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LAW REPORT OR LAW DIGEST PERMITTED.**

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CRI-2018-004-007098  
[2020] NZHC 1710**

**THE QUEEN**

v

**“S”**

Hearing: 9 July 2020  
Counsel: HDL Steele for Crown  
BL Sellars QC and SJ Bird for Defendant  
Judgment: 16 July 2020

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**JUDGMENT OF DOWNS J**

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*This judgment was delivered by me on 16 July 2020 at 11.00 am.*

*Registrar/Deputy Registrar*

Solicitors/Counsel:  
Crown Solicitor, Auckland.  
BL Sellars QC, Auckland.

## **Alleged terrorism?**

[1] S is charged with offences including possession of offensive weapons—a hunting knife and throwing star—and possession of objectionable publications. The latter include an Islamic State video on how to kill “non-Muslims”, in which a masked man cuts the throat and wrists of a restrained prisoner. The Crown alleges S sympathises with Islamic State, and this informs his possession of weapons. The Crown applies to add a charge under s 6A of the Terrorism Suppression Act 2002—the Act. The charge alleges S, on or about 9 August 2018, planned or otherwise prepared to cause death or serious bodily injury.

[2] S opposes the application. He contends the evidence does not sustain the charge and more fundamentally, no such offence exists under the Act.

## **Background**

[3] S is from Sri Lanka. He arrived in New Zealand 21 October 2011. S sought and was given refugee status.

[4] On 29 April and 25 May 2016, Police formally warned S about posting objectionable material on the web. The material was staunchly anti-Western and violent. It included videos and pictures of graphic violence, comments advocating violent extremism, and expressions of support for recent terrorist attacks by Islamic State.

[5] S did not desist. Using aliases, S continued to post similar material to the web. These included graphic images of executions, self-mutilation and torture. S also posted this comment:

One day I will go back to my country and I will find kiwi scums in my country (its very easy to find) and I will show them.. what will happen when you mess with [S] while I'm in their country. If you're tough in your country.. we are tougher in our country scums #payback.

[6] S's Facebook posts alluded to martyrdom. On 23 April 2017, S quoted an Islamic State lyricist:

I WILL FILL THE ENEMIES WITH STABBING AND CUT OFF THEIR HEADS VIOLENTLY

[7] S also told a worshipper at an Auckland Mosque he wanted to go to Syria “to fight for ISIS”.<sup>1</sup>

[8] On 19 May 2017, S booked flights for his family to Kuala Lumpur, and for himself to Singapore via Kuala Lumpur. All were for the next day. S’s ticket was one-way. Police arrested S at Auckland Airport on the evening of 20 May. He had a backpack of clothing, some medication, \$4,000 in cash, a wallet, keys and travel papers. S declined to provide Police the PIN for his mobile phone.<sup>2</sup> Police executed a search warrant at S’s apartment. They found:

- (a) A large hunting knife under a mattress on the floor. S said he got the knife to protect himself from someone entering the apartment and killing him.
- (b) Secure digital cards. These contained fundamentalist material, including propaganda videos, and photographs of S posing with a firearm and digital bookmarks to sales of firearms, crossbows, binoculars, military boots and a vest.

[9] S was remanded in custody. On 29 June 2018, he pleaded guilty to representative charges of knowingly distributing restricted publications.<sup>3</sup> Police withdrew an offensive weapon charge in relation to the knife.

[10] S was remanded on bail for sentence 7 August 2018. On that day, he searched the web for camouflaged trousers at Hallensteins, his own name, news stories about his offending and “ISIS allegiance”.

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<sup>1</sup> The witness said he did not know if S was planning anything in New Zealand, and S had not mentioned doing anything here if he could not go to Syria.

<sup>2</sup> S did not deny the posts. He said he wanted “to show others what was happening to Muslims throughout the world”.

<sup>3</sup> And other charges unrelated to this case.

[11] Wylie J imposed a sentence of supervision.<sup>4</sup> The offences before the Judge were not particularly serious, and S had earlier been in custody.

[12] On 8 August 2018, S bought the same model of hunting knife that Police had earlier found under his mattress. The knife had a camouflaged sheath. S paid cash. He told the vendor “he didn’t want to take the knife today as he is a dark person and people might think he is a bad person”. S arranged for the vendor to deliver the knife by courier.

[13] Police arrested S the next day (9 August). S declined to make a statement. He again declined to provide his phone’s PIN.

[14] Police executed a search warrant at S’s address. They found a throwing star and electronic devices. These devices revealed 5 August web searches for “Enemies of Allah”, “Target Shooter Manukau”, “Hunting Knife”, “Saber Stainless Steel Hunting Knife”, and “Islamic State Dress”; and the accessing of Islamic State hymns and videos on 5 August. Hymns included:

- (a) “Come on Immerse”, which features a person with a sniper rifle. The lyrics begin:

Come on immerse in the dark disbeliever troops,  
thrust your weapon in the heart of the criminal,  
roar with jihad like the wild lions,  
and storm them in the epic fighting,  
never their cunning can break our resolve,  
mother of disbelievers will cry in funeral,  
we will cut the necks striking by sword,  
and we will knock out eyes shooting by fire,  
come on immerse in the dark disbeliever troops,  
come on immerse,

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<sup>4</sup> *R v S* [2018] NZHC 2465.

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- (b) “My Ummah, Dawn Has Appeared”, the unofficial anthem of Islamic State. Lyrics include, “Islamic State has arisen by the blood of the righteous”; “Islamic State has arisen by the jihad of the pious”.
- (c) “What a Victory For He Who Got Shahada”. This objectionable publication features someone in a black balaclava with a machine gun, against the backdrop of the Islamic State flag. Lyrics exhort decapitation, tearing of flesh and dripping of blood.
- (d) “Flames of War”. This hymn refers to bloodletting and decapitation.

[15] Videos were:

- (a) “The Tent of Muslims”. This shows a dead man being dragged by his legs, a man holding a severed head (and laughing), beheaded corpses, and burned bodies. The Islamic State flag features prominently.
- (b) “Let’s Go For Jihad”. This shows executions and snipers shooting soldiers.

[16] The devices also revealed access to these and other hymns and videos between 5 and 9 August 2018:

- (a) “We Came to Fill Horror Everywhere”. This shows men in black with assault rifles, the Islamic State flag, and a city on fire. Lyrics include, “we ripped apart their hearts and veins” and “we will drink from the blood of disbelievers”. Establishment of Islam by force is exhorted. This video was accessed daily on 6, 7, 8 and 9 August.
- (b) “My Brother the Martyr”.

- (c) “Come on Immerse”, “Flames of War”, and “The Tent of Muslims” again (see [[14](a)], [[14](d)] and [[15](a)]).
- (d) An objectionable Islamic State video about how to kill “non-Muslims”, the video foreshadowed in the introduction to this judgment. Viewers are mentored about a desirable knife and vulnerable body parts. A masked man cuts the throat and wrists of a restrained prisoner. In another scene, a young man has a homemade bomb strapped to his back. The bomb is detonated, killing him. Men in military garb counsel revenge against the “kuffar”, a non-believer. The Islamic State flag appears throughout in the top right corner. This video was accessed 8 August, a little before midnight. The user bookmarked the video and “theync.com”, having searched for “Islamic State” on that website.
- (e) “How to Survive in the West: A Mujahid Guide”. This provides advice about concealing extremist identity, bomb-making, making other weapons, counter-surveillance, and other topics.
- (f) “Anwar al-Awlaki: ISIS Digital Caliph Preaching Beyond the Grave”. S had 44 lectures delivered by Mr al-Awlaki.

[17] S made two Facebook posts between 5 and 9 August. The first said, “Fight against the Allies of Satan. Indeed, the plot of Satan has ever been Weak. Quran 4:76”. Osama bin Laden quoted the same verse in justification of the attacks on 11 September 2001. The second said, “When you’re tired of this dunya [world] but not ready for akhirah [afterlife].

[18] On 9 August, S checked the track and trace number for his knife at 9.13, 10.11, 10.43 and 11.46 am, then 12.37, 1.21 and 3.44 pm. He was arrested at 4.40 pm.

## **A brief overview of the Act**

[19] The Act provides further New Zealand law to suppress terrorism, implements our international obligations under various conventions, and seeks to further implement the Al-Qaida and the Taliban Sanctions Resolutions.<sup>5</sup>

[20] The Act creates several offences. The relevant offence provision is s 6A, which reads:

### **6A Terrorist act**

- (1) A person commits an offence who engages in a terrorist act.
- (2) A person who commits a terrorist act is liable on conviction to imprisonment for life or a lesser term.

[21] This offence was not part of the original enactment. It was incorporated by s 6 of the Terrorism Suppression Amendment Act 2007. As will be apparent, s 6A does not define a terrorist act. This falls to s 5. Section 5 was part of the original enactment. It reads:

### **5 Terrorist act defined**

- (1) An act is a terrorist act for the purposes of this Act if—
  - (a) the act falls within subsection (2); or
  - (b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
  - (c) the act is a terrorist act in armed conflict (as defined in section 4(1)).
- (2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
  - (a) to induce terror in a civilian population; or
  - (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.
- (3) The outcomes referred to in subsection (2) are—
  - (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):

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<sup>5</sup> Section 3.

- (b) a serious risk to the health or safety of a population:
  - (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):
  - (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
  - (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.
- (4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.
- (5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—
- (a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or
  - (b) intends to cause an outcome specified in subsection (3).

[22] The Act empowers the Prime Minister to designate an entity as a terrorist entity.<sup>6</sup> Consequences follow; some criminal, others civil. For example, it is an offence to participate in a group or organisation constituting a terrorist entity.<sup>7</sup> It is also an offence to recruit a person as a member of a group or organisation that is a designated terrorist entity.<sup>8</sup> Both are punishable by up to 14 years' prison. A financial institution "in possession or immediate control of property" must report to the Commissioner of Police if it suspects a designated terrorist entity owns or controls the property.<sup>9</sup> Such property may be forfeited to the Crown.<sup>10</sup>

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<sup>6</sup> Sections 20–42.

<sup>7</sup> Section 13.

<sup>8</sup> Section 12.

<sup>9</sup> Section 43.

<sup>10</sup> Section 55.



[23] The Act contains a suite of sections—from 24 to 29A—under the heading, “Further provisions relating to interim and final designations”. One of these, s 25, reads:

**25 Carrying out and facilitating terrorist acts**

- (1) For the purposes of this Act, a terrorist act is carried out if any 1 or more of the following occurs:
  - (a) planning or other preparations to carry out the act, whether it is actually carried out or not:
  - (b) a credible threat to carry out the act, whether it is actually carried out or not:
  - (c) an attempt to carry out the act:
  - (d) the carrying out of the act.
- (2) For the purposes of this Act, a terrorist act is facilitated only if the facilitator knows that a terrorist act is facilitated, but this does not require that—
  - (a) the facilitator knows that any specific terrorist act is facilitated:
  - (b) any specific terrorist act was foreseen or planned at the time it was facilitated:
  - (c) any terrorist act was actually carried out.

As with s 5, s 25 was part of the original enactment.

[24] Section 4 is the interpretation section. Section 4(1) says “carried out, in relation to a terrorist act, has the meaning given to it in section 25(1)”, “unless the context otherwise requires”.

**The proposed charge and related arguments**

[25] The charge proposed by the Crown reads:

That S on or about 9 August 2018 at Auckland, engaged in a terrorist act [contrary to ss 3(a), 5(2), 6A and 25(1)(a) of the Act].

Particulars: Planning or otherwise preparing to cause the death of, or serious bodily injury to one or more persons.

[26] The charge presupposes planning or otherwise preparing to cause someone's death or serious bodily injury can constitute a terrorist act. On this analysis, the terrorist act in s 5(1)(a) comprises S's *planning or preparation* with the intention to cause the outcome specified in ss 5(2) and (3)(a)—“death of, or other serious bodily injury to, 1 or more persons” “in any 1 or more countries” (New Zealand)—with the purpose specified in s 5(2), the advancement of an ideological, political, or religious cause; and an intention specified in either ss 5(2)(a) or 5(2)(b): inducement of terror in a civilian population, or unduly compelling or forcing the government to do or abstain from doing any act.

[27] This frames the important question: can a terrorist act constitute planning or preparation (with the required intents and purpose)? Or, in terms of the specified offence in s 6A, does someone *engage* in a terrorist act if they plan or prepare to cause death or serious bodily injury in New Zealand (or elsewhere) to advance an ideological, political, or religious cause; intending to induce terror in a civilian population (or with the alternative statutory intention)?

[28] On behalf of the Crown, Mr Steele contends these questions should be answered yes. Mr Steele describes S's purchase of the knife on 8 August 2018 as the “triggering act”. Mr Steele argues surrounding evidence reveals S's intention to use the knife to attack someone. Mr Steele says the *contemplated* knife attack is a terrorist act within s 5, hence s 6A, because S's purchase of the knife constitutes planning or other preparations to carry out the attack. Mr Steele argues s 25(1)(a) deems a terrorist act to have been carried out when such planning or other preparations has occurred. Mr Steele then argues because the attack is *deemed to have occurred*, an inference can be drawn the attack was committed to advance an ideological, political or religious cause, with the intention to induce terror in a civilian population or alternative statutory intention.

[29] In short, Mr Steele contends s 25 deems a terrorist act to have occurred whether carried out or not, and this provision informs ss 5 and 6A, so that planning or preparation engages liability under s 6A providing S has the required intents and purpose. Mr Steele submits this interpretation is consistent with the Act's purpose—suppression of terrorism—without which the legislation would have a significant gap

in relation to a great evil. Mr Steele also submits this interpretation is consistent with “appropriately proactive policing” necessary to catch an individual who intends a “lone wolf” terrorist attack.

[30] On behalf of S, Ms Sellars QC contends the proposed charge does not disclose an offence. Ms Sellars says it is not an offence to plan or otherwise prepare to commit a terror act when such planning or preparation does not attract liability for a recognised inchoate offence, such as conspiracy to murder. Ms Sellars argues s 25 is confined to the designation of terrorist entities and does not inform ss 5 and 6A. Ms Sellars also argues the Crown’s proposed interpretation is circular and would abridge other provisions of the Act or make them superfluous. Ms Sellars contends legislative history affirms these arguments.

### **Analysis**

[31] Section 5 is complex. It creates three species of terrorist act: those meeting the requirements of s 5(2) and (3); those against a specified terrorism convention; and those in armed conflict. The proposed charge lies within the first species to which this judgment is confined.

[32] A terrorist act of the first species act must fall within subs (2). It does so if it is intended to cause in one or more countries, New Zealand included, one or more of the outcomes specified in subs (3). These include the death of or other serious bodily injury to one person or more, and the destruction of, or serious damage to, property of great value or importance. The act must be carried out for the purpose of advancing an ideological, political, or religious cause; and with an intention in subs (2). The subsection provides alternatives of inducing terror in a civilian population, or unduly compelling or forcing a government or international organisation to do or abstain from doing any act.

[33] An act in a situation of armed conflict is excluded as a terrorist act if subs (4) is engaged. And, by subs (5), any protest, advocacy, dissent, or so on by a person is not by itself a basis to infer that person is carrying out an act with the required purpose or intents.

[34] So, under s 5, there must be an act (or acts); the act must be intended to cause here or elsewhere at least one of the identified outcomes, for example, someone's death; the act must be carried out for the purpose of advancing an ideological, political, or religious cause; and the act must be accompanied by one of the specified intentions: inducing terror in a civilian population, or unduly compelling or forcing a government or international organisation to do or abstain from doing any act. An act within subs (4) is not a terrorist act. To this must be added the offence provision itself, s 6A, which requires the offender engage in a terrorist act.

[35] Mr Steele acknowledges S's acquisition of a knife against the backdrop outlined from [4] could not amount to a terrorist act under ss 5 and 6A unless s 25 has the effect the Crown contends for. I welcome the concession. It is responsible.

[36] The problems are obvious. Buying a knife—even one intended for use in a potentially fatal attack—is not an act intended to cause death or serious bodily injury; stabbing someone with that knife is. This highlights the *preparatory* nature of the act of acquisition which, like many other grim steps on the path to a terrorist killing, may occur days, weeks, months or even years earlier. There is a respectable argument the acquisition of a knife could be an act carried out for the purpose of advancing an ideological, political, or religious cause, but the same act does not readily admit an inference of an intention to induce terror in a civilian population. That inference would not typically arise until the knife was used in an attack, an attempted attack, or at least the threat of one. Again, this highlights the preparatory nature of the act in question.

[37] Section 5 contemplates an act (or acts) sufficiently proximate to an outcome in subs (3) to attract one of the remaining intents required by subs (2). To be clear, s 5 does not require a subs (3) outcome to have occurred for there to be a terrorist act. Subsection (2) refers to an act “*intended to cause ... 1 or more of the outcomes specified in subsection (3)*”, not to the outcome having occurred.<sup>11</sup> So, for example, death or bodily injury need not have occurred for there to be a terrorist act. That said, unless the act is proximate to an outcome in subs (3), the required intention to induce terror in a civilian population (or subs (2)(a) alternative) is unlikely to be inferable.

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<sup>11</sup> Emphasis added.

Moreover, preparatory acts early in the chain may not even disclose an intention to cause a subs (3) outcome.

[38] So, does s 25 affect ss 5 and 6A as the Crown argues? The answer is no for the reasons Ms Sellar identifies. These reduce to five.

[39] First, s 25 is part of a suite of sections under the heading, “Further provisions relating to interim and final designations”. An enactment’s headings and parts may inform its meaning.<sup>12</sup> As observed, the Prime Minister may designate an entity as a terrorist entity under this part of the Act. Section 25 allows the Prime Minister to do so even though the entity has not yet carried out a terrorist act, providing its conditions (and others) are met. There is good reason for this, and one specifically identified during the legislative history. Dr Lockwood Smith posed the Executive this question:<sup>13</sup>

But if the Prime Minister knew that an entity like al-Qaeda was about to carry out a terrorist attack, maybe it would make sense to freeze its assets immediately, and not wait until after it had carried out the act.

[40] The Minister of Foreign Affairs and Trade, Hon Phil Goff, replied:<sup>14</sup>

That’s covered under clause 17F [which became s 25]. If members turn to subclause 1 they will see that the definition includes: planning or other preparations to carry out the act.

[41] In other words, s 25 gives the terrorist entity designation process teeth by allowing a designation—hence execution of associated powers—before a terrorist act is committed.

[42] Second, if s 25 has the effect contended for, s 5 invites conjecture. The alleged facts provide an instructive example. As will be recalled, Mr Steele argues s 25(1)(a) deems a terrorist act to have been carried out when the planning or other preparations to which the provision refers has occurred. In this case, the deemed terrorist act is said to be a “knife attack”. Mr Steele argues the “knife attack” permits the inference it was

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<sup>12</sup> Interpretation Act 1999, ss 5(2) and 5(3).

<sup>13</sup> (8 October 2002) 603 NZPD 1105.

<sup>14</sup> (8 October 2002) 603 NZPD 1105.

committed to advance an ideological, political or religious cause, with the intention to induce terror in a civilian population or alternative statutory intention.

[43] How does one know what the “knife attack” involves? Is it, for example, an attack in broad daylight in a busy shopping centre, while the defendant repeatedly yells support for Islamic State? Or, an attack under cover of darkness with no witnesses, in which the defendant says nothing? The former would admit the required inferences. The latter may not. The example highlights a fundamental problem with the proposed interpretation. Conjecture is exhorted as the premise for criminal liability potentially punishable by life imprisonment.

[44] Third, if s 25 has the effect contended for, other provisions of the Act may be crowded out. Section 13A provides:

**13A Harbours or concealing terrorists**

- (1) A person commits an offence who, with the intention of assisting another person to avoid arrest, escape lawful custody, or avoid conviction, harbours or conceals that person,—
  - (a) knowing, or being reckless as to whether, that person intends to carry out a terrorist act; or
  - (b) knowing, or being reckless as to whether, that person has carried out a terrorist act.
- (2) A person who commits an offence against subsection (1) is liable on conviction to a term of imprisonment not exceeding 7 years.

[45] Section 13A contemplates an accomplice assisting the offender in two distinct situations: before the commission of a terrorist act (paragraph (a)), and afterwards (paragraph (b)). If s 25 operates as the Crown contends, it is not clear why section 13A would need to criminalise assistance before the commission of the terrorist act as s 25 would mean the act had been carried out “whether it is actually carried out or not”.

[46] Sections 8, 12 and 13 criminalise the financing of terrorism, recruitment of members of terrorist entities, and participation in terrorist entities. Each creates a maximum penalty of 14 years’ imprisonment. If s 25 operates as the Crown contends,

some of the conduct captured by these provisions would likely be captured by the offence in s 6A, and in turn, subject to its higher maximum penalty of life imprisonment.<sup>15</sup>

[47] Fourth, while the strict construction of offence provisions has softened over the last quarter century or so to a more purposive approach, the Crown's proposed interpretation borders the radical.<sup>16</sup> Unequivocal statutory language would be required to demonstrate this is what Parliament intended. The Crown responds s 4(1) is unequivocal, for, it provides, "carried out, in relation to a terrorist act, has the meaning given to it in s 25(1)". However, s 4(1) commences, "unless the context otherwise requires". Context requires otherwise, a view supported by legislative history. Section 25 was part of the original enactment. Section 6A, which creates the offence, was not.

[48] Fifth, other aspects of the legislative history tell against the Crown's construction. As observed, s 6A was enacted by the Terrorism Suppression Amendment Act 2007—the 2007 Act. The 2007 Act made changes to the terrorist entity designation regime, created new offences involving nuclear and radioactive material, and expanded the mental requirement for the offence of participating in a terrorist entity. The Hon Dr Michael Cullen introduced the related Bill to the House.<sup>17</sup> Dr Cullen said nothing about the creation of an offence involving a legal fiction. Nor did the Select Committee in its examination of the Bill. During the committee stage, Dr Wayne Mapp noted the New Zealand Law Society had commented on the Bill and said the offence provisions were "ordinary crimes".<sup>18</sup> Dr Mapp agreed but did not see this as a reason to remove the offences. This was because:<sup>19</sup>

It is right that we have a specific crime relating to committing a terrorist act. The reason it is right is that terrorism affects fundamentally the stability of society.

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<sup>15</sup> The point is indicative rather than decisive. Potentially overlapping criminal offences is not a novel phenomenon.

<sup>16</sup> See *Karpavicius v R* [2002] UKPC 59, [2004] 1 NZLR 156.

<sup>17</sup> (29 March 2007) 638 NZPD 8495.

<sup>18</sup> (6 November 2007) 643 NZPD 12793.

<sup>19</sup> (6 November 2007) 643 NZPD 12794.

[49] Mr Keith Locke, who followed Dr Mapp, said the existence of offences in the Crimes Act 1961 meant there was no need for the offence provisions:<sup>20</sup>

Wayne Mapp talked about whether there is a difference between criminal offences and terrorism offences when *they involve exactly the same activity of a criminal nature*. The only real difference between them, if the crime is exactly the same, is that one—the terrorism offence—has a higher penalty, and the only reason for that is the political, religious, or ideological motivation. People are not being punished additionally because of something they have done that is worse; they are being punished additionally because their motivation is political, religious, or ideological.

[50] In short, those who addressed the Bill (that became the 2007 Act) believed it did little new, let alone anything radical. Indeed, the Hon Mark Burton, when introducing the second reading, said “this Bill is not intended to substantially change the way the Terrorism Suppression Act operates; rather, the primary purpose of the Bill is to make the Act more workable and to update its provisions to reflect New Zealand’s international obligations”.<sup>21</sup>

[51] This brings me to s 25. Section 25(1) opens with the phrase, “For the purposes of this Act ...”. The phrase is not circumscribed, suggesting it applies to s 5(2). However, this would be at odds with the qualification in s 4(1). Moreover, as I have noted, s 25(1) was part of the original Act, and not modified by the 2007 Act. Neither was s 5. The new offence was created by adding s 6A. The phrase must be constrained given what I have said: a literal interpretation would be inconsistent with the scheme of the Act, cut across other (offence) provisions and result in an offence reliant on conjecture.

[52] I do not overlook the Crown’s other arguments. Terrorism *is* a great evil. “Lone wolf” terrorist attacks with knives and other makeshift weapons, such as cars or trucks, are far from unheard of. Recent events in Christchurch demonstrate New Zealand should not be complacent. Some among us are prepared to use lethal violence for ideological, political, or religious causes. The absence of an offence of planning or preparing a terrorist act (falling short of existing inchoate offences) could be an Achilles heel. The United Kingdom has an offence in relation to terrorist

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<sup>20</sup> (6 November 2007) 643 NZPD 12795.

<sup>21</sup> (24 October 2007) 643 NZPD 12670.



planning and preparation.<sup>22</sup> So too Australia.<sup>23</sup> Each is punishable by life imprisonment. However, it is not open to a Court to create an offence, whether in the guise of statutory construction or otherwise. The issue is for Parliament. So too the effect of the term “engages” in s 6A, one infrequently encountered in criminal law.

[53] I decline to evaluate the evidence in the event I am wrong for the reason identified at [36]. I cannot know what the deemed “knife attack” involves.

### **Result**

[54] The application to add a charge under the Act is dismissed.

[55] The Crown is to provide a copy of this judgment to the Attorney-General, Solicitor-General and Law Commission.

### **Addendum**

[56] I thank Mr Steele and Ms Sellars for their excellent submissions.

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**Downs J**

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<sup>22</sup> Terrorism Act 2006, s 5.

<sup>23</sup> Criminal Code Act 1995, s 101.6.