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Terrorism High Risk Offenders Law Alert

NSW GOVERNMENT | Crown Solicitor's Office

First contested terrorism intelligence application under the *Terrorism (High Risk Offenders) Act 2017*

State of New South Wales v Lawrence [2019] NSWSC 946 is the first decision to analyse, in detail, the terrorism intelligence provisions of the *Terrorism (High Risk Offenders) Act 2017* (*THRO Act*) and the first decision to consider the amended statutory scheme since it came into effect on 28 November 2018.

KEY POINTS

- The Court considered the construction of the definition of "terrorism intelligence" in s. 4 of the *THRO Act,* finding that it engages in a form of risk assessment when determining whether the disclosure of information could reasonably give rise to one of the consequences listed in the provision.
- The term "intelligence agencies" includes the NSW Police Force and Corrective Services NSW.
- The evidentiary and procedural approach taken in public interest immunity matters usefully informs the approach to be taken in a terrorism intelligence application.

BACKGROUND

The Act defines "terrorism intelligence" in s. 4 as:

> "information relating to actual or suspected terrorism activity (whether in the State or elsewhere) the disclosure of which could reasonably be expected:
>
> (a) to adversely affect the capacity of persons or bodies involved in the prevention of terrorist acts from preventing such acts or the capacity of intelligence agencies (for example, the Australian Security Intelligence Organisation) to carry out their functions, or
>
> (b) to prejudice criminal investigations or investigations by intelligence agencies, or
>
> (c) to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or the functions of intelligence agencies, or
>
> (d) to endanger a person's life or physical safety."

THE COURT'S DECISION

The Court found that intelligence is direct and indirect information that falls short of evidence, and it is not necessary for the information to relate directly to the eligible offender to fall within the definition.

Further, the words "relating to" in the definition should not be read narrowly and the words "could reasonably be expected" should be given their ordinary meaning; that is, requiring a judgement to be made as to whether "it is reasonable, as distinct from something that is irrational, absurd or ridiculous".

Johnson J found that the term "terrorism intelligence" means information relating to actual or suspected terrorism activity and that the holding of extremist views with violent intent may be accommodated readily within the words "information relating to actual or suspected terrorism activity".

The evidence relied on by the Attorney General in support of the application, being affidavits and confidential affidavits of an Assistant Commissioner of Police and an Assistant Commissioner of Corrective Services NSW, was challenged by the defendant as opinion or expert evidence. In rejecting the challenge, the Court held that the evidentiary and procedural approach taken was usefully informed by the approach taken in public interest immunity matters, whilst acknowledging the different nature of the terrorism intelligence application. The Court took into account the evidence, in which each deponent explained the nature and significance of documents that were the subject of the application, as well as the functioning of their agency and the intelligence gathering processes and investigative processes undertaken.

The Court was satisfied that an order should be made that would allow the defendant's legal representatives to view the information that was the subject of the application but not have a copy, and which would deny the defendant from having any form of access to the information.

CONTACTS

Lisa Turner, Principal Solicitor
lisa.turner@cso.nsw.gov.au
02 8224 5488

Matthew Ashworth, Senior Solicitor
matthew.ashworth@cso.nsw.gov.au
02 9224 5254