



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

NO A5 OF 2020

BETWEEN:

THE QUEEN

Appellant

AND:

ZAINAB ABDIRAHMAN-KHALIF

Respondent

SUBMISSIONS OF THE APPELLANT

PART I FORM OF SUBMISSIONS

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

PART II ISSUES PRESENTED BY THE APPEAL

2. This appeal raises a single issue. To prove that a person is intentionally a member of a terrorist organisation contrary to s 102.3 of the *Criminal Code*, must the prosecution adduce evidence of the process by which a terrorist organisation admits people to membership?

PART III SECTION 78B NOTICE

3. No notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

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PART IV REPORTS OF DECISIONS BELOW

4. The trial judge's sentencing remarks were given on 16 April 2019 and are unpublished. The judgment of the Court of Criminal Appeal of the Supreme Court of South Australia has not been reported. Its medium neutral citation is [2019] SASFC 133.

PART V FACTS

A. The respondent's alleged conduct

5. The respondent was born in Kenya on 1 January 1995.¹ She immigrated to Australia in 2009, acquired Australian citizenship on 6 May 2015, and resided in South Australia.² She identified as a Sunni Muslim.³
6. On 13 July 2016, the respondent booked a one-way ticket for travel from Adelaide to Istanbul, Turkey, departing the next day.⁴ She went to the airport with carry-on luggage only.⁵ She took with her a certificate of Australian citizenship, and insufficient funds to return to Australia.⁶
7. The respondent was detained prior to boarding her flight and her mobile phone was seized. Islamic State propaganda and other extremist material was found on her phone.

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¹ Exhibit P16 – Statement of Agreed Facts, [1] [BFMV1 468].

² Exhibit P16 – Statement of Agreed Facts, [1], [3]-[4] [BFMV1 468].

³ Exhibit P16 – Statement of Agreed Facts, [5] [BFMV1 468].

⁴ Exhibit P16 – Statement of Agreed Facts, [11] [BFMV1 469].

⁵ Exhibit P16 – Statement of Agreed Facts, [11] [BFMV1 469].

⁶ The respondent was carrying \$183 in cash and had \$14.38 in her bank account. The cash, and certificate of citizenship, were photographed by Australian Border Force officers (Exhibit P1).

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Investigators identified 1,614 image files, 379 audio files and 127 video files of interest.⁷

8. An image found on her phone depicted the respondent in Islamic dress with a right index finger raised, which is a gesture used by Islamic State members. At the time of her attempted travel to Turkey, the respondent had used the phone on a number of occasions to communicate with three Kenyan women who later, on 11 September 2016, committed a terrorist attack at Mombasa police station in the name of Islamic State, in which they were killed. Islamic State claimed responsibility for the attack.⁸ Her phone was returned, and the respondent used it to warn one of the Kenyan women not to contact her.
9. On 22 September 2016, a search warrant was executed at the respondent's home and investigators seized her mobile phone (for a second time) and a computer. Analysis of the seized devices revealed the respondent had downloaded more Islamic State material and extremist propaganda since the previous examination of her phone in July 2016. Analysis of the seized computer established that, at least between 21 July 2015 and 27 July 2015, the respondent had used another device to access blogs about Islamic State, hijrah (religious migration) and practical advice for women travelling to Islamic State controlled territory.⁹
10. A listening device was installed in the respondent's bedroom. The device captured the respondent listening to lectures and sermons containing extremist Islamic teachings, nasheeds¹⁰ (with which she sometimes sang along), and conversations in which she expressed views consistent with conservative extremist Salafist beliefs, and support for the Kenyan women who carried out the Mombasa attack. During one of the captured conversations, she said one of the Kenyan women had provided advice about "hiding the passport somewhere, checking things all the house, she gave me all ideas".¹¹ It also captured the respondent swearing a *bay'ah* (pledge of allegiance) to Abu Bakr al-Baghdadi, who was then the leader of Islamic State. The *bay'ah* was in these terms:¹²

We give our allegiance Sheik Abu Bakhar al Baghdadi to listen and to obey in good time and bad time, prosperous time, in time of hardship we apply altruism for him and we will not to try to take the authority from the leaders, unless we

⁷ Trial transcript, p 730 (Evidence of Detective Sgt Simon Warwick).

⁸ Exhibit P16A – Second Statement of Agreed Facts [BFMV1 473].

⁹ See Exhibits P9 and P11 [BFMV1 478 – 608].

¹⁰ A nasheed is a "[s]ong, chant, hymn, anthem": Exhibit P31 – Glossary of Arabic Terms [BFMV1 754]. More particularly, it is "a sung version of Arabic poetry" which Islamic State had "taken ... and turned it into another social media platform for them": Trial transcript, p 1005 lines 12-22 (Evidence of Dr Shanahan) [BFMV1 127].

¹¹ Exhibit P44 – Bundle of LD Material Transcripts, p 85 lines 86-89.

¹² Exhibit P44 – Bundle of LD Material Transcripts, p 36 lines 29-35.

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see a clear disbelieving from them, and we got a clear evidence from god. We give our allegiance to migration and jihad....The Islamic State is lasting, lasting...

B. The respondent's trial and conviction

11. **Charge.** On 23 May 2017, the respondent was arrested and ultimately charged with intentionally being a member of a terrorist organisation, namely Islamic State, between 14 July 2016 and 23 May 2017, contrary to s 102.3(1) of the *Criminal Code* (Cth).
12. **Islamic State as a terrorist organisation.** It was not in issue at trial that Islamic State was a terrorist organisation. There were agreed facts that:¹³

During the period encompassed by the charge 'Islamic State' was an organisation and a terrorist organisation. From approximately 2006 onwards, including in its predecessor organisations, it did, on an ongoing basis, directly and indirectly engage in preparing, planning, assisting in or fostering the doing of various terrorist acts.

During the period encompassed by the charge Islamic State was lawfully specified under the *Criminal Code (Terrorist Organisation – Islamic State) Regulation* 2014 as a terrorist organisation.

13. **The Crown case.** The Crown case was that the respondent had taken steps to become a member of Islamic State, and was thus a member by reason of paragraph (b) of the definition of "member" in s 102.1(1).¹⁴
14. The Crown provided six particulars of conduct that she was alleged to have engaged in as proof of her having taken steps to become a member of Islamic State:¹⁵

1. attempting to travel on a one way ticket to Istanbul, Turkey in order to engage with the terrorist organisation, Islamic State;
2. possessing and accessing material promoting Islamic State and violent jihad;
3. communicating with members of Islamic State;
4. pledging an oath of allegiance (*bay'ah*) to the leader of Islamic State, Abu-Bakr Al Baghdadi;
5. expressing support for Islamic State and violent jihad including by recitation of Islamic State and extremist Nasheeds; and
6. self-identification as a 'muwahideen', a term used as an identifier by Islamic State members.

15. The trial judge directed the jury that they could only find the respondent guilty if satisfied

¹³ Exhibit P16 – Statement Agreed Facts, [31]-[32] [BFMV1 471].

¹⁴ See, eg, Trial transcript, p 1245 line 32 – p 1247 line 33; p 1251 lines 20-27 (Crown Closing Address) [BFMV1 253, 259].

¹⁵ See Trial transcript, p 1254 line 2 – p 1255 line 5 (Crown Closing Address) [BFMV1 262-263]. See also Exhibit 71 (MFI), Jury Memorandum at p 4 [BFMV1 749].

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beyond reasonable doubt of the first particular.¹⁶

16. *Dr Shanahan’s expert evidence on Islamic State.* At trial, Dr Rodger Shanahan gave detailed expert evidence about Islamic State. He said that the group saw the world in conflictual terms: as divided between Islam and the enemies of Islam. According to the extreme Salafist ideology Islamic State followed, jihad against the enemies of Islam is an individual’s religious obligation.¹⁷ Dr Shanahan explained that Islamic State sought to impose its version of Sharia law on the territory it controlled, and to expand the writ of Islamic rule through offensive global jihad.¹⁸
17. He said that Islamic State “saw themselves as literally building a State, so a State in which Islamic law would prevail, but like any State you have to provide services, you have to have a population policy”.¹⁹ The Islamic State motto was “remaining and expanding”²⁰: “they wanted to control and administer this rump territory that they had won by force of arms and they wanted to expand it, expand it on the ground militarily but also expand it through achieving allegiance from groups in other countries”.²¹
18. Dr Shanahan explained that Islamic State sought to “call Muslims from outside those areas to come to the areas they controlled to build that Islamic State. So they wanted engineers to come, they wanted doctors to come, they wanted fighters to come, they wanted people to come, women to come, everybody to come to build this State”.²² Islamic State described migration to Islamic State for both men and women as a religious duty.²³ It paid wages to the fighters, and was reported to pay wages to the widows of fighters.²⁴
19. As to women, Dr Shanahan explained:²⁵

Women were to fulfil several roles. To look after jihadis is very - as I said, Salafists, literalists and traditionalists, so it was a literalist and traditional way of viewing the role of women, it was to provide support to her husband. It was to provide support to the jihadis, it was to produce children and to raise children in the appropriate Islamic way as leader of that household.

¹⁶ Exhibit 71 (MFI), Jury Memorandum at p 5 [BFMV1 750].

¹⁷ Trial transcript, p 1016 line 16 – 1017 line 1, p 1043 lines 3-10 [BFMV1 138; 160].

¹⁸ Trial transcript, p 996 [BFMV1 118].

¹⁹ Trial transcript, p 994 lines 15-21. See also Trial transcript, p 1041 lines 10-20 [BFMV1 116; 158].

²⁰ Or “*baqiyyah wa Tatamaddad*”: Trial transcript, p 995 lines 17-24, 37-38; p 1015 lines 4-14 [BFMV1 117; 137].

²¹ Trial transcript, p 995 lines 19-23 [BFMV1 117].

²² Trial transcript, p 994 lines 23-28 [BFMV1 116].

²³ Trial transcript, p 1053 lines 35-37 [BFMV1 170].

²⁴ Trial transcript, p 1001 lines 26-27 [BFMV1 123].

²⁵ Trial transcript, p 1008 lines 29-36 [BFMV1 130].

20. He said that “if you're trying to produce the ideal Islamic society, you also want the ideal Islamic woman as well, so somebody who is ideologically attuned to creating the Islamic State”.²⁶ There were “online recruiters for other women to travel to Islamic State held territory”.²⁷ Dr Shanahan explained the role of children in Islamic State as follows:²⁸

this use of children is something that we see not irregularly in Islamic State imagery and it goes back to that notion of you're building a State so one of the ways you build a State is indoctrinate your youth in building the State so the next generation of members of Islamic State or residents of Islamic State territory are there and that's what it's trying to show and that's that - you know, goes back to that motto 'Remaining and expanding'. If you've got children as part of your organisation, you're looking at generations of Islamic State not just the here and now.

10 21. Dr Shanahan explained that there was no template for the pledge of allegiance (*bay'ah*) of the kind the respondent recited, and it is “an individualised oath”.²⁹ He said that its effect was to undertake to follow the directions of the person to whom it is given.³⁰ Islamic State had asked for the pledge to be given to Abu Bakr al-Baghdadi.³¹

22. Dr Shanahan also gave evidence about the concept “muwahideen”. He explained that “what's central to Islam in general, and Salafists in particular, is the notion of tawheed, so the unity of God”.³² He went on to explain that “Muwahideen are people who follow the notion of tawheed. Though it is not a very common term, Islamic State in particular refer to themselves often as muwahideen.³³ The “one finger salute” with the “right index finger” upwards is imagery for identifying as a muwahideen and asserting the tawheed.³⁴

20 23. Dr Shanahan said Islamic State used social media to communicate with its followers.³⁵ There was evidence that the respondent used the Telegram app.³⁶ Dr Shanahan explained that the Telegram app was “often used by Islamic State”,³⁷ including as one means of Islamic State claiming responsibility for attacks.³⁸ Telegram became a format for communication with members of Islamic State.³⁹ In relation to nasheeds, while they have

²⁶ Trial transcript, p 1009 lines 3-7 [BFMV1 131].

²⁷ Trial transcript, p 1009 lines 17-18 [BFMV1 131].

²⁸ Trial transcript, p 1023 lines 3-14 [BFMV1 145].

²⁹ Trial transcript, p 1003 lines 14-16 [BFMV1 125].

³⁰ Trial transcript, p 1004 line 5 and p 1054 lines 2-5 [BFMV1 126; 171].

³¹ Trial transcript, p 1002 lines 12-19 [BFMV1 124].

³² Trial transcript, p 1015 lines 19-21 [BFMV1 137].

³³ Trial transcript, p 1015 lines 30-33 [BFMV1 137].

30 ³⁴ Trial transcript, p 1016 lines 1-8 [BFMV1 138].

³⁵ Trial transcript, p 997 lines 29-37 [BFMV1 119].

³⁶ See Exhibit P16 – Statement of Agreed Facts, [17]-[21] [BFMV1 469-470].

³⁷ Trial transcript, p 1012 lines 10-11 [BFMV1 134].

³⁸ Trial transcript, p 1012 lines 27-28 [BFMV1 134]. See also Trial transcript, p 1065 lines 4-15 [BFMV1 182].

³⁹ Trial transcript, p 1065 lines 12-15 [BFMV1 182].

“a traditional function”,⁴⁰ Dr Shanahan explained that “[w]hat Islamic State has done has taken that form and turned it into another social media platform for them.”⁴¹

24. ***Extremist material in the respondent’s possession.*** Of the video files found on the respondent’s phone, 62 found in the Telegram file directory were the subject of a representative sample produced by investigators, played and tendered at trial.⁴² The sample videos (which formed the tendered compilation video) consisted of Islamic State propaganda, which contained exhortations to join its jihad, and to migrate to Islamic State. They depicted extreme violence, including numerous executions.⁴³ The 62 videos were each included within the Chronology document provided to the jury.⁴⁴ Two representative samples of image files stored in the Telegram file directory of the respondent’s phone were also produced and tendered at trial. The first representative sample included images located by investigators when the device was first seized in July 2016 and the second representative sample included images located following the September 2016 seizure.⁴⁵ These representative samples consisted largely of Islamic State and other jihadist propaganda.⁴⁶
25. There was evidence that the respondent was involved in chat groups, called “Baqiyaa sisters” and “Naughty sisters”, with the three Kenyan women who were later killed carrying out the Mombasa attack for which Islamic State claimed responsibility.⁴⁷ In these chats, the respondent used an image of an assault rifle nestled in flowers resting against a tiled concrete structure as her profile picture.⁴⁸ Dr Shanahan said: “the use of Baqiyaa and sisters I would take to mean - sisters or sisterhood I would take to mean a kind of collective noun for women who are supporters or members of Islamic State”.⁴⁹
26. ***Records of interview.*** Evidence was led of three recorded interviews with the respondent: on 14 July 2016 (following her unsuccessful attempt to travel), 22 September 2016 (following the execution of the search warrant at her home address) and on 23 May 2017

⁴⁰ Trial transcript, p 1005 line 18 [BFMV1 127].

⁴¹ Trial transcript, p 1005 lines 20-22 [BFMV1 127].

⁴² Exhibit P15 (trial transcript p 735) [BFMV2 3].

⁴³ Depictions of the executions were replaced with descriptive text in the compilation video tendered.

⁴⁴ Exhibit P70 (MFI) [BFMV1 729-744].

⁴⁵ Exhibits P14 (July 2016 Bundle) [BFMV2 4-169].and P33 (September 2016 Bundle) [BFMV2 170] respectively.

⁴⁶ Exhibit P14 [BFMV2 4-169], trial transcript p 731.

⁴⁷ See Exhibit P16A – Statement of Agreed Facts [BFMV1 473-474].

⁴⁸ See Exhibit P14, images 11 and 13 [BFMV2 29; 31]. See Trial transcript, p 1304 [BFMV1 311].

⁴⁹ Trial transcript, p 1028 lines 24-27 [BFMV1 150].

(following her arrest). In her first interview, she said she was going to Turkey for a holiday and possibly to do aid work, but that she “wasn’t planning to go like into Syria”.⁵⁰ In her second interview, she confirmed that she had Arabic language skills,⁵¹ and answered questions about a document seized from her with the handwritten words “Syria” and “I love you”⁵² In her third interview, she was asked about various files found on her seized devices, and her use of certain apps.⁵³ She denied attempting to travel to join Islamic State, supporting it, or believing in its version of Islam.⁵⁴

27. The jury returned a unanimous verdict of guilt [**CAB 139-140, 196**].

C. The respondent’s appeal to the Court of Criminal Appeal

10 28. The respondent appealed against her conviction. One of her appeal grounds was that the verdict was unreasonable and could not be supported having regard to the evidence. A majority (Kourakis CJ and Parker J) upheld this ground, even though their Honours accepted that the evidence at trial “was capable of supporting an inference that the [respondent] was a supporter of Islamic State, its extremist ideology and its terrorist activities” and that “she intended to travel to Turkey to make contact with members or supporters of Islamic State in Turkey, with the intention of travelling into the areas of Syria, Iraq and Turkey controlled by it for the purposes of either providing medical assistance to fighters and others or to marry an Islamic State fighter” [**CAB 217 [8], 274 [240]**]. Parker J had “no doubt whatsoever that the evidence was more than sufficient to permit the jury to conclude that the appellant firmly supported IS and was strongly committed to its cause” [**CAB 280 [271]**].

20 29. **Kourakis CJ.** Kourakis CJ, with whose reasons Parker J generally agreed [**CAB 274 [238]**], delivered the leading judgment. The Chief Justice said that what was lacking from the Crown case was evidence about Islamic State’s “organisational structure”, membership and “decision-making processes or command structure” [**CAB 217 [9]**]. There was no evidence about “how members, other than fighters, participated in the organisation” and “how members were recruited or selected, or of any process by which they were inducted and finally accepted into its organisation” [**CAB 217 [9]**].

30 30. Such evidence was said to be necessary to “evaluate any connection” between the

⁵⁰ Exhibit P8 (MFI) – Transcript ROI (14 July 2016) Q85 – Q110, Q199, Q205 [**BFMV1 648-650; 657**]; Exhibit P7.

⁵¹ Exhibit P37 (MFI) – 22 September 2016 ROI, Q54-Q66 [**BFMV1 678-679**]; Exhibit P36.

⁵² Exhibit P37 (MFI) – 22 September 2016 ROI, Q24, Q35 [**BFMV1 675-676**]; Exhibit P36.

⁵³ See Exhibit P50 (MFI) – 8 Feb 2017 ROI [**BFMV1 683-728**]; Exhibit P49.

⁵⁴ Exhibit P50 (MFI), Q128, Q290, Q510-512 [**BFMV1 694; 708; 728**]; Exhibit P49.

particularised conduct and “formal or informal membership of Islamic State” [CAB 217-218 [10]]. Kourakis CJ said that the prosecution had failed to proffer any evidence of the “clear criteria” required to identify members of Islamic State [CAB 218 [13], 239 [86]]. Another reason his Honour gave for requiring evidence of a process by which members were admitted to Islamic State was that “the very notion of a step” in the extended definition of “member” in s 102.1 “implies a membership process. That process can only be determined by the organisation – not by its prospective members” [CAB 220 [20]]. The Chief Justice added that determining whether a person has embarked on a process towards membership required something to be “known about the organisation’s rules, formal or informal, or at least its common practices” [CAB 220 [21]].

- 10 31. His Honour accepted that membership is to be determined as a matter of substance, but held that this required an evaluation of “the extent and nature of the person’s participation in the *governance of the organisation* and in the execution of its decisions” (emphasis added) [CAB 223 [32]]. On this reasoning, a supporter cannot become a member until they are accepted as one, and commit to *participating in*, and executing, the organisation’s decisions, in accordance with its rules [CAB 223-224 [34]] (emphasis added). In the view of the Chief Justice, the critical question was whether a person had taken a step toward participating “in the organisation itself” in this sense [CAB 224 [35]].
- 20 32. Kourakis CJ further held that a body for whom membership could be shown based on the Crown’s particulars would not be an organisation within the meaning of the *Criminal Code*, but instead “an amorphous or fluctuating group” [CAB 218 [11]-[13], 240 [90]].
- 30 33. Kourakis CJ considered that the evidence distinguished between Islamic State the organisation, and the State it was seeking to build [CAB 232 [58], 233 [62]]. His Honour inferred that the organisation operated “covertly and through carefully controlled membership” [CAB 232 [58]]. Dr Shanahan’s evidence about the role of women did not show them to have “sufficiently participated in the organisational structure of this radically conservative Islamic organisation, so as to be, even informal, members” [CAB 234 [68]]. The Chief Justice considered that taking the *bay’ah* was “not peculiar to membership, formal or informal, of Islamic State, the organisation” and likened it to the giving of oaths as a condition of office in Australia [CAB 235 [73]]. The Chief Justice did not consider, or cite, the decision in *Benbrika v The Queen (Benbrika)*.⁵⁵
34. *Parker J.* Parker J expressly agreed with the Chief Justice that taking steps to

⁵⁵ (2010) 29 VR 593.

membership “necessarily contemplates that there will be some form of practice or process, whether formal or informal, required to attain membership” [CAB 278 [260]]. His Honour accepted that membership might be readily inferred from conduct in the case of a “small and informal organisation” [CAB 276 [252]], but not in the case of Islamic State, which was “a large organisation conducting widespread military and terrorist activities” [CAB 278 [259]]. For similar reasons, his Honour distinguished *Benbrika*, considering there was a “real possibility” that “something more” was required for membership of Islamic State than was required for membership of Benbrika’s group [CAB 278 [260]]. Like the Chief Justice, his Honour considered that to treat supporters of Islamic State as members would result in it being “an amorphous or fluctuating group of individuals” rather than an “organisation” [CAB 278 [259], 279 [266]].

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35. *Kelly J.* In dissent, Kelly J observed that, in returning a verdict of guilt, the jury must have accepted that the respondent attempted to travel to Turkey in order to engage with Islamic State, because they were directed that this was a necessary step in any reasoning toward guilt. Her Honour held that the jury could use proof of the respondent’s intention in travelling to Turkey in determining whether she had taken steps to become a member of Islamic State [CAB 269 [216]]. The nature, character and purpose of Islamic State were relevant to this determination [CAB 271 [221]], as was all of the evidence which went to prove the respondent’s state of mind (such as the extremist videos, images, songs and messages in the respondent’s possession).

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36. Kelly J differed from the majority in her approach to statutory construction. Following the reasoning in *Benbrika*, her Honour adopted a purposive interpretation of the expression “membership of a terrorist organisation” [CAB 261 [171]-[173], 265-266 [192]-[202]]. Kelly J recognised that the definition of “organisation” was, as the explanatory memorandum had said, designed “to defeat any argument that a group of persons is not an organisation because it does not have a particular formal attribute or structure”. [CAB 264 [183]]. By including persons who had taken steps to become informal members of an organisation, Parliament intended to capture a broad range of individuals who had engaged in preparatory conduct (insufficient to amount to an attempt) [CAB 265 [192]-[196]]. Kelly J observed that “it does not matter if the appellant would have succeeded in becoming a member”, that result not being an element of the offence [CAB 269 [212]].

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37. As a consequence of her Honour’s approach to the construction of the relevant provisions,

Kelly J did not regard proof of a process within Islamic State for the admission of members as essential to sustain the respondent’s conviction. Her Honour recognised that the membership of an organisation like Islamic State will fluctuate constantly [CAB 263-264 [182]], and observed that there was no indication that the Parliament intended that a terrorist organisation reaching a particular size and scale meant that it ceased to have the qualities of an “organisation” (CAB 264 [184]).

PART VI ARGUMENT

A. The membership offence in s 102.3(1) of the *Criminal Code*

38. Section 102.3(1) of the *Criminal Code* provides:

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Membership of a terrorist organisation

- (1) A person commits an offence if:
- (a) the person intentionally is a member of an organisation; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person knows the organisation is a terrorist organisation.
- Penalty: Imprisonment for 10 years.

39. Section 102.1(1) defines “member” inclusively as follows:

member of an organisation includes:

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- (a) a person who is an informal member of the organisation; and
- (b) a person who has taken steps to become a member of the organisation; and
- (c) in the case of an organisation that is a body corporate—a director or an officer of the body corporate.

40. Where it is alleged that a person is a “member” because he or she has taken steps to become a member, in reliance upon paragraph (b) of the extended definition of “member”, the physical element is the taking of those steps, and the fault element is the intention to take steps to become a member, while knowing that the organisation is a terrorist organisation. This accords with Kelly J’s analysis of the elements [CAB 268 [206]].

B. Errors in the reasoning of the majority

Requirement of proof of a process for admission of members

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41. Both Kourakis CJ and Parker J held that evidence of a process by which Islamic State admits members was required before an offence against s 102.3 could be made out. The primary reason their Honours gave was that the very notion of a step implied a process [CAB 220 [20], 278 [260]]. The requirement of proof of a process for the admission of

members also appeared to be a consequence of their Honours both holding (though for slightly different reasons) that evidence of clear criteria for the admission of members was necessary [CAB 218 [12], 220 [20]-[21], 278 [259]-[260]]. The reasoning which led their Honours to conclude that evidence of a membership process was necessary is:

- (a) unsupported by the statutory text;
- (b) inconsistent with paragraph (b) of the inclusive definition of membership;
- (c) inconsistent with the context and purpose of the provisions; and
- (d) contrary to the decision in *Benbrika*.

Statutory text and the notion of a step

- 10 42. Not only does the statutory text not explicitly or implicitly require evidence of a practice or process for the admission of members to prove a contravention of s 102.3(1), but to read such a requirement into the provisions is contrary to their meaning and purpose. As a matter of logic, and ordinary meaning, a person could be said to take a step toward membership of a terrorist organisation without that step being prescribed by any identified rule, practice or process. And there is nothing in the *Criminal Code* to require the steps taken to be along an objective pathway to membership.
- 20 43. Travelling overseas with intent to join a terrorist organisation provides a ready example of conduct which may constitute such a step. A particular terrorist organisation may, for example, only ever have contemplated recruiting locally. This would not preclude a person who attempted international travel in order to join such a group from being characterised as a member for having taken a step toward membership. Other examples, of infinite variety, could be proffered. Depending on the knowledge and intent of the prospective member, and the nature of the organisation in question, all sorts of preparatory conduct could properly be described as the taking of a step toward membership in the absence of evidence of correspondence with a prescribed membership procedure (including the making of inquiries, or assembling material resources).
- 30 44. Read together, paragraphs (a) and (b) of the extended definition in s 102.1(1) allow for a person to qualify as a “member” of a terrorist organisation if they take a step to become an *informal* member. As Kelly J observed, the *Oxford English Dictionary* definition of ‘informal’ includes the meaning: “not done or made according to a recognised or prescribed form; not observing established procedures or rules; unofficial; irregular”

[CAB 265 [190]].⁵⁶ To allow for informal membership is to allow for membership *outside* a prescribed process or practice. To require a ‘step’ toward membership to correspond with a process set down by the relevant organisation is inconsistent with the inclusion of informal membership as part of the statutory definition.

45. Nor is there any basis to construe paragraphs (a) and (b) of the definition of ‘member’ as mutually exclusive, or as alternatives. They are connected by the conjunction ‘and’. The prosecution is therefore always entitled to put a case of a contravention of s 102.3(1) on the basis that the accused took a step to become an informal member.

46. To require proof of an organisation’s processes for the admission of members is an inherently unlikely requirement to read into provisions which are intended to target activities which may occur informally, and often in secret. In answer to this point, the Chief Justice observed that “secrecy may pose problems of proof in prosecutions but evidential difficulties cannot control the meaning of the legislature’s choice of words” [CAB 221 [25]]. As submitted above, his Honour’s construction does not reflect the legislature’s choice of words. The consequences of that construction also render it so improbable that it is not an intended meaning lightly to be imputed to the legislature.⁵⁷

47. It is not to be assumed that terrorist organisations will have a prescribed means of attaining membership at all.⁵⁸ There is no reason to suppose that Islamic State itself used the language of ‘membership’ to denote any of its followers, including those with elevated roles in its organisation such as battlefield commanders, senior recruiters or clerics. What matters is not how an organisation talks about its own participants, but whether those participants are “members” within the meaning of s 102.3(1)(a).⁵⁹ Even if evidence of formal membership rules of an organisation were available, it would not be determinative of whether a person was a ‘member’ of the organisation for the purposes of this offence provision, particularly where the Crown can rely on a *step* taken toward *informal* membership.

48. These observations also meet a point which underlies the majority’s reasoning, namely that Dr Shanahan was not asked in terms about who was, and was not, a member of

⁵⁶ The Macquarie Dictionary includes the following, nearly identical, definition: “not according to prescribed or customary forms; irregular.”

⁵⁷ *Tjungarrayi v Western Australia* (2019) 93 ALJR 556 at 576 [106]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321.

⁵⁸ Presumably, on the approach taken by the majority in the Court below, the Crown would have to prove that no membership process existed, lest its case fail for absence of proof of such a process.

⁵⁹ The trial judge recognised this point during pre-trial discussion: Voir Dire Transcript, p 78 lines 2-8 [BFMV1 81].

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Islamic State [CAB 235 [76]]. First, from the other evidence led at trial about Islamic State, there is no basis to suppose Dr Shanahan could have said anything directly about who qualified as a ‘member’ of it. Secondly, anything he might have said could never be determinative. There is one final, additional point. If Dr Shanahan had been asked directly for his opinion on what was sufficient to constitute ‘membership’ of Islamic State, there is little doubt he would have been prevented from answering.⁶⁰ This question involves an application of a legal standard, namely the customised concept of membership appearing in Division 102 of the Code. As such, it is not a matter for expert opinion.⁶¹ During the *voir dire*, Dr Shanahan was prevented from answering a question which raised the legal question of membership,⁶² and defence counsel then avoided addressing it further.⁶³

10 The need for ‘clear criteria’

49. In his charge, Peek J gave the jury some understanding of the concepts of an ‘organisation’ and of ‘membership’. Quoting from the indicia of an organisation set out in *Kibby v Registrar of Titles (Kibby)*,⁶⁴ his Honour said that an ‘organisation’ or ‘unincorporated body’ “for present purposes may be described as ... some form of combination of persons (with a common interest or purpose) with a degree of organisation and continuity at least sufficient to distinguish the combination from an amorphous or fluctuating group of individuals and with some clear criteria or method of identification of its members” [CAB 21, 23]. His Honour went on to note that it was an admitted fact that Islamic State was a terrorist organisation, and was prescribed as such. Peek J said he was explaining the concept of a terrorist organisation to assist the jury assess the critical question: whether the defendant was intentionally a member of such an organisation [CAB 24-25]. Noting that the relationship between the accused and the organisation needn’t be evidenced by membership cards, ceremonies or official records, his Honour directed the jury: “there is no bright line which enables one to say that there are sufficient characteristics of a member of an organisation present to conclude that the defendant is

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⁶⁰ As senior counsel for the Crown suggested, with the trial judge’s concurrence: see Voir Dire Transcript p 77 line 37 – p 78 line 8 [BFMV1 80-81]; see also Trial Transcript p 1203, lines 31-35 [BFMV1 227].

⁶¹ *Van Den Heuvel v Tucker* (2003) 85 SASR 512 at [61], citing *R W Miller and Co Pty Ltd v Krupp (Australia) Pty Ltd* (1994) 34 NSWLR 129 at 130.

⁶² Voir Dire Transcript, p 32 lines 2-7 [BFMV1 35].

⁶³ Voir Dire Transcript, p 73 lines 32-37 [BFMV1 76]; p 74 line 24 [BFMV1 77] ff.

⁶⁴ [1999] 1 VR 861. It should be noted that *Kibby* was a case concerning unincorporated associations.

intentionally a member of an organisation; nor is there any set of necessary conditions, ... Rather, it is a question of fact and degree.” [CAB 26]⁶⁵

50. In the Court below, the majority erred in adopting the *Kibby* indicia as a definition, which dictated the kind of evidence required to identify the relevant organisation, and the scope of its membership [CAB 218 [13], 239 [86], 240 [90], 278 [259]]. This was not what the trial judge’s directions meant, and is inconsistent with the decision of the Court of Appeal of the Supreme Court of Victoria in *Benbrika*.

51. In *Benbrika*, the Court held that the concept of an “organisation” is not amenable to an exhaustive or rigid definition, and raises a question of fact and degree about which there cannot be an unequivocal and objective answer.⁶⁶ In so holding, the Court rejected an argument that the trial judge should have directed the jury that satisfaction of at least some of the criteria in *Kibby* was necessary to find that an “organisation” existed:⁶⁷ “The *Kibby* indicia were signposts to be considered in what was, in the end, an evaluative exercise”.⁶⁸

52. If, as a matter of law, clear criteria for the identification of its members are not required for a group to qualify as an organisation, then as a matter of logic, those criteria cannot be required in order to prove a person’s membership of that organisation.

53. The Court in *Benbrika* also considered two arguments specifically directed to the concept of membership. First, the Court rejected an argument that, in order to become a member of a terrorist organisation, a person needed to commit a definable act toward that end.⁶⁹ The Court reasoned that this argument was inconsistent with the authorities on the construction of the terrorism provisions of Part 5.3 of the Code, which criminalise preparatory conduct.⁷⁰ This line of authority was correctly applied by Kelly J in the Court below [CAB 265-266 [195]-[198]]. It was not referred to by the majority. The second argument about the meaning of ‘membership’ considered in *Benbrika* was that the jury needed to be directed on the distinction between being a ‘member’ of a terrorist organisation and being ‘associated’ with one.⁷¹ In rejecting this argument, the Court

⁶⁵ See also CAB 31, where his Honour repeated these directions, adding that there was no “set of necessary conditions” for membership of a terrorist organisation.

⁶⁶ (2010) 29 VR 593 at [84]-[97].

⁶⁷ (2010) 29 VR 593 at [74].

⁶⁸ (2010) 29 VR 593 at [86].

⁶⁹ (2010) 29 VR 593 at [128].

⁷⁰ (2010) 29 VR 593 at [128]-[130]. See also *Lodhi (No 1) v The Queen* (2006) 199 FLR 303 at 318 [66]; *Ul-Haque v The Queen* [2006] NSWCCA 241 at [36]; *Lodhi (No 2) v The Queen* (2007) 179 A Crim R 470.

⁷¹ (2010) 29 VR 593 at [131]-[134].

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observed that “[t]he notion of membership of an organisation is one that a jury would readily understand”.⁷²

54. Kourakis CJ’s judgment contains no reference to *Benbrika*. His Honour’s requirement for evidence of ‘clear criteria’ to distinguish Islamic State’s members from its supporters was inconsistent with *Benbrika*, and was erroneous.
55. Parker J made a related, error. His Honour distinguished *Benbrika* on the basis that it concerned a smaller organisation, which may have lacked a formal structure or process for admitting members [CAB 276 [252]]. His Honour considered that, by contrast, there was a “real possibility” that, given its size and hierarchical structure, Islamic State decided on criteria for the admission of members [CAB 278 [259]]. There was no proper basis to impose a test for membership which was stricter for Islamic State than for the group convened by *Benbrika*. The statutory concepts of organisation and membership do not change for terrorist groups which control significant territory or reach a certain size and scale [c.f. Kelly J CAB 264 [184]]. Parker J’s supposition that the leadership of Islamic State might decide whether to accept members by applying settled criteria was unsupported by the evidence. Calls for people to join Islamic State were directed at anyone sharing its ideology and willing to provide practical support.

The requirement for participation, and misconstruction of the definition of ‘organisation’

56. The Chief Justice posited a requirement of participation in, or steps towards participation in, ‘the organisation itself’,⁷³ before membership could be proved [CAB 223-224 [30]-[35], 234 [68]]. It may be accepted that a jury could infer membership from participation of that kind. That does not, of course, make it a legal requirement, and there is nothing in the statutory text, context or purpose which suggests it is. In constructing this test of ‘participation’, the Chief Justice was influenced by:

- (a) the analogies his Honour drew with unincorporated associations and political parties, and the contrast with nations [CAB 220-221 [21]-[25], 235 [73]]; and
- (b) his Honour’s view of paragraph (c) of the definition of ‘member’ as *confining* its scope to directors and offices of bodies corporate (that is, people who participate in decisions).

⁷² (2010) 29 VR 593 at [134].

⁷³ In defining ‘the organisation itself’, his Honour referred to its ‘structure’ and ‘governance’.

57. With respect, the analogies discussed by his Honour are of no assistance given the *sui generis* nature of terrorist organisations, and the specialised use of the term “organisation” in Division 102.⁷⁴ The fact that Islamic State controlled territory, and claimed to be a State, were potential distractions from the Court’s task in evaluating the case against the respondent. That case was supported by strong evidence, and in particular by a body of evidence illuminating the respondent’s true purpose in travelling to Turkey. The safety of her conviction was to be assessed primarily on that evidence, rather than by abstract contemplation of the theoretical limits of membership of Islamic State, and analogies with very different types of organisation.

10 58. The Chief Justice construed the definition of “member” of a body corporate in paragraph (c) of s 102.1(1) as *restricted* to directors and officers to the exclusion of shareholders [CAB 220 [19]]. His Honour regarded this restriction as “important”, and it informed the distinction he drew between an organisation’s members and its supporters. Kourakis CJ considered the concept of membership generally needed to be understood in light of the definition in paragraph (c), to avoid “an inexplicable gulf between the narrowly defined membership of incorporated terrorist organisations and those which are unincorporated”. As a consequence, his Honour reasoned that members needed to participate in an unincorporated organisation’s affairs, in the manner of directors and officers of bodies corporate. This reasoning is flawed for two reasons. *First*, it misconstrues paragraph (c), which is properly understood as *extending* the meaning of membership in the context of an incorporated association. That membership would prototypically include shareholders, and is extended by paragraph (c) to include directors and officers, who would not ordinarily be regarded as “members” of a body corporate. *Second*, it overlooks that paragraphs (a) through (c) are not exhaustive of the defined term “member”. It is an inclusive definition.

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Consequences of the approach of the majority

59. The errors in the interpretation adopted by the majority are illuminated by contemplating its consequences. On that approach, a person travelling to Syria to fight with Islamic State could not be characterised as a member without evidence of a process by which fighters are admitted to membership. Kourakis CJ characterised the call for people to come to Islamic State, even to fight, as a call for “migrants” rather than “members” [CAB 233 [63]]. If fighters were members of anything it was, on his Honour’s view, an

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⁷⁴ See and compare *Benbrika v The Queen* (2000) 20 VR 593 at 621-622 [87]-[89].

“unstructured mass of people”, not an organisation [CAB 233-234 [65]]. The absurdity of this result demonstrates the error in the majority’s construction of membership of an organisation.

60. Appearing to recognise the counter-intuitive result of the application of his approach to Islamic State fighters, Kourakis CJ suggested that “an inference might more readily be drawn” that fighters were members because they would be subject to hierarchical control [CAB 233-234 [65]]. His Honour was bound to stop short of a conclusion that fighters *were* members. Consistently with his Honour’s reasoning, that conclusion was unavailable without evidence that fighters were admitted to membership in accordance with Islamic State’s practices, and participated in its “organisational structure” [CAB 233-234 [65]]. But Kourakis CJ’s approach provided no sound basis on which to distinguish fighters from others who came to join Islamic State to provide other forms of support. It was open to the jury to infer that the respondent would follow the directions of Islamic State’s leader, and would in that sense be subject to a form of hierarchical control in Islamic State territory. Indeed, there was specific evidence to this effect. In one of the advisory blogs accessed by the respondent, ‘sisters’ coming to Islamic State are informed that once in Turkey, they need to follow orders.⁷⁵ The author advises that once they cross the border, they need to remain in Makkar until accompanied out. In an apparent reference to a vetting process, the ‘Dawlah’ (State) was said to have ‘set some paperwork’ having regard to the danger of infiltration by spies. The ‘sisters’ are reminded to obey the Caliph, who has ‘set some protocols and there are reasons behind it’. Medical or nursing students will be allowed out of Makkar, and are advised to “bring your certs as proof”.⁷⁶

Correct approach to the evidence

61. Kelly J was correct to recognise that people who travelled to join Islamic State in answer to its call for support could be regarded as members, whether or not they personally intended to fight [CAB 270 [219]-[220]]. Islamic State’s mission to “remain and expand” was to be fulfilled, in perpetuity, through coercive violence within its territory,

⁷⁵ Exhibit P9, p 109 (post 43) [BFMV1 591-593]; This post was specifically referred to in the Crown’s closing address: Trial transcript, p 1276.

⁷⁶ Exhibit P9, p 110 (post 43) [BFMV1 591-593].

at its borders, and beyond.⁷⁷ Its purpose was to impose its version of Islamic rule by force.⁷⁸ By definition, this is a form of terrorism. It was open to the jury to conclude that the respondent well understood Islamic State’s cause, and believed in its righteousness. The terms in which she swore the *bay’ah* involved an explicit commitment to jihad. Violent jihad was integral to life in the territory controlled by Islamic State, and was promoted as such by its members,⁷⁹ and in its propaganda.⁸⁰ That propaganda celebrated the centrality of jihad to the lives of people willing to come to Islamic State. Numerous images on the respondent’s phone depicted women and children bearing firearms.⁸¹ Videos she accessed showed children being trained to fire assault rifles.⁸² An Islamic State recruiter explained in one of the videos within the compilation tendered as an exhibit: “that which gives you life is jihad, that which gives you life, is war”. His example of the “life” that war gave was the families spending time in a park nearby.⁸³

62. It was clear on the evidence that wives, doctors and nurses were needed to support the fighters who were on the front line of Islamic State’s jihad.⁸⁴ A message displayed within an image stored on the respondent’s phone called for people with medical training to migrate to the Caliphate, because with too many “brothers” dying from minor wounds, doctors were needed more than fighters.⁸⁵ It was open to the jury to conclude that in attempting to travel to Syria, the respondent was answering Islamic State’s call to assist in its mission, in full knowledge of its aims and methods. Kelly J observed [**CAB 270 [219]-[220]**] that there was no basis for the distinction which Kourakis CJ drew [**CAB 233-234 [65]-[68]**] between the Islamic state ‘militia’ and those who supported them. Dr Shanahan’s evidence and the propaganda in the respondent’s possession demonstrated the correctness of Kelly J’s view. To the extent that contemplation of the position of the broader population under Islamic State rule is of any assistance, the respondent was

⁷⁷ Trial transcript, pp 995-996 (Dr Shanahan) [**BFMV1 117-118**]. The nature of Islamic State’s mission was also made clear in the material found on the respondent’s electronic devices: including the video files (Exhibits P15 and P41), image files (Exhibits P14 and P33) and blog posts (Exhibit P9).

⁷⁸ Trial transcript, pp 995-996 (Dr Shanahan) [**BFMV1 117-118**]. A blog post described the jihad being pursued until “all religion is for Allah” (Exhibit P9, page 11) [**BFMV1 506**].

⁷⁹ The blogs accessed by the respondent are replete with references to jihad and the need to support the Mujahideen. One of the blogs refers to Islamic State as ‘dar al jihad’ or the ‘house of jihad’: Exhibit P9, p 22 (blog post 10) [**BFMV1 517**]. See also, Exhibit P31 – Glossary of Arabic Terms [**BFMV1 754-755**].

⁸⁰ The nasheeds possessed or played by the respondent revolved around themes of jihad and martyrdom. See Exhibits 60 and 65 [**BFMV1 609-639**].

⁸¹ Exhibit P14, images 6, 17, 27, 68, 120, 137 and 151 [**BFMV2 24; 35; 45; 86, 138, 155; 169**]. Exhibit P23, depicting a toddler dressed in camouflage, with a toy assault rifle. The respondent described this toddler as “the cutest boy”: see Exhibit P14, image 13 [**BFMV2 29**].

⁸² Exhibit P15, video 3 [**BFMV2 2**].

⁸³ Exhibit P15, video 8 (see approx. 45 mins 10 secs to 45 mins 30 secs of the video file) [**BFMV2 2**].

⁸⁴ See Exhibit P9, page 10 [**BFMV1 505**].

⁸⁵ Exhibit P14, image 15 [**BFMV2 31**].

clearly capable of being distinguished from an unwilling, or passive, member of the population who happened to be living in territory conquered by Islamic State.

C. The correct approach to construction

63. As submitted above, Kelly J’s approach to the construction of the relevant provisions differed in important respects from that of the majority. Her Honour set out critical parts of the reasoning in *Benbrika* on the nature of a terrorist organisation, and recognised that the trial judge’s charge was consistent with those passages [CAB 260-261 [171-173]]. Following *Benbrika* and *Lodhi*, her Honour had regard to the context for the introduction of the terrorism provisions, and the legislative choice they reflected to criminalise preparatory acts [CAB 266 [197]-[198], 269 [211]].

64. This approach led her Honour to the following conclusions, each of which is correct, and achieves the purpose or object of the provisions in question [CAB 266]:

[199] I do not consider that the term “member” used in s 102.1 and s 102.3(1) should be given any technical or legal meaning.

[200] A terrorist organisation such as Islamic State, given its very nature, is unlikely to have a membership process capable of objective verification.

[201] Accordingly, in my view, the proper construction of the definition of “member” in s 102.1(1) leads to the conclusion that there is no absolute means by which the status of membership of Islamic State may be proven.

[202] As the trial Judge directed the jury, whether or not the conduct of the appellant amounted to taking steps to becoming a member was ultimately a question of fact to be decided by the jury after undertaking its own evaluative exercise.

[203] ... [T]he Judge was therefore right when directing the jury *on the matters to be taken into account when determining whether the appellant had taken steps to become a member*, to adopt the reasoning of the Court in *Benbrika* as to the expansive meaning to be afforded to the expression “terrorist organisation”. (Emphasis added)

65. Kelly J did not superimpose any requirements of proof onto the statutory language defining the offence. Ultimately, “membership” is, as the Court in *Benbrika* observed, a concept capable of being understood and applied by a jury. Kelly J’s broad construction of the definition of “member” finds support in the need to have regard to context, including the mischief at which the provisions were directed.⁸⁶ The explanatory

⁸⁶ See *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293 at [23] (Kiefel CJ, Gageler and Keane JJ). See also at [71] (Nettle and Gordon JJ); *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 at [47] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Western Australia v Manado* [2020] HCA 9 at [56] (Nettle J); *R v A2* (2019) 93 ALJR 1106 at [15], [33], [37]-[44] (Kiefel CJ and Keane J).

memorandum described the relevant mischief as “an *affiliation* with a group” and stated an intent to avoid the evasion of liability “by a technical argument about their lack of formal membership status”.⁸⁷ It is consistent with the intention behind the expansive definition of “membership” for the question whether an accused has taken steps to become a member of a terrorist organisation to be a matter for evaluation by the jury, having regard to the organisation’s “nature, character and purpose”, and the conduct and intentions of the accused [CAB 271 [221]].

- 10 66. Free from unduly restrictive requirements of proof of membership processes and organisational participation, Kelly J correctly observed that it did not matter if the respondent would have succeeded in becoming a member, there being no requirement for proximity between the steps she took and ultimate membership [CAB 265-266 [195], 269 [212]]. And, as her Honour observed, Islamic State was “unlikely to have a membership process capable of objective verification” [CAB 266 [200]]. This observation was supported by the evidence of the broad nature of Islamic State’s jihadist mission and its calls for support, which were directed towards any Muslim believing in its cause.
67. As Kelly J’s reasons demonstrate, once any requirement to adduce evidence specifically about the means by which Islamic State admits a person into membership is eschewed, as it must be, then conviction was well open to the jury upon the evidence led at trial.

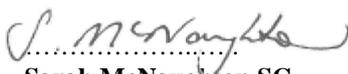
PART VII ORDERS SOUGHT

- 20 68. The appellant seeks the orders in the notice of appeal.

PART VII ESTIMATE OF HOURS

69. The appellant estimates that she requires 2.5 hours to present oral argument (inclusive of reply and address on the respondent’s notice of contention).

Dated: 8 May 2020



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⁸⁷ Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002* (Cth) at 14 (emphasis added).

**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

NO A5 OF 2020

BETWEEN:

THE QUEEN

Appellant

AND:

ZAINAB ABDIRAHMAN-KHALIF

Respondent

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SUBMISSIONS OF THE APPELLANT ANNEXURE A:

**LIST OF STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN
APPELLANT'S SUBMISSIONS**

Statutes

Criminal Code Act 1995 (Cth) Sched, s 102.1, Subdivision B of Division 102
[Compilation No. 106, registered 7 July 2016].

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