher Lythgoe, described as the leader of National Action, and Matthew Hankinson were found guilty of the offence and received sentences of eight and six years respectively: Home Office, 'Home Secretary statement on sentencing of Christopher Lythgoe and Matthew Hankinson' (18 July 2018) <<https://homeofficemedia.blog.gov.uk/2018/07/18/home-secretary-statement-on-sentencing-of-christopher-lythgoe-and-matthew-hankinson/>> accessed 6 April 2020. In December 2018, six persons were sentenced for the offence of belonging to a proscribed organisation: Adam Thomas was sentenced to six years and six months for membership of National Action, Claudia Patatas received a five year sentence, Daniel Bogunovic was sentenced to six years and four months, Darren Fletcher pleaded guilty and received a five year prison sentence, Nathan Pryke pleaded guilty and was sentenced to five years and five months, and Joel Wilmore pleaded guilty and received a sentence of five years and ten months: BBC, 'National Action trial: Members of new-Nazi group jailed' (18 december 2018) <<https://www.bbc.co.uk/news/uk-england-oxfordshire-46592080>> accessed 6 April 2020.

<sup>79</sup> These are: Alice Cutter, Mark Jones, Garry Jack, and Connor Scothern, who were convicted in March 2020: Crown Prosecution Service, 'Racist couple and two others guilty of banned hate group membership' (19 March 2020): <<https://www.cps.gov.uk/cps/news/racist-couple-and-two-others-guilty-banned-hate-group-membership>> [accessed 6 April 2020].

<sup>80</sup> HM Government, 'Table A.08a' (n 20).

<sup>81</sup> On the decentralised nature of al-Qaeda, for example, see: Jason Burke, *Al-Qaeda: The True Story of Radical Islam* (Penguin, London 2007). The number and variety of far-right organisations means there is no uniformity of organisational structure. However, the traditional perception that far-right terrorists are lone actors does not reveal the current picture of far-right organisations, particularly National Action in the UK. See: Graham Macklin, 'The Evolution of Extreme-Right Terrorism and Efforts to Counter it in the UK' (2019) 12(1) *CTC Sentinel* 15.

<sup>82</sup> Jessie Blackburn, 'The UK's Anti-Terrorism Laws: Does their Practical Use Correspond to Legislative Intention?' (2013) 8(1) *Journal of Policing, Intelligence and Counter Terrorism* 19.

useful in relation to potential future terrorist threats which emerge from organisations that are highly centralised and structured.

Australia has two distinct terrorist organisation listing regimes. The first gives effect to decisions made by the United Nations Security Council to list ‘persons, entities and assets’ associated with the Taliban, al-Qaeda and Islamic State under Chapter VII of the Charter of the United Nations.<sup>83</sup> It has not been used in relation to the far-right. The second is contained in Division 102 of the Criminal Code. The Governor-General may make a regulation specifying an organisation as a terrorist organisation, but only once the AFP Minister is satisfied ‘on reasonable grounds’ that the organisation:

- (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- (b) advocates the doing of a terrorist act.<sup>84</sup>

Once an organisation is specified in the regulations, a number of offences attach to it, including directing the activities of a terrorist organisation, membership of a terrorist organisation, recruiting for a terrorist organisation, and associating with a terrorist organisation, amongst others.<sup>85</sup> To date, no far-right groups have been specified as terrorist organisations through this route.<sup>86</sup> There have thus been no prosecutions. However, Australia’s proscription regime is more flexible than the UK’s. It also allows for individuals to be prosecuted for the terrorist organisation offences listed in Division 102 of the Criminal Code even if that organisation has not been formally specified under the regulations by the Governor-General.<sup>87</sup> Instead, the prosecution can adduce evidence that the organisation meets the definition of a terrorist organisation in section 102.1(1)(a) of the Criminal Code, namely, ‘an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’. If the jury finds this to be proved beyond reasonable doubt, then the terrorist organisation offences are engaged.<sup>88</sup> Whilst this presents an extra evidential hurdle that must be crossed by the prosecution, it enables prosecutions to be initiated for terrorism organisation offences in the absence of a formal listing as a terrorist organisation. It is surprising, given the flexibility in this regime, that no individuals have been prosecuted for terrorist organisation offences in Australia in respect of far-right groups. However, it is likely that this is because the breadth of the preparatory terrorism offence, discussed above, renders it unnecessary to deal with far-right terrorism in this way. It is much simpler to adduce evidence that an individual has done an act in preparation for a terrorist act, than to prove beyond reasonable doubt that the individual has committed one of the terrorism organisation offences, and that the relevant organisation concerned meets the definition of a terrorist organisation.

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<sup>83</sup> Charter of the United Nations Act 1945 (Cth) s 15, as amended by Suppression of the Financing of Terrorism Act 2002 (Cth). See also: Kent Roach, ‘Counter-Terrorism and the Challenges of Terrorism from the Far Right’ in this issue.

<sup>84</sup> Criminal Code Act 1995 (Cth), s 102.1(2).

<sup>85</sup> See Criminal Code Act 1995 (Cth) Division 102, Subdivision B.

<sup>86</sup> See; Australian Government, ‘Listed Terrorist Organisations’, *Australian National Security*: <<https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>> accessed 21 August 2020.

<sup>87</sup> See: Andrew Lynch, Nicola McGarrity and George Williams, ‘The proscription of terrorist organisations in Australia’ (2009) 37 *Federal Law Review* 1.

<sup>88</sup> See: Nicola McGarrity and George Williams, ‘The proscription of terrorist organisations in Australia’ (2018) 30 *Terrorism and Political Violence* 216, 224-226.

### *Criminal Measures Aimed at Foreign Incursions and Foreign Terrorist Fighters*

Though far-right terrorism is often considered to pose a peculiarly domestic threat, a number of far-right organisations operate at a transnational level.<sup>89</sup> This means that the various measures enacted over the past five years in respect of foreign terrorist fighters are relevant in relation to far-right organisations. Although these laws were tailored specifically to the threat of Islamic extremist foreign terrorist fighters – in particular those seeking to join Islamic State in Syria and Iraq – they might equally apply to individuals who have sought to engage in foreign terrorist fighting abroad with far-right organisations. In fact, it has been reported – though details are scant – that following a tip off from ASIO, Australian authorities have used their powers to prevent an individual from travelling abroad to ‘fight with an extreme right-wing group on a foreign battlefield’.<sup>90</sup> However, this is the only known example of Australia and the UK using their extensive foreign terrorist fighters regimes in response to far-right terrorism, despite a number of reports in both countries of individuals travelling to the Ukraine to participate in its conflict.

In April 2019, the Australian Broadcasting Corporation (ABC) reported that intelligence had been provided to the AFP that five Australian citizens had returned to Australia after fighting with a far-right extremist, Russian-backed separatist militia group in the Donbass region of Eastern Ukraine.<sup>91</sup> They are not the only Australians to have returned home from the Ukrainian conflict. In May 2018, the ABC reported that two other Australians – both former Australian Defence Force (ADF) personnel – had returned to Australia from the region.<sup>92</sup> They had been fighting on the other side of the conflict, namely, for far-right extremist pro-Ukrainian groups. None of these men was prosecuted, or subject to any other form of counter-terrorism action, upon their return.

This lack of action cannot be attributed to the absence of appropriate criminal justice measures. Between 2014 and 2019, the Australian Federal Parliament enacted more than 20 new counter-terrorism laws.<sup>93</sup> Many of these were designed specifically to deal with the foreign terrorist fighters phenomenon. This includes the Counter-Terrorism

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<sup>89</sup> See, for example: Daniel Baldino and Kosta Lucas, ‘Anti-government rage: understanding, identifying and responding to the sovereign citizen movement in Australia’ (2019) 14 *Journal of Policing, Intelligence and Counter Terrorism* 245. This is not a new development, but has been a characteristic of far-right terrorism for some time. See: Bruce Hoffman, *Right-wing terrorism in West Germany* (Santa Monica, CA: RAND Corporation, 1986).

<sup>90</sup> Andrew Greene, ‘Neo-Nazis among Australia’s most challenging security threats, ASIO boss Mike Burgess warns’, *ABC News Online* (24 February 2020): <<https://www.abc.net.au/news/2020-02-24/asio-director-general-mike-burgess-neo-nazi-threat-rising/11994178>> accessed 26 February 2020.

<sup>91</sup> Nino Bucci, ‘Five Australians free to return after fighting in Ukraine far-right ‘finishing school’ alongside Russian nationalist militia’, *ABC News online* (22 April 2019): <<https://www.abc.net.au/news/2019-04-23/five-australians-free-to-return-after-ukraine-conflict/11004438>> accessed 19 June 2019.

<sup>92</sup> Sean Rubinsztein-Dunlop, Suzanne Dredge, and Michael Workman, ‘From Neo-Nazi to militant: The foreign fighters in Ukraine who Australia’s laws won’t stop’, (*ABC News online*, 7 May 2018) <<https://www.abc.net.au/news/2018-05-01/foreign-fighters-return-to-australia-with-military-training/9696784>> accessed 19 June 2019.

<sup>93</sup> There is no single consolidated list of the relevant legislation. See: ‘Legislative Framework’, *Australian National Security Law* <<https://ausnatsec.wordpress.com/contact/>> accessed 28 February 2020; Independent National Security Legislation Monitor, *Annual Report 2016-2017* (Commonwealth of Australia, 2017), 16-19; Independent National Security Legislation Monitor, *Annual Report 2017-2018* (Commonwealth of Australia, 2018), 27-28; Independent National Security Legislation Monitor, *Annual Report 2018-2019* (Commonwealth of Australia, 2019), 21-23.

Legislation Amendment (Foreign Fighters) Act 2014 (Cth),<sup>94</sup> which updated the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) and incorporated it into Division 119 of the Criminal Code. Section 119.1 of the Criminal Code makes it a criminal offence, punishable by life imprisonment, for an Australian citizen or resident to enter 'a foreign country with the intention of engaging in a hostile activity in that or any other foreign country'.<sup>95</sup> To 'engage in hostile activity' has a very broad definition under the Criminal Code. It includes: conduct aimed at overthrowing a government by force or violence; the engagement in a terrorist act by that or any other person; intimidating the public or a section of the public; causing the death of, or bodily injury to, a head of state or a person who performs any of the duties of a public office; and, finally, unlawfully destroying or damaging any real or personal government property.<sup>96</sup> Whilst it might appear that the actions of the seven Australians participating in the conflict in the Ukraine would fall under s 119.1, they were not prosecuted.

Nor have they been prosecuted for any other offence. For example, section 119.2 of the Criminal Code makes it a criminal offence to enter into or remain in a declared area<sup>97</sup> – that is, an area that the Foreign Affairs Minister has declared on the grounds that 'she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country'.<sup>98</sup> Only two areas have been declared to date: al-Raqqa in Syria and Mosul in Iraq.<sup>99</sup> Both declarations have since been revoked by the Minister for Foreign Affairs; al-Raqqa with effect from 28 November 2017, and Mosul with effect from 19 December 2019.<sup>100</sup> No other areas have been declared and during the period that the two areas were declared, only one person was prosecuted for the offence of entering into or remaining in a declared area.<sup>101</sup> It appears, therefore, that engaging in far-right terrorist activity<sup>102</sup> in foreign conflicts outside of Syria and Iraq does not attract the same level of criminal sanction as those involving Islamic extremist terrorism.

In 2019, inspired by the Australian declared area offence, the UK Parliament enacted similar legislation which enables the Home Secretary to designate an area abroad. It is then an offence to enter into or remain in that area.<sup>103</sup> Parliament was informed that this was an urgent and necessary power to deal with foreign terrorist fighters. Whilst it was initially introduced amid concerns about individuals travelling to Syria and Iraq to join Islamic State, it could also be used in respect of areas of far-right terrorist activity abroad,

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<sup>94</sup> Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth), Sched 1.

<sup>95</sup> Criminal Code Act 1995 (Cth), s 119.1(1).

<sup>96</sup> Criminal Code Act 1995 (Cth), s 117.1.

<sup>97</sup> Criminal Code Act 1995 (Cth), s 119.2(1).

<sup>98</sup> Criminal Code Act 1995 (Cth), s 119.3(1).

<sup>99</sup> Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria; Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2015 – Mosul District, Ninewa Province, Iraq.

<sup>100</sup> Australian Government, 'Declared area offence', *Australian National Security* <<https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>> accessed 31 March 2020.

<sup>101</sup> Australian Federal Police and NSW Police Force, 'Sydney man charged over alleged foreign fighter links', (*Media release*, 19 December 2017).

<sup>102</sup> A 'terrorist act' is defined in Australian law as 'action or threat of action' that causes serious harm and is done 'with the intention of advancing a political, religious or ideological cause' and '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 'intimidating the public or a section of the public.' Criminal Code Act 1995 (Cth), s 100.1.

<sup>103</sup> Counter-Terrorism and Border Security Act 2019, s 4.

particularly those known to attract British foreign fighters, such as the Donbass region of the Ukraine.<sup>104</sup> However, it has not been used in this way and nor have any of the other measures enacted to deal with foreign terrorist fighters. For example, in 2015, the UK parliament enacted measures to prevent individuals suspected of attempting to travel abroad to engage in terrorism from leaving the UK,<sup>105</sup> as well as measures to control the return to the UK of individuals abroad who were suspected of being involved in terrorism-related activity.<sup>106</sup> There are no reports that these measures have been used in respect of far-right foreign terrorist fighters. The inevitable conclusion that must be reached is that these types of provisions do not appear to have been particularly useful in responding to far-right terrorism, either in Australia or the UK.

### *Lessons*

Over the past two decades, Australia and the UK have enacted a significant number of laws designed to deal with Islamic extremist terrorism. That threat did not remain static, and both countries enacted new laws as the threat changed over time. Legislation enacted shortly after 9/11 tended to focus on 'international', or 'foreign' terrorists, persons who represented an external threat to the state. Towards the end of the first decade of the twenty first century, the legislative focus shifted towards al-Qaeda inspired 'home grown' terrorism, that is, threats from internal sources. Following the emergence of Islamic State in early 2014, the focus shifted again, and legislation was created to deal with foreign terrorist fighters, whether they had already left the jurisdiction to fight with Islamic State, only sought to do so, or wanted to return. What these measures have in common is that the focus of Australia and the UK's counter-terrorism efforts in the twenty-first century has been on Islamic extremist terrorism with new laws and policies introduced to plug ever smaller gaps in each jurisdiction's counter-terrorism regimes.

What this article highlights is that the Australian and UK authorities have not adopted the same approach in respect of far-right terrorism, relying instead upon the prevailing counter-terrorism framework. The only exception appears to be the Australian Federal Parliament's enactment of the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth) in response to the livestreaming of the Christchurch terrorist attacks by the Australian perpetrator. However, in recent years, both Australia and the UK have successfully disrupted a number of far-right terrorism plots, and laws enacted to counter Islamic extremist terrorism have been used in respect of far-right terrorists. The survey contained in this article reveals that some measures have been more frequently used, and have proven to be more useful, than others. These are three broad lessons which can be drawn from this.

First, the criminal justice system in both Australia and the UK seems to be relatively well-adapted to dealing with the activities of far-right terrorists in some respects. There have been a significant number of prosecutions for inchoate offences, particularly in the UK. This is not surprising and mirrors the frequent use of the offences in respect of Islamic extremist terrorism. The inchoate offences have proven particularly useful because they are very widely drawn and capture a range of behaviours at the very early stages of any

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<sup>104</sup> See, for example: Tom Burrige, 'Ukraine conflict: the Brits fighting with pro-Russian rebels', (*BBC*, 19 October 2015) <<https://www.bbc.co.uk/news/world-europe-34568857>> accessed 24 August 2020; Emma Vardy, 'The Briton fighting "other peoples' wars"', (*BBC*, 29 April 2018) <<https://www.bbc.co.uk/news/uk-43899959>> accessed 24 August 2020.

<sup>105</sup> Counter-Terrorism and Security Act 2015, s 1.

<sup>106</sup> Counter-Terrorism and Security Act 2015, s 2.

terrorist plot. In the UK, for example, the offence of collecting or making a record of information 'of a kind likely to be useful to a person committing or preparing an act of terrorism' in section 58 of the Terrorism Act 2000 includes mere possession of a document containing information of that kind; there is no requirement for the individual themselves to have planned to use the information to commit an act of terrorism. Similarly, in Australia, an individual can be prosecuted under section 101.6 of the Criminal Code for the offence of doing 'any act in preparation for, or planning, a terrorist act' even if a terrorist act does not occur. The words 'any act' incorporate a wide range of behaviours, including those which would not constitute any level of harm. The types of activities that individuals prosecuted for far-right terrorism offences in Australia and the UK have engaged in do not differ significantly from those motivated by an Islamic extremist ideology. Where completed far-right terrorist attacks have taken place in the UK, the methods used by the perpetrators – vehicle attacks on pedestrians, stabbings and shootings – have been remarkably similar to those used by Islamic extremist terrorists. The Director-General of ASIO expects far-right terrorist attacks to take the same form in Australia: 'While we would expect any right wing extremist inspired attack in Australia to be low capability, i.e. a knife, gun or vehicle attack, more sophisticated attacks are possible.'<sup>107</sup> It is no surprise therefore that measures designed for use against acts of Islamic extremist terrorism also work in respect of far-right terrorism.

Second, the UK case study suggests that proscription of far-right terrorist organisations is a useful tool to counter far-right terrorism and can lead to a significant number of prosecutions (and convictions) for proscribed organisation offences. The fact that it has not been used at all in respect of far-right organisations in Australia (despite the existence of a number of far-right groups and the flexibility of Australia's terrorism organisation offences regime) raises a number of questions. In particular, whether there is a lack of political will to list far-right groups as terrorist organisations,<sup>108</sup> and the extent to which prosecutorial discretion plays a role in considering that some groups (those motivated by an Islamic extremist ideology) constitute a terrorist organisation for the purposes of the terrorist organisation offences in the Criminal Code, while others (those motivated by a far-right ideology) do not.

Finally, it seems that measures that were enacted during the foreign terrorist fighter era are not particularly suited to the threat posed by far-right terrorists who travel abroad to fight. Whilst one individual has recently been prevented from attempting to leave Australia to fight with one of these organisations, none of the individuals who have already returned from fighting with far-right terrorist organisations abroad have been prosecuted under Australia's foreign terrorist fighter laws. The absence of any counter-terrorist action on the part of the Australian authorities in respect of the Australians who returned from the Ukraine might, of course, be justified; the numbers of Australian foreign terrorist fighters who have returned from there pales in comparison to the number of Australians who are estimated to have travelled to Syria and Iraq to fight either for or against Islamic State.<sup>109</sup> However, the lack of action raises a number of significant

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<sup>107</sup> Director-General of Security (n 2).

<sup>108</sup> Jessie Smith, 'Australia recognises the threat posted by far-right groups. So, why aren't they listed on the terror register?' *The Conversation* (19 March 2020) <<https://theconversation.com/australia-recognises-the-threat-posted-by-far-right-groups-so-why-arent-they-listed-on-the-terror-register-134019>> accessed 25 August 2020.

<sup>109</sup> Approximately 220 Australians are estimated to have travelled to the region to engage in the conflict: Senate, 'Question on notice no. 68, Portfolio Question Number AE18-069', *2017-2018 Additional Estimates*.

concerns. One is that terrorist skills can be learned by foreign terrorist fighters from extreme far-right organisations in the Ukraine just as much as they can from jihadists in Islamic State. Furthermore, there is a significant risk that the skills that these foreign terrorist fighters return with might be shared with far-right organisations in Australia. For example, one of the Australians who returned from the Ukraine is a former member of Right Wing Resistance, a white supremacist group operating in Australia and New Zealand. Finally, far-right terrorism is no less deadly than Islamic extremist terrorism; the Australian who pleaded guilty to carrying out the Christchurch terrorist attacks in New Zealand, in which 51 Muslims were killed, is reported to have travelled to the Ukraine as part of his voyage of ideological discovery.<sup>110</sup> The fact that foreign terrorist fighter measures have not been used in Australia or the UK suggests that there may be some double standards in the application of laws to individuals depending on the type of extremist ideology involved.<sup>111</sup> However, the fact that the foreign terrorist fighter laws also have not seen significant use in respect of Islamic extremism (despite both the Australian and UK governments' claims that they were an essential and urgent addition to their counter-terrorism regimes) suggests that it might actually be that foreign terrorist fighter laws are not particularly useful at all. It possibly reveals more about the (f)utility of enacting very specific laws in relation to Islamic extremist foreign terrorist fighters, rather than about their suitability in other contexts, such as far-right terrorism.

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<sup>110</sup> Bucci (n 92).

<sup>111</sup> See: Kent Roach, 'Counter-Terrorism and the Challenges of Terrorism from the Far Right' in this issue.