



Australian Government

Attorney-General's Department

SECURITY LEGISLATION REVIEW

ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION

FEBRUARY 2006

CONTENTS

1. Introduction and Overview

- 1.1. Legislative requirement for review
- 1.2. Role of the Committee
- 1.3. Overview of this Submission
- 1.4. Key points

2. Origins and Rationale for Special Terrorism Laws

3. The Legislation under Review

3.1. *Security Legislation Amendment (Terrorism) Act 2002*

- 3.1.1 Treason Offence
- 3.1.2 Part 5.3 – Terrorism – Division 100 – Preliminary
 - a) Definition of a terrorist act
 - i. Simplifying the provisions
 - ii. Use or threatened use of firearms or explosives
 - iii. Psychological fear
 - iv. Exception: advocacy, protest, dissent or industrial action
 - v. Must the results of the act actually happen?
- 3.1.3 Part 5.3 – Terrorism – Division 101 – Terrorism
 - a) Hoax offence
 - b) Participating in training
 - c) Effectiveness of the offences
- 3.1.4 Part 5.3 – Terrorism – Division 102 – Terrorist Organisations
 - a) Terrorist Organisations
 - i. Prescription of an organisation as a terrorist organisation
 - ii. Should the process for listing be judicial rather than executive?
 - iii. Merits Review
 - iv. Specified Criteria

- b) Terrorist Organisation Offences
 - i. Membership of a terrorist organisation
 - ii. Getting funds to, from or for a terrorist organisation
 - iii. Associating with a terrorist organisation
 - iv. Fault elements – strict liability when the organisation is a prescribed organisation
 - v. Sections 102.5 and 102.8 – Strict Liability and Recklessness

3.1.5 Part 5.3 – Terrorism – Division 103 – Financing of Terrorism

3.1.6 Air Security Officers

3.2 *Suppression of the Financing of Terrorism Act 2002*

3.2.1 Financial Action Task Force on Money Laundering

3.2.2 FATF's Mutual Evaluation of Australia

3.2.3 Exposure Drafts – Anti-Money Laundering and Counter-Terrorism Financing Bills

3.2.4 Amendments to the Charter of the *United Nations Act 1945*

3.2.5 Amendments to the *Extradition Act 1988*

3.3 *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*

3.4 *Border Security Legislation Amendment Act 2002*

3.5 *Telecommunications Interception Legislation Amendment Act 2002*

3.6 *Criminal Code Amendment (Terrorism) Act 2003*

3.7 *Anti-terrorism Act 2004, Anti-terrorism (No.2) Act 2004, Anti-terrorism (No.3) Act 2004*

3.8 *Anti-Terrorism Act 2005, Anti-Terrorism (No.2) Act 2005*

4 Additional points raised by other submission

4.1 Express references to attempt and conspiracy

4.2 Admissibility of evidence obtained overseas

4.3 Protection of ASIO officers

4.4 Sharing of information

4.5 Education

4.6 Penalties

4.7 PJC oversight of the AFP

4.8 Miscellaneous

1. INTRODUCTION AND OVERVIEW

1.1 *Legislative requirement for the review*

Subsection 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002* requires the Attorney-General to cause a review of the operation, effectiveness and implications of amendments made by the *Security Legislation Amendment (Terrorism) Act 2002*, *Suppression of the Financing of Terrorism Act 2002*, *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*, *Border Security Legislation Amendment Act 2002* and *Telecommunications Interception Legislation Amendment Act 2002*. In 2003, subsection 4(1) was amended by the *Criminal Code Amendment (Terrorism) Act 2003* to add that Act to the list of Acts to be covered by the review.¹

During preliminary discussions with the Committee, an issue arose as to whether the review was to consider the 2002 provisions as enacted, or whether later amendments to those provisions were within the scope of the review. Following advice received from Mr Henry Burmester QC, Chief General Counsel of the Australian Government Solicitor, the Department understands that the review will address the legislation as it is currently in force.

1.2 *Role of the Committee*

Section 4 of the *Security Legislation Amendment (Terrorism) Act* requires the Committee to provide for public submissions and public hearings as part of the review process.² The legislation also requires the Committee to prepare a written report of the review, including an assessment of the relevant legislation, and alternative approaches or mechanisms as appropriate. The Committee is required to give the report to the Attorney-General and the Parliamentary Joint Committee on Intelligence and Security³ within six months of commencing the review.⁴ Tabling of the report must occur in each House of the Parliament within 15 sitting days of that House after its receipt by the Attorney-General.⁵

1.3 *Overview of this submission*

With the exception of the *Border Security Legislation Amendment Act 2002*, which is administered on behalf of the Attorney-General by Australian Customs Service, the Attorney-General's Department administers the legislation that is the subject of this review. As the administering agency, the Department works closely with relevant law enforcement and intelligence agencies, and prosecutorial authorities, to ensure that the legislation works effectively in the fight against terrorism.

The Department and the operational agencies engage in continuing dialogue aimed at refining and improving the operation of the legislation. In addition to considering the requirements of the agencies that dialogue takes into account the civil liberties and rights of the individual. Ultimately the aim is to ensure that the people in Australia are protected from terrorism in line with the protection of their individual rights and freedoms. As the Human Rights and Equal Opportunity Commission (HREOC) has noted in its submission to the Committee⁶ "it is crucial that measures to combat terrorism are consistent with international human rights to ensure that in an attempt to

¹ In this Submission, the legislation under review is collectively referred to as the 2002 provisions.

² Subsection 4(5), *Security Legislation Amendment (Terrorism) Act 2002*.

³ Formerly called the Parliamentary Joint Committee on ASIO, ASIS and DSD

⁴ Subsection 4(6), *Security Legislation Amendment (Terrorism) Act 2002*.

⁵ Subsection 4(7), *Security Legislation Amendment (Terrorism) Act 2002*.

⁶ Submission No. 11 available at www.ag.gov.au/slrc.

safeguard our society we do not give away the very rights that are essential to the maintenance of the rule of law, one of the fundamental principles of a functioning democracy.” The issue of the need to protect human rights and fundamental freedoms is raised in a number of submissions to the Committee. For example, the Multicultural Council of Tasmania points to the lack of a Bill of Rights in Australia⁷. While the Department submits that this is not an issue for the Committee to address, it does raise the important point that legislation cannot be viewed in isolation. Any piece of legislation must be considered in the light of all other acts, practices and procedures that impact on the operation of the legislation.

On 21 December 2005, the Department made a preliminary submission to the Committee, which addressed the following points:

- the importance of maintaining the preparatory conduct provisions
- whether the terrorism offences can be simplified, particularly the definition of a terrorist act
- the suggestion by the Australian Federal Police that consideration be given to including a domestic federal murder offence in the *Criminal Code*
- the undertaking by the Attorney-General that the Committee would include in their review the operation, effectiveness and implications of the new offence of associating with a terrorist organisation as set out in section 102.8 of the *Criminal Code* (which was added by the *Anti-terrorism (No. 2) Act 2004*), and
- the request by the Attorney-General that the Committee consider whether there is scope to develop an individual offence for advocating a terrorist act.

The preliminary submission also referred to discussions on 21 October 2005 that noted there is some scope for the Committee’s review to consider amendments made by the *Anti-Terrorism Act (No.2) 2005*. While the 2005 Act certainly contains provisions that enhance Australia’s response to combating terrorism and therefore fall within the concept of “security legislation”, the Department considers that amendments that introduce new concepts, such as sedition, control orders and preventative detention orders do not fall within the spirit or scope of the Committee’s review. As a corollary, amendments post 2002 that do impact on the 2002 provisions (such as the new offence in section 102.8 of the *Criminal Code*) do fall within the scope of the Committee’s review.

The Department further notes that as the 2005 Act only received Royal Assent on 14 December 2005 and it will be reviewed by the Council of Australian Governments (see section 4 of the *Anti-Terrorism (No.2) Act 2005*) a review by this Committee of the 2005 Act would be premature. For completeness, the Department notes that the Attorney-General has announced his intention of referring the issue of sedition to the Australian Law Reform Commission for inquiry and report in 2006.

This additional Departmental submission provides an outline of the 2002 provisions and, where relevant, how they have been amended since enactment.

⁷ Submission No. 1 available at www.ag.gov.au/slr.

The Department has had the benefit of reading the publicly available submissions⁸ made to the Committee by Governments and other organisations. At the Committee's request, this submission therefore includes comments on points raised by those submissions. In addition, while issues relating to how the legislation has operated in practice or how effective it has been in countering the threat of terrorism are issues that fall to the agencies that are tasked with implementing the legislation, this submission draws on those submissions and makes comments on operational points, where appropriate.

1.4 Key points

The Departments suggests that the Committee may wish to:

- conclude that there continues to be a threat of terrorism justifying the continuing need for the legislation
- conclude that the legislation provides a framework that has been used by the relevant authorities to respond in a targeted manner to terrorist activity
- conclude that fears that the provisions would be misused have not been realised
- review the definition of terrorist act to assess whether it could be simplified, in particular by removing the requirement to prove an intention of advancing a political, religious or ideological cause,
- review the definition of terrorist act to remove the requirement for the harm to be physical harm
- retain the preparatory conduct offences
- consider the introduction of a new offence based on using or threatening to use firearms or explosives which need not involve serious damage to property
- consider the introduction of a new offence based on participating in terrorist training
- clarify the operation of subsection 100.1(1) and 100.1(2) by inserting a note referring the reader to the subsection that provides that a terrorist act need not occur before an offence has been committed
- review the fault elements in the terrorist organisation offences with a view to introducing a new tier of offence where strict liability applies to certain elements
- clarify the operation of the fault elements in sections 102.5 and 102.8, and
- retain the breadth of the prescription power.

⁸ Available at www.ag.gov.au/slrc

2. ORIGINS OF AND RATIONALE FOR THE SPECIAL TERRORISM LAWS

Following the September 11 terrorist attacks in the United States, Mr Robert Cornall AO, the Secretary of the Attorney-General's Department, was tasked with the responsibility of conducting a high level review of Australia's security and counter-terrorism arrangements. Several existing Commonwealth Acts already covered certain types of terrorist conduct, however, the review identified some significant gaps in Australia's legislative framework in relation to terrorism. Following that review, the Government developed a counter-terrorism legislative package. The legislation was designed to strengthen and consolidate Australia's legislative framework in regard to terrorism and to demonstrate Australia's commitment to combating terrorism.

In developing the legislative package, the Government recognised the need to have appropriate safeguards to ensure that an individual's rights and freedoms were enhanced rather than challenged by the new laws. The safeguards also avoid the potential for misuse.

A detailed analysis of the context in which the legislation was developed, including the role of the United Nations Security Council resolutions and the Leaders' Summit on Terrorism and Multi-Jurisdictional Crime which was held on 5 April 2002, is contained in the Bills Digest produced by the Department of the Parliamentary Library Information and Research Services (Bills Digest No. 126 2000-2001)⁹.

The Department supports the comments made in submissions to the Committee by the Commonwealth Director of Public Prosecutions (CDPP)¹⁰ and the Australian Federal Police (AFP)¹¹ as to why the counter-terrorism legislation is and was necessary. The CDPP states that it has the advantage of dealing with terrorism comprehensively rather than relying on a myriad of other laws (page 9). The CDPP also states that "terrorism is a national issue that requires a national response. It is vital for there to be a national approach with laws that allow for a consistent and coordinated approach to prosecutions in this area. The nature of terrorist activity is such that the State and Territory legislative framework does not provide a consistent and encompassing approach" and that "it is crucial to recognise terrorism as a separate and distinct activity that should be addressed by the specific provisions" (page 1) and not rely on other more generic criminal offences. The AFP submission notes that the legislation is integral to an effective law enforcement response to terrorism and related serious criminal activity (page 2).

In early 2002 the specific terrorism laws were a contingency measure put in place in anticipation of a real but not completely understood threat. While the uncovering of plans to attack the Australian Embassy in Singapore in 2000, and intelligence and the generalised anti-western nature of Al-Qa'ida's statements, provided evidence that Australia was likely to be a target, the starkness of the reality of the threat was yet to come. Since 2002 there have been attacks that have impacted on Australia every year. While it is historically usual for war weariness to dilute empathy for the pain and suffering of the innocent individuals who are targeted by such attacks, it is important to reflect on reality of the threat to Australians and thousands of others throughout the world. It is also important to reflect on the following incidents as they amount to the most obvious evidence that there is a real threat that warrants special laws:

⁹ See <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Billsdgs/VLF660.pdf>.

¹⁰ Submission No. 15 available at www.ag.gov.au/slr.

¹¹ Submission No. 12 available at www.ag.gov.au/slr.

- Bali Bombing – 12 October 2002
- Marriott Hotel Bombing Jakarta – 5 August 2003
- Bombing of UN Headquarters in Baghdad – 19 August 2003
- Madrid Bombing – 11 March 2004
- Jakarta Bombing – 9 September 2004
- Kidnapping of Douglas Wood May – June 2005
- London Bombing – 7 July 2005
- Bali Bombing – October 2005

In 2002, Parliament concluded that the laws were needed even without the horrific attacks that have occurred since that time. The fact that many of the laws have been used to disrupt plans to carry out terrorist attacks in Australia supports the Department's submission that the need for the special laws is as strong as ever.

There have been those who state that the laws will not help make Australia a "safer" country nor protect the community from harm. The Department has to acknowledge that the law prohibiting a terrorist act is probably not a strong deterrent to someone motivated by strong ideological causes. However, this makes the offences that deal with preparatory conduct, whether it be training, financing or otherwise supporting terrorism, fundamental to the protection of Australia.

The submission by the AFP (at page 4) states that the offences have proven to be an essential mechanism in establishing that terrorism is a serious criminal offence and have been relied upon on numerous occasions since their introduction. A number of prosecutions for terrorist offences have now commenced¹² and the Department will monitor the cases and judicial reaction to the legislation in order to address any issues that might arise with the interpretation of the provisions. This may mean that this review is premature because of the time it takes for cases to be brought before and dealt with by the courts. As a result, it will not be possible to properly assess the effectiveness of the laws in disrupting terrorist attacks and removing those who might involve themselves in attacks again. Nevertheless, it can be said that the law enforcement agencies and prosecutors are satisfied that there are good cases for prosecuting individuals under the special terrorism laws. Prosecutors have a strong interest in choosing the most effective offences available.

The need for special terrorism laws is not only recognised by the federal Government. State and Territory Governments also appreciated, and continue to appreciate, that it is important to have a national approach. Those Governments have supported the Australian Government with a textual reference of constitutional power that enables national terrorism offences to be enacted with confidence.

The definition of 'terrorist act' provides a clear definition about what should be the federal Government's responsibility in this part of the criminal law as agreed with the States and Territories. However, the laws also recognise that State and Territory Governments continue

¹² See the Department's preliminary submission and the submission by the AFP.

to have responsibility in this area of the law. Specific terrorism offences also provide a targeted basis for the exercise of additional law enforcement resources and powers. In recognition of the joint responsibility, this involves federal as well as State and Territory police resources in addition to the resources of Australia's and foreign intelligence and security agencies.

Special terrorism offences provide the opportunity for the Parliament to provide for enhanced penalties that recognise the widespread harm that acts of terrorism can cause to the whole community. Most other forms of crime have a narrower effect. The broad often indiscriminate target of terrorism produces fear throughout a community and as such is very disruptive. The death toll in a single terrorist attack can dwarf the annual national or regional death toll from other types of murder.

It is necessary to have severe penalties not only for the actual attacks but preparatory conduct that would not be caught by the general ancillary offences found in Part 2.4 of the Criminal Code. The significant penalties should lead to those preparing or assisting in the preparation of attacks to be taken out of the community and imprisoned for many years. It is the hope of Government that imprisonment of those people for long periods will make Australians and the innocent citizens of other countries throughout the world safer. For example, section 101.6 provides that a person commits an offence if the person does an act in preparation for, or planning, a terrorist act. The maximum penalty is imprisonment for life. Subsection 101.6(2) provides that the person commits an offence even if the terrorist act does not occur, the act is not done in preparation for, or planning, a specific terrorist act; or the person's act is done in preparation for, or planning, more than one terrorist act. September 11 and the terrorist activity listed above demonstrate that it is not much help to the victims to be only punishing the perpetrators after the event. It is self-evident that it would have been far preferable if it had been possible to detect the perpetrators at the planning stage and to have them convicted and sentenced to imprisonment for an offence like the offence in section 101.6.

The other offences in Divisions 101 and 102 of the *Criminal Code* also focus on preparatory conduct. The offence of engaging in a terrorist act itself includes preparatory conduct. Threats, endangerment, risks to health and safety and disruptive conduct that could indirectly severely impact on individuals – seriously interfering with, disrupting or destroying an electronic system are part of the definition. Providing or receiving training connected with the preparation for a terrorist act (s.101.2), possession of things connected with terrorist acts (s.101.4) and the documents offences (s.101.5) all focus on preparatory conduct and can have a direct impact on preventing an attack. Likewise the terrorist organisation offences: directing the activities of such an organisation (s. 102.2), membership (s.102.3), recruiting (s.102.4), training (s.102.5), funding (s.102.6), support (s.102.7) and association (s.102.8) and the general financing of terrorism offences (ss.103.1 and 103.2) attack more remote aspects of preparation for an attacks. Attacks invariably require finance and organisation. The organisation and financing offences also have deterrence as an objective where the perpetrator is more at the fringes of the terrorist activity and may fear the consequences of a long prison term.

In 2002, and since, some commentators have suggested that the special terrorism laws would be used capriciously by the authorities. There is no evidence that the Department is aware of to suggest that this is the case. The offences and accompanying powers appear to have been used in a targeted and focused manner.

A number of submissions challenge the laws on the basis of proportionality and in so doing raise the operation of the International Convention on Civil and Political Rights¹³. The Department does not accept this contention. As the HREOC submission notes, neither the right to freedom of expression nor the right to freedom of association are absolute. Those rights may be limited to the extent that the limitations are provided or prescribed by law and proportionate and necessary to achieve a legitimate end.

The Department submits that the limitations as prescribed by the offences in the *Criminal Code* and the prescription of an organisation as a terrorist organisation by regulation are directly proportionate to the terrorist threat. Australia needs to be in a position where it can respond to the threat of terrorism – the laws in Part 5.3 of the *Criminal Code* are a critical and necessary part of that response in enhancing Australia's preparedness to deal with that threat.

3. THE LEGISLATION UNDER REVIEW

3.1 *Security Legislation Amendment (Terrorism) Act 2002*

The Security Legislation Amendment (Terrorism) Bill 2002 (No. 2) was introduced into the House of Representatives on 13 March 2002. The original Bill (the Security Legislation Amendment (Terrorism) Bill 2002) was introduced on 12 March 2002 but was withdrawn on 13 March 2002 because of a technical problem. The (No.2) Bill was substituted to address this issue.

The Bill passed the House of Representatives on 13 March 2002 and was introduced into the Senate on 14 March 2002. On 20 March 2002, the Bill was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. The Committee subsequently reported on 14 May 2002. The Bill was debated and amended in the Senate and passed the House of Representatives in its amended form on 27 June 2005. It received Royal Assent on 5 July 2002.

The *Security Legislation Amendment (Terrorism) Act 2002*:

- amended the *Criminal Code* to:
 - transfer the offence of treason from the *Crimes Act 1914* to the *Criminal Code*
 - introduce a statutory definition of terrorist act and create specific terrorism offences, and
 - introduce an administrative power to prescribe terrorist organisations
- amended the *Australian Protective Service Act 1987* to facilitate the involvement of the Australian Protective Service in the Air Security Officer Program, and
- amended the *Crimes (Aviation) Act 1991* to extend its operation to *intrastate* flights.

¹³ See, for example, the submissions by HREOC, the Law Council, the Australian Privacy Foundation and the Federation of Community Legal Centres (Vic). Inc.

The Act also amended the *Intelligence Services Act 2001* to provide that the Parliamentary Joint Committee on Intelligence and Security (PJC) must review, as soon as possible after the third anniversary of the day on which the *Security Legislation Amendment (Terrorism) Act 2002* receives the Royal Assent, the operation, effectiveness and implications of amendments made by that Act and the *Border Security Legislation Amendment Act 2002*, *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* and *Suppression of the Financing of Terrorism Act 2002*.¹⁴ The Department notes that subsection 4(9) of the Security Legislation Amendment (Terrorism) Act provides that the PJC must take into account the report from the Counter-Terrorism Legislation Review Committee before it conducts its review.

Schedule 1 of the Security Legislation Amendment (Terrorism) Act amended the *Criminal Code* to add Part 5.3 – Terrorism. This Part was repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003* to give the federal counter-terrorism offences comprehensive national application following the reference of power from the States in accordance with section 51(xxxvii) of the Constitution.

3.1.1 Treason Offence

The Security Legislation Amendment (Terrorism) Act enacted a new treason offence in the *Criminal Code*¹⁵ and repealed the offence from the *Crimes Act 1914*. Consequential amendments were also made to the Crimes Act.

The treason offence was re-enacted in 1960 in the form set out at **Annex A**. It dealt with such offences as acts against the Sovereign, the Sovereign's heir or Queen Consort, levying war, assisting an enemy (either in a war situation or where the enemy has been proclaimed to be an enemy) and instigating a foreigner to invade the Commonwealth. While historically treason was an offence that related to the Crown, that concept was now outdated. The offence was also of no effect in situations like the conflict in Afghanistan.

In addition to being drafted in accordance with modern drafting practices (including using gender neutral language) the new treason offence includes references to the Governor-General and the Prime Minister to reflect the importance of those offices to Australia's governmental framework. The new treason offence also includes specific defences for persons who provide aid of a humanitarian nature.

Division 80 of the *Criminal Code*, which includes the treason provisions in section 80.1, was amended by the *Anti-Terrorism (No.2) Act 2005* to add a modernised sedition offence. While consequential amendments were made to section 80.1, the amendments were structural and have not altered the operation of the treason offence.

For example, former subsection 80.1(6) provided that section 24F of the Crimes Act applied to the treason offence as if the treason offence was in Part II of the Crimes Act. This meant that certain acts which were done in good faith were not unlawful, including for the purposes of the treason offence. Subsection 80.1(6) was repealed by the 2005 Act and the defence for acts done in good faith was re-enacted as section 80.3 of the *Criminal Code*. This meant that it applies to both the treason and the sedition offences. Similarly, provisions dealing with the

¹⁴ This provision in the *Intelligence Services Act 2001* (paragraph 29(1)(ba)) was not amended by the *Criminal Code Amendment (Terrorism) Act 2003* to include that Act within the mandatory scope of the PJC's review.

¹⁵ Section 80.1, *Criminal Code*.

need for the Attorney-General's consent before a prosecution is commenced and extended geographical jurisdiction were repealed from section 80.1 (where they applied just to treason) and were re-enacted as new stand-alone provisions (so that they apply to both treason and sedition).

There is one new provision: section 80.6. Section 80.6 provides that the laws of the States and Territories are not displaced by Division 80, to the extent that they are capable of operating concurrently with the Division. This is to ensure that the provisions of Division 80 do not exclude any State or Territory laws dealing with the urging or inciting terrorist activity or other seditious activity.

The Department is unaware of any actual or prospective prosecution for treason or of any operational problems with the content or structure of the offence. The Department notes that decisions not to use an offence can be for many reasons that have little to do with whether the offence is in fact needed. Even during the first and second world wars, treason was rarely used. However, the Department submits that it is necessary to keep this offence as the conditions where treason may be a real possibility still exist. For example, there are Australians who have greater allegiance to organisations that are in conflict with Australian forces deployed overseas.

3.1.2 Part 5.3 – Terrorism Division 100 – Preliminary.

This Division includes the definition section (s.100.1) and technical provisions dealing with the reference of power (s.100.2), the constitutional bases for the operation of Part 5.3 (s.100.3), the application provisions (s.100.4), the application of the *Acts Interpretation Act 1901* (s.100.5), the intention that there be concurrent operation of State and Territory laws (s.100.6), the creation of a power to amend, by regulation, the operation of Part 5.3 dealing with the interaction with State and Territory laws (s.100.7) and the need for approval for changes to or affecting Part 5.3 (s.100.8).

The 2003 Act inserted section 100.3 to 100.8 (inclusive) and made consequential amendments to sections 100.1 and 100.2. There were no other changes to Division 100 until the *Anti-Terrorism (No.2) Act 2005*, which amended section 100.1 (definitions) to insert terms relevant to the operation of the new control order and preventative detention powers.

a) Definition of a terrorist act.

When introduced, the Security Legislation Amendment (Terrorism) Bill 2002 defined terrorist act in the following terms:

terrorist act means action or threat of action where

- (a) the action falls within subsection (2); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;

but does not include:

- (c) lawful advocacy, protest or dissent; or
- (d) industrial action.

- (2) Action falls within this subsection if is:
- (a) involves serious harm to a person; or
 - (b) involves serious damage to property; or
 - (c) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.

Following the inquiry by the Senate Legal and Constitutional Legislation Committee and consultation with the Opposition, the Government agreed to amend the definition by:

- clarifying that advocacy, protest, dissent or industrial action will not be covered by the definition of terrorist act, unless it is done with one of the specified intentions;
- including an additional requirement that action is done or the threat of action is made, with the intention of 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. This amendment made the definition consistent with the United Kingdom *Terrorism Act 2000* (see **Annex B**) and Article 2 of the International Convention for the Suppression of the Financing of Terrorism [2002 ATS 23]¹⁶;
- inserting a requirement that harm to a person only means physical harm; and

¹⁶ Article 2 provides that:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the Annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

- inserting a reference to action that causes death.

The definition was also amended during the debate on the Bill¹⁷ to replace the word “involves” in paragraphs (2)(a) and (b) with the word “causes” to establish a closer nexus between the conduct and the result of that conduct.

Therefore as enacted the definition of terrorist act was in the following terms:

A terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
 - (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
 - (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it:
- (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.

¹⁷ See Senate *Hansard* for 24 June 2002 at pages 2479-2480

(3) Action falls within this subsection if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

i. *Simplifying the Provision*

As has been noted, the Department's preliminary submission raised the possibility that the definition was too complicated and whether it was necessary to prove the 'intention of advancing a political, religious or ideological cause'. The Department also notes that the submission by the CDPP (at page 9-10) recommends the removal of the requirement to prove the 'intention of advancing a political, religious or ideological cause'.

The CDPP submission states that the laws in the United States¹⁸ and France¹⁹ do not require the prosecution to prove an intention to advance a political, religious or ideological cause. However, in the United Kingdom, although the prosecution is not required to prove an *intention* to advance a political, religious or ideological cause, the prosecution is required to prove that the use or threat of action is made for the *purpose* of advancing a political, religious or ideological cause.

The requirement for the prosecution to establish that the person did the act with either the *intention* of or for the *purpose* of advancing a political, religious or ideological cause requires the court to consider the motive and not the intention of the accused. This seems to be at odds with the common law principles that motive is a distinct and largely irrelevant consideration to the criminality of an act. The CDPP submission states that "it is not in the public interest for a person to avoid criminal liability by showing that their acts were motivated by something other than politics, religion or ideology".

It is also submitted that if the prosecution is able to establish that the act is done or the threat is made with the intention of 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, then the motive for the act should be irrelevant. The requirement to prove the reason behind this conduct adds a level of complication that appears to be unwarranted.

¹⁸ Federal crime of terrorism means an offence that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct' and in violation of criminal offences under the US Code (see *US Code*, Title 18, Chapter 113B, Section 2332b(5))

¹⁹ In France a terrorist act comprises a serious criminal offence under ordinary criminal law with an individual or collective undertaking, the aim of which is to cause serious damage to public order by means of intimidation or terror (see *Penal Code (France)*, Article 421-1)

Finally, the Department notes that this element is not a requirement imposed by the International Convention for the Suppression of the Financing of Terrorism, which, in Art. 1(b) sets out a definition of terrorism²⁰.

ii. *Use or threatened use of firearms or explosives*

The Department notes that Australia's definition of a terrorist act differs from that in the United Kingdom, as the United Kingdom's offence includes the use or threat of action that involves the use of firearms or explosives which need not involve serious damage to property. The Department believes that there may be merit in including such action within the definition of terrorist act. For example, the use of smoke bombs (with the requisite intentions and motives) in the Sydney Harbour Tunnel or in a place of mass gathering, accompanied by the use of fake explosives would be an action that would cause public chaos but does not involve any intended or actual damage.

iii. *Psychological Fear*

The current definition of terrorist act requires, inter alia, that the action or threat of action causes serious harm that is physical harm to a person. The Department submits that serious psychological harm is just as damaging as serious physical harm and suggests that the limitation should be removed. This would be consistent with the Model Criminal Code offences against the person in Chapter 5, as well as offences against the person as they apply in each State and Territory.

iv. *Exception: advocacy, protest, dissent or industrial action*

The United Kingdom provision does not specifically exclude action such as advocacy, protest, dissent or industrial action where there is no intent to cause harm, death, serious risk to health and safety of the public or to endanger someone's life. Given that any action must be done with the requisite intention, the Department submits that subsection (3) is unnecessary and consideration could be given to its removal.

v. *Western Australian submission – must the act actually happen?*

The Department notes that the submission to the Committee by the acting Premier for Western Australia, Mr Eric Ripper MLA²¹ and adds its support for the need to clarify the interaction between subsections 100.1(1) and (2). However, the Department believes that this can be achieved simply by inserting a note drawing the reader's attention to the relevant offence provisions.

The Western Australian submission focuses on the definition of terrorist act leading to the conclusion that the word "causes" in paragraphs (2)(a), (b) and (c) suggests that the result of the action must have occurred before there can be a terrorist act. This appears to be a plausible interpretation of the definition.

However, there is a need to read the definition of terrorist act in the context of the operative offence provisions. This makes it clear that a person commits an offence against section 101.2, 101.4, 101.5 and 101.6 even if the terrorist act does not occur. A note cross-referring to these provisions in the definition of terrorist act would prevent confusion. Alternatively,

²⁰ Art. 2 of the Convention is set out at footnote 16

²¹ See Submission No. 13 available at www.ag.gov.au/slr.

the Committee might be able to devise another solution if it recommends simplifying the definition of terrorist act.

3.1.3 Part 5.3 – Terrorism Division 101 – Terrorism.

As originally enacted in 2002, Division 101 contained the following terrorism offences²²:

- section 101.1 – engaging in a terrorist act
- section 101.2 – providing or receiving training connected with terrorist acts
- section 101.4 – possessing things connected with a terrorist act²³
- section 101.5 – collecting or making documents likely to facilitate a terrorist act, and
- section 101.6 – other acts done in preparation for, or planning, terrorist acts.

In 2003²⁴, these offences were repealed and substituted without amendment in order to attract the reference of power from the states. The only other amendment to the provisions occurred in 2005, when the *Anti-Terrorism Act 2005* made it clear that in a prosecution for a terrorism offence in Division 101, it is not necessary to identify *a particular* terrorist act. It will be sufficient for the prosecution to prove that particular conduct was related to “a” terrorist act.

a) *Hoax offence*

The CDPP submission suggests that there is a need for a hoax offence where there is a threat of harmful action but the threat is made without any evidence of any intention of advancing a political, religious or ideological cause or 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. The Department suggests that this issue could be considered by the Committee during its consideration of the definition of terrorist act, particularly in its consideration of the need to prove that the person intended to advance a political, religious or ideological cause, but is otherwise a matter that is outside the scope of its reference.

b) *Participating in training*

Section 101.2 deals with providing or receiving training connected with terrorist acts and section 102.5 deals with training a terrorist organisation or receiving training from a terrorist organisation. The CDPP submission suggests in relation to the offence in 102.5 that there may be situations where individuals are neither providing nor receiving training from a terrorist organisation but they are nevertheless participating in that training.

The Departments support this submission and suggest that it applies equally to section 101.2.

²² The Department notes that absolute liability applied to certain elements of the offences as originally introduced but that this was removed before passage of the Bill and a tiered approach to the fault element was enacted.

²³ Section 101.3 originally included an offence dealing with directing organisations concerned with terrorist activities. This was removed during the debate on the Bill and enacted as section 102.2.

²⁴ The *Criminal Code Amendment (Terrorism) Act 2003*

c) *Effectiveness of the offences*

Whether or not the offences have been effective in the fight against terrorism is difficult to assess. It is arguable that providing the law enforcement authorities with a framework to focus on investigating specific terrorist conduct has prevented an actual terrorist act in Australia. The submission by the AFP (page 5) states that the AFP has undertaken 450 counter-terrorism related investigation resulting in a number of charges.

3.1.4 Part 5.3 – Terrorism Division 102 - Terrorist Organisations

As originally enacted in 2002, Division 102 contained the following provisions:

- Subdivision A – Definitions
 - section 102.1 – Definitions
- Subdivision B – Offences
 - section 102.2 – directing the activities of a terrorist organisation
 - section 102.3 – membership of a terrorist organisation
 - section 102.4 – recruiting for a terrorist organisation
 - section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation
 - section 102.6 – getting funds to or from a terrorist organisation
 - section 102.7 – providing support to a terrorist organisation.
- Subdivision C – General provisions relating to offences
 - section 102.9 – extended geographical jurisdiction for offences
 - section 102.10 – alternative verdicts

The 2003 Act repealed and substituted these provisions without amendment. However, before this occurred, the definition of terrorist organisation in section 102.2 was amended by the *Criminal Code Amendment (Terrorist Organisations) Act 2002*, so that regulations made for the purposes of that definition are able to take effect from the date they are gazetted and not on the last day of the disallowance period as originally provided.²⁵

²⁵ The regulations now commence in accordance with the provisions of the *Legislative Instruments Act 2003*.

a) Terrorist organisation

Section 102.1 contains a definition of “terrorist organisation”, which is central to the offence provisions in Subdivision B. That definition has been amended a number of times (see following dot-points) and a copy of the current provision is at **Annex C**.

- *Criminal Code Amendment (Hizballah) Act 2003* to create a mechanism for the Hizballah External Security Organisation to be included within the definition of a terrorist organisation.
- *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* to create a mechanism for those organisations to be included in the definition of a terrorist organisation.
- *Criminal Code Amendment (Terrorist Organisations) Act 2004* to remove the requirement that an organisation be first identified in, or pursuant to, a decision of the United Nations Security Council relating wholly or partly to terrorism, or using a mechanism established under the decision, as a condition precedent to specifying the organisation in regulations as a terrorist organisation. This Act also made a number of other amendments to the definition of terrorist organisation. The Act also added a new section 102.1A to establish a statutory requirement for the PJC on Security and Intelligence to review the listing of organisations as terrorist organisations.
- *Anti-terrorism (No.2) Act 2004* to add definitions of *associate* and *close family member* (as a consequence of the insertion of a new offence of associating with terrorist organisations (see below)).
- *Anti-Terrorism (No.2) Act 2005*, which makes a number of amendments to the definition. The amendments streamline the definition by removing redundant provisions and insert a new basis for prescribing an organisation as a terrorist organisation. The new ground is that the Minister is satisfied on reasonable grounds that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

i. *Prescription of an organisation as a terrorist organisation*

The *Criminal Code* provides two ways for an organisation to be identified as a 'terrorist organisation'. The first occurs when a person is charged with one of the terrorist organisation offences in relation to an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs). In this situation, a Court will determine whether or not the organisation is a terrorist organisation. Secondly, the Governor-General may make a regulation prescribing an organisation as a terrorist organisation²⁶ if the Attorney-General is satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or it advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

²⁶ There are currently 19 prescribed organisations:

<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/D2801B61EABE80A2CA256809001328BA/95FB057CA3DECF30CA256FAB001F7FBD>

A number of submissions²⁷ raise concerns about the width of this power. These concerns include:

- the fact that the power is exercised by the executive and not the judiciary
- the lack of judicial review
- the lack of specified criteria that the Attorney-General needs to take into account before exercising the discretion; and
- its alleged discriminatory effect.

ii. *Should the process for listing be judicial rather than executive?*

The submission by HREOC states that the process by which an organisation is prescribed as a terrorist organisation should be judicial and not executive (see paragraphs 6.20 to 6.25). A number of submissions refer to Part IIA of the Crimes Act, which deals with unlawful associations as a precedence for the use of a court and not the executive to determine the nature of an organisation.

The Department submits that the listing of organisations is a process that does not just involve the executive: it also involves the Parliament, as it is Parliament that has the power to disallow a regulation that prescribes an organisation as a terrorist organisation. It is appropriate that the executive and the Parliament play a role in determining the nature of the organisation taking into account the expert advice of those with an extensive knowledge of the security environment. The expertise of members of the executive, who have contact with senior members of the Governments and agencies of other countries cannot be understated.

Both the Commonwealth Government and the Governments of the States and Territories have concluded that the executive and not the judiciary is best placed to make the necessary decision about the nature of the organisations that should be prescribed and that it is desirable that this power not be left to the courts. The Government considers that it is essential that the executive take responsibility for making such decisions and that it should not abdicate this responsibility to the courts.

iii. *Merits Review*

The Department notes that a decision by the Attorney-General that he is satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or it advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur) is a decision that is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. As the submission by HREOC notes (at page 5) a review under the ADJR Act is not a merits review but a review as to whether the decision to specify an organisation was made in accordance with the law. This enables a court to determine whether, for example, the decision was made in bad faith or at the direction or behest of another person or is so unreasonable that no reasonable person could have so exercised the power²⁸.

²⁷ See, for example, the submissions by HREOC, the Australian Muslim Civil Rights Advocacy Network and the Law Council of Australia.

²⁸ See Section 5 of the Administrative Decision (Judicial Review) Act.

Some submissions²⁹ suggest that the decision to list an organisation should be subject to a full judicial merits review. This would mean that a court would be able to determine not only whether the Attorney-General's decision was made in accordance with the law, but whether there was sufficient substantive evidence for him to have reached the decision that he did.

The Department submits that judicial review under the ADJR Act strikes the appropriate balance between an unfettered discretion and merits review.

iv. *Specified Criteria*

The contentions that the Attorney-General's discretion is unlimited are without merit. The Attorney-General must be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or it advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). Then and only then is the Governor-General empowered to make the necessary regulations prescribing the organisation as a terrorist organisation.

The Department submits that specifying further criteria such as the organisation's engagement in terrorism, its links to Australia, the threat to Australia's interests, and proscription by the United Nations or other like-minded countries is unnecessary. What is relevant to the exercise of the Attorney-General's discretion needs to be assessed on a case by case basis. If the Attorney-General makes a decision by taking irrelevant considerations into account or by failing to take relevant considerations into account, then the organisation can seek review of the decision under the ADJR Act.

In relation to the suggested criteria that the activities of the organisation must have direct relevance to Australia before it may be listed, the Department submits that this is inconsistent with the international nature of terrorism. Terrorism is not something that is relevant to a particular region or country; it is a global problem that requires a global response. Being able to prescribe an organisation as a terrorist organisation even if the organisation has no direct relevance to Australia is a part of that global response.

b) Terrorist Organisation Offences

Minor technical amendments were made to the offence in section 102.3 (Membership of a terrorist organisations) by the Criminal Code Amendment (Hizballah) Act, the Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act and the *Anti-terrorism Act 2004*.

i. *Membership of a terrorist organisation – section 102.3*

Many other jurisdictions have in place an offence for membership of a terrorist organisation similar to that in section 102.3. The Department notes that the United Kingdom definition is slightly wider than the other jurisdictions in that it also covers those who profess to belong to a prescribed organisation. This concept of identification with a terrorist organisation, whether or not there is actual membership, is also reflected in the United Kingdom offence of wearing clothing which suggests membership of a terrorist organisation. Under this provision it is an offence to wear an item of clothing or display an article in such a way as to arouse a reasonable suspicion that the person is a member or supporter of a proscribed organisation.³⁰

²⁹ See HREOC's and the Law Institute of Victoria

³⁰ The Department understands that this reference to clothing may well be unique to the United Kingdom where the Irish Republican Army wore distinctive clothing. The Department is not aware of similar groups in Australia.

ii. *Getting funds to, from or for a terrorist organisation- section 102.6*

The offence in section 102.6 (Getting funds to or from a terrorist organisation) was amended by the *Anti-Terrorism (No.2) Act 2005* to make it an offence to collect funds for, or on behalf of, a terrorist organisation as well as receiving funds from or making funds available to a terrorist organisation. This new offence is in response to a Financial Action Taskforce on Money Laundering³¹ requirement that the wilful collection of funds for terrorist organisations be explicitly covered by terrorist financing offences.

iii. *Associating with terrorist organisation – section 102.8*

The *Anti-terrorism (No.2) Act 2004* added a new offence of associating with a terrorist organisation (section 102.8) to make it an offence for a person, on two or more occasions to intentionally associate with another person who is a member of, or who promotes or directs the activities of, a terrorist organisation where that association provides support to the terrorist organisation.

The explanatory memorandum explains that the amendment extends the application of Division 102 to persons who have links with a listed terrorist organisation or a person who is a member or who promotes or directs the activities of a listed terrorist organisation, but who themselves are not members of the organisation but through the association provide support to the organisation. The offence will apply in relation to the provision of support to the terrorist organisation as an entity, rather than with respect to the activities of the organisation. The offence is therefore designed to address the fundamental unacceptability of the organisation itself by setting out that meeting or communicating ("associating") with the organisation in a manner which assists the continued existence or the expansion of the organisation illegal. This is an acknowledgement that because membership of such organisations is illegal, playing a role in supporting the existence or expansion of an illegal organisation should also be a crime.

Subparagraph 102.8(1)(a)(iv) provides that the person must intend to help the organisation continue to exist or to expand on each occasion of associating with a person who is a member of the organisation.

Exceptions are provided for in the case of associations with 'close family members' relating to matters that could be regarded (taking into account the person's cultural background) as matters of family or domestic concern, and associations at a place being used for public religious worship which take place in the course of practicing a religion. Exceptions are also provided for in relation to associations only for the purpose of providing aid of a humanitarian nature and associations only for the purpose of providing legal advice or legal representation in connection with criminal proceedings or proceedings connected with criminal proceedings or proceedings relating to whether the organisation in question is a terrorist organisation. The exception in relation to humanitarian aid is intended to apply to persons undertaking humanitarian aid who, through the course of providing such humanitarian aid, associate with

³¹ The FATF is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF is therefore a "policy-making body" created in 1989 that works to generate the necessary political will to bring about legislative and regulatory reforms in these areas. The FATF has published 40 + 9 Recommendations in order to meet this objective.

a person who is a member of a terrorist organisation or who promotes or directs the activities of a terrorist organisation. The exception in relation to legal advice and representation is designed to ensure that lawyers who provide advice to, or act on behalf of, a person who is a member of a terrorist organisation or who promotes or directs the activities of a terrorist organisation are not liable under the provision. It is important that even those suspected of associating with terrorists have adequate legal advice so that their interests can be properly represented, courts can be sure there is an adequate array of evidence and there is rigorous argument on the issues in question. The Government is committed to a trial process that identifies genuine cases of terrorist-related wrongdoing.

The amendment is by necessity wide-ranging in terms of the types of activities or persons who might be subject to it. For this reason, section 102.8 has been designed to avoid impugning the implied constitutional freedom of political communication. This exception can be established by the defendant if he or she establishes the evidential burden. If the person can point to evidence suggesting a reasonable possibility that the association was a purely political communication for the purposes of the Constitution, then it is for the prosecution to prove beyond reasonable doubt that the exception would have no application. For example, a journalist interviewing a terrorist for a documentary could make use of the exception.

iv. *Fault elements – strict liability when the organisation is a prescribed organisation*

The terrorist organisation offences require the prosecution to prove that the defendant either knew that the organisation was a terrorist organisation or, in certain cases, was reckless as to that fact. This requires the prosecution to show either that the defendant knew (or was reckless as to the fact) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in, or fostering, the doing of a terrorist act (whether or not a terrorist act occurs) or that the defendant knew (or was reckless as to the fact) that the organisation was prescribed.

As the submission by the CDPP points out, while prescribing an organisation as a terrorist organisation enables the CDPP to prove that the organisation was a terrorist organisation, it does not assist establishing the defendant's knowledge as to that fact. In most cases, the prosecution will not be able to show that the defendant knew about (or was reckless as to) the existence of the regulations. This means that the prosecution must prove that the defendant either knew (or was reckless as to the fact) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in, or fostering, the doing of a terrorist act (whether or not a terrorist act occurs). This in turn means that the prosecution has to establish, beyond reasonable doubt, the nature of the organisation.

The Committee may consider that the requirement for the prosecution to prove that the person knew (or was reckless as to the fact) that the organisation was a terrorist organisation could be amended to provide that strict liability applies to the fact that the organisation is a terrorist organisation when the organisation is a prescribed or listed organisation. Once an organisation is prescribed or listed, then it is a terrorist organisation as a matter of law. As such, the prosecution should not be required to establish that the person knew the law, although mistake of fact will be open to the accused. If this suggestion is adopted, consideration could also be given to imposing a lesser penalty for such an offence.

When the organisation is not a prescribed or listed organisation, the prosecution should continue to be required to prove that the defendant either knew (or was reckless as to) the nature of the organisation.

v. *Sections 102.5 and 102.8 – Strict liability and recklessness*

The offence in section 102.5 (Training a terrorist organisation or receiving training from a terrorist organisation) was repealed by the *Anti-terrorism Act 2004* and a new offence was inserted. The amendment removed the requirement for the prosecution to prove that the person *knew* that the organisation was a terrorist organisation and inserted a new offence (in subsection 102.5(2)) where *strict liability* applied to this element of the offence. (The offence requiring proof that the person was reckless as to the nature of the organisation was not affected by this change.)

This means that strict liability applies to the element of the offence that the organisation is a prescribed or listed organisation. However, subsection 102.5(4) provides that the offence in subsection (2) does not apply unless the person is reckless as to the fact that the organisation is a prescribed or listed organisation (and the defendant has an evidential burden to establish this). This means that if the defendant can establish that they were not reckless as to the organisation being a prescribed or listed organisation, then subsection (2) does not apply at all and the prosecution is left with establishing that the person was in fact reckless.

Similarly, subsection 102.8(3) provides that strict liability applies to paragraphs 102.8(1)(b) and (2)(g) that is, that the organisation is a prescribed or listed organisation. Subsection 102.8(5) also provides that the offences in section 102.8 do not apply unless the person is reckless as to the fact that the organisation is a listed or prescribed organisation. As the CDPP point out, this section is further complicated by requiring the prosecution to prove that the defendant knew that the organisation is a terrorist organisation.

The Department submits that the fault elements need to be clarified, first by applying strict liability to the question of whether the organisation is a prescribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation.

The Submission by the Law Institute of Victoria states that “the imposition of strict liability offences, which carry heavy penalties (ie 15 years imprisonment) for offences committed without intent or recklessly, and the reversal of the onus of proof contained in the terrorism offences do not accord fairness and justice to those accused of such offences”. The submission goes on to note that offences carrying life imprisonment are also strict liability offences. The Department notes that strict liability only applies to specific elements of the offences and that the prosecution must prove the relevant fault element for the remaining elements of the offences. The core culpability that justifies the penalty is not affected by the application of strict liability in the manner proposed.

3.1.5 Part 5.3 – Terrorism Division 103 – Financing terrorism

Section 103.1 in Division 103 makes it an offence to finance terrorism. This offence provision was amended by the *Anti-Terrorism Act 2005* to provide that in addition to a person committing an offence even if a terrorist act does not occur, a person will also commit an offence even if the funds will not be used to facilitate or engage in a specific terrorist act; or the funds will be used to facilitate or engage in more than one terrorist act.

The explanatory memorandum provides that the 2005 Act clarifies that it is not necessary for the prosecution to identify a specific terrorist act. It will be sufficient for the prosecution to prove that the particular conduct was related to a terrorist act.

Division 103 was further amended by the *Anti-Terrorism (No.2) Act 2005* to add a new offence of financing a terrorist (section 103.2). This new offence deals with conduct similar to that in subsection 103.1(1), but explicitly requires that the funds be made available to or collected for, or on behalf of, another person. If the person providing or collecting the funds is reckless as to whether that other person will use the funds to facilitate or engage in a terrorist act, the offence will be made out. (Consequential amendments were made to subsection 103.1 and the *Financial Transaction Reports Act 1988*.)

According to the explanatory memorandum for the 2005 Act, this amendment is intended to better implement a recommendation from the Financial Action Task Force on Money Laundering. This recommendation requires that terrorist financing offences explicitly cover the wilful provision or collection of funds intending or knowing that they will be used by an individual terrorist.

As with other offences that are preparatory to a terrorist act, prohibiting the financing of terrorism is an integral part of Australia's approach to combating terrorism from all angles – see discussion under *Suppression of Financing of Terrorism Act 2002*.

3.1.6 Air Security Officers

Schedule 2 of the Security Legislation Amendment (Terrorism) Act amended subsection 13(2) of the *Australian Protective Service Act 1987* to ensure that Australian Protective Service was able to exercise its arrest without warrant powers in relation to the offences in Division 72 of the *Criminal Code* (terrorist-bombing) and the offences in Division 101 of the *Criminal Code* (terrorism). This was designed to enable those officers to exercise these powers as Air Security Officers.

For international sectors the power of arrest of Air Security Officers continues until an alleged offender is handed to foreign authorities. This power was introduced by the *Crimes Legislation Enhancement Act 2003*. The amendment allows Air Security Officers to deliver an arrested person into the custody of a police officer, which includes 'a member, however described, of a police force of a foreign country'.

In 2004, the *Australian Federal Police and Other Legislation Amendment Act 2004* transferred the provisions from the Australian Protective Service Act to the Australian Federal Police Act as a consequence of the amalgamation of those two services.

Schedule 2 of the Security Legislation Amendment (Terrorism) Act also amended the *Crimes (Aviation) Act 1991* to extend the coverage of the offences over which the Australian Protective Service could exercise its powers to include aircraft on intra-state flights.

Air Security Officers have been operational on domestic airlines within Australia since 31 December 2001, and on international flights since late December 2003 when agreement was reached for Air Security Officers to be deployed on flights between Australia and Singapore. In addition, an exchange of Diplomatic Notes between Australia and the United States occurred on 8 May 2004.

These arrangements are reciprocal, allowing the deployment of Singaporean Air Marshals and United States Air Marshals on foreign flights to and from Australia and the deployment of Australian Air Security Officers on Australian flights to and from Singapore and the United States.

Negotiations are continuing with a number of South East Asian countries.

The operational effectiveness of these provisions and the Air Security Officer regime is a matter for the Australian Federal Police to address.

3.2 Suppression of the Financing of Terrorism Act 2002

The Suppression of the Financing of Terrorism Bill 2002 was first introduced into, and passed by, the House of Representatives on 13 March 2002. It was introduced into the Senate on 14 March 2002 and on 20 March 2002 it was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. The Committee subsequently tabled its report 14 May 2002.

The Bill was debated and amended in the Senate and passed in its amended form by the House of Representatives on 27 June 2005. It received Royal Assent on 5 July 2002.

The *Suppression of the Financing of Terrorism Act 2002 (Cth)* (SFTA) implemented Australia's obligations under the International Convention on the Suppression of the Financing of Terrorism and United Nations Security Council Resolution 1267 and United Nations Security Council Resolution 1373, which imposes mandatory obligations on States, and other related resolutions.

The SFTA amended the following legislation:

- *Criminal Code Act 1995*
 - making it an offence to provide or collect funds where the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act
- *Financial Transaction Reports Act 1988*
 - requiring 'cash dealers' to report transactions for which they have reasonable grounds to suspect are preparatory to, or relevant to an investigation or prosecution for, a financing of terrorism offence, and
 - extending Australian agencies' capacity to share financial intelligence with foreign countries, foreign law enforcement agencies and foreign intelligence agencies, and
- *Charter of the United Nations Act 1945*
 - implementing United Nations Security Council Resolutions requiring states to freeze terrorist assets.

Although there have been no prosecutions to date in Australia for the financing of terrorism offence, approximately \$2,000 in funds of one entity has been frozen under the *Charter of the United Nations Act 1945*.

The SFTA implemented Australia's then international obligations to combat terrorist financing. Increasing international appreciation of the value of tackling the financing of terrorism as a key tool in the fight against global and domestic terrorism has resulted in new multi-lateral responses.

3.2.1 Financial Action Task Force on Money Laundering

The SFTA brought Australia's systems for international cooperation on money laundering into compliance with the 1996 40 Recommendations of the Financial Action Task Force on

Money Laundering (FATF), and was a step towards implementing the FATF's 8 Special Recommendations on Terrorist Financing which were adopted in October 2001. In June 2003 the FATF issued a revision of its 40 Recommendations on Money Laundering which significantly extended the scope of the Recommendations and the requirements for compliance. The revised Recommendations were endorsed by the Minister for Justice and Customs in December 2003. At that time the Minister for Justice and Customs also initiated a review of Australia's Anti-Money Laundering and Counter-Terrorist Financing Systems (AML Review) with a view to implementing the revised FATF Recommendations.

Since FATF adopted the 8 Special Recommendations on Terrorist Financing in 2001, the FATF has continued to develop additional guidance to assist countries with implementation. This guidance clarifies the specific measures contemplated by the 8 Special Recommendations. In October 2004 the FATF also added a ninth Special Recommendation on Terrorist Financing to the original 8 Special Recommendations and this was also considered by the AML Review.

The FATF's revised 40 Recommendations on Anti-Money Laundering and 9 Special Recommendations on Terrorist Financing are now the recognised international standard in combating the financing of terrorism. While the 9 Special Recommendations relate specifically to terrorist financing, they are intended to be read with the 40 Recommendations on Anti-Money Laundering.

The FATF has recognised that the measures necessary to combat money laundering are in large part the same as those required to combat the financing of terrorism, and the 9 Special Recommendations represent an extension of anti-money laundering measures to counter-terrorist financing.

The status of the FATF Recommendations as the international AML/CTF standard was recently formally recognised by the UN Security Council. On 29 July 2005 the UN Security Council adopted Resolution 1617 which strongly urges all Member States to implement the comprehensive international standards embodied in the FATF's 40 Recommendations on money laundering and the 9 Special Recommendations on Terrorist Financing.

Resolution 1617 is a successor resolution to Resolution 1267 and related resolutions, which require all states to freeze the assets of the terrorists and terrorist organisations, including the Taliban, Al-Qaida, Osama bin Laden and other entities and individuals included on a list maintained by the Resolution 1267 Committee.

Further amendments to supplement those made in 2002 would be needed for Australia to fully meet the international standards contained in the 9 Special Recommendations. These are substantially addressed in the exposure draft of the Anti-Money Laundering Bill which was released for public comment on 16 December 2005.

3.2.2 FATF's Mutual Evaluation of Australia

In March 2005, as a member of FATF Australia underwent a mutual evaluation of its AML/CTF systems to assess our compliance with the FATF Recommendations. FATF's assessment of Australia's compliance with its Recommendations was published on 17 October 2005 following FATF's Plenary meeting.

FATF found Australia has a comprehensive system for reporting suspicious transactions and that our mechanisms for international cooperation and information sharing are working well. The FATF has also found that Australia has comprehensive measures in place to meet its international obligations to criminalise terrorist financing and freeze terrorist assets. The evaluation found Australia's AML and CTF laws addressed requirements under 31 of FATF's 40 recommended international anti-money laundering standards issued by FATF.

In relation to FATF's Nine Special Recommendations (SRs) on counter-terrorism financing the evaluation found Australia is largely compliant with SR I (implementing UN counter-terrorist financing conventions), SR II (criminalising terrorist financing), SR III (freezing and confiscating terrorist assets), SRIV (reporting suspicions of terrorist financing) and SR V (international cooperation). Australia was also found to be partially compliant with SR VI (regulating alternative remittance dealers), SRVIII (regulation of charitable and non-profit organisation) and SR IX (cash couriers).

3.2.3 Exposure draft Anti-Money Laundering and Counter-Terrorism Financing Bill

On 16 December 2005, the Minister for Justice and Customs released for public consultation the exposure draft Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Bill (the exposure Bill). The Government had agreed to progress reforms to strengthen Australia's AML/CTF systems in line with FATF recommendations.

The FATF evaluation highlighted areas for improvement, consistent with those areas identified by the Australian Government as part of the Government's AML/CTF Review, established after FATF issued its revised Recommendations.

Australia strengthened its CTF provisions by passing the Anti-Terrorism Bill (No 2) 2005 which made a package of CTF related amendments to the *Criminal Code Act 1995* (the Criminal Code) and the *Financial Transaction Reports 1988* (FTRA). The CTF amendments to the Criminal Code improved Australia's implementation of SR II. The amendments to the FTRA enhanced Australia's implementation of SRs VI, VII and IX covering alternative remittance dealers, wire transfers and cash couriers.

The amendments require AUSTRAC to maintain a register of alternative remittance providers. It also includes requirements for cash dealers to include customer information in international funds transfer instructions transmitted out of Australia, and it extends the application of reporting obligations to persons carrying bearer negotiable instruments into or out of Australia.

3.2.4 Amendments to the *Charter of the United Nations Act 1945*

The Financing Act, in conjunction with other measures including the Proceeds of Crime Bill 2002, also implemented Australia's obligations under United Nations Security Council Resolution 1373 and the International Convention for the Suppression of the Financing of Terrorism. Australia has signed the Convention and the Government intends to ratify the Convention in the near future, subject to the usual consultation processes.

The Financing Act introduced new Part 4 to the Charter which provided offences directed at those who provide assets to, or deal in the assets of, persons and entities involved in terrorist activities and associated provisions allowing for the Minister for Foreign Affairs to list

persons and entities for the purpose of the offences, to revoke a listing and to permit a specified dealing in a freezable asset.

We understand that the Committee is concerned that individuals' and businesses' assets might be incorrectly frozen due to similarity with names gazetted by the Minister.

To date, 538 individuals and entities (plus their various aliases) have been listed under Charter of the United Nations Act. 89 of these individuals and entities have been listed by the Foreign Minister under section 15 of Charter of the United Nations Act as being associated with terrorism as provided in paragraph 1(c) of UNSC Resolution 1373. The remainder (449) are individuals or entities that have been listed by the UN 1267 Sanctions Committee as being affiliated with the Taliban or Al-Qaida.

The AFP has advised that they currently receive about five inquiries per week from financial institutions who think they have found a match with the Consolidated List.

There has been only one case in which assets have been frozen. On 27 August 2002, three bank accounts held by International Sikh Youth Federation (ISYF) totalling \$2196.99 were frozen. (The ISYF had been listed by the Minister for Foreign Affairs under the earlier United Nations (Anti-terrorism Measures) Regulations 2001.)

We are not aware of any prosecutions under sections 20 or 21 of Charter of the United Nations Act.

3.2.5 Amendments to the *Extradition Act 1988*

Financing Act amended the definition of "political offence" in section 5 to ensure that financing of terrorism offences are not considered political offences for extradition or mutual assistance purposes.

3.3 *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*

The Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 was introduced into the House of Representatives on 12 March 2002 and passed on 13 March 2002. It was introduced into the Senate on 14 March 2002 and on 20 March 2002 it was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. The Committee subsequently reported on 14 May 2002. The Bill passed the Senate on 27 June 2005 and received Royal Assent on 3 July 2002.

The *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* inserted "Division 72 – International terrorist activities using explosives or lethal devices" into the *Criminal Code* to give effect to the International Convention for the Suppression of Terrorist Bombings (the Convention).

The Criminal Code Amendment (Suppression of Terrorist Bombings) Act established offences for placing bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss, with a penalty of life imprisonment. The Act does not establish jurisdiction over an offence where the circumstances relating to the alleged offence are exclusively internal to Australia as this would exceed the Australian Government's authority under the Constitution.

The Attorney-General's written consent must be obtained before a prosecution for an offence under Division 72 can be commenced.

The provisions have not been amended since enacted and, as far as the Department is aware, no prosecutions have been commenced under the provision.

3.4 *Border Security Legislation Amendment Act 2002*

The Border Security Legislation Amendment Bill 2002 was introduced into the House of Representatives on 12 March 2002 and passed on 13 March 2002.

It was introduced into the Senate on 14 March 2002 and on 20 March 2002 it was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. The Committee subsequently reported on 14 May 2002. The Bill was debated and amended in the Senate and passed the House of Representatives in its amended form on 27 June 2005. It received Royal Assent on 5 July 2002.

The *Border Security Legislation Amendment Act 2002* (Border Security Act) amended the *Customs Act 1901*, the *Customs Administration Act 1985*, the *Fisheries Management Act 1991*, the *Migration Act 1958* and the *Evidence Act 1995* as follows:

- *Customs Act 1901*
 - increased Customs powers at airports by allowing Customs officers to patrol airports, increasing the restricted areas in which unauthorised entry is prohibited and by allowing officers to remove people from those restricted areas
 - required employers of people who work in restricted areas of the airport to provide information about those people to Customs
 - required the issuers of security identification cards (which are issued to most people who work at airports) to provide information about the people to whom they have issued security identification cards
 - required goods that are in transit through Australia to be reported to Customs
 - allowed in transit goods to be examined and certain in transit goods to be seized
 - required mail to be electronically reported to Customs as part of a cargo report
 - required certain airlines and shipping operators to report passengers and crew to Customs electronically
 - required certain airlines to provide Customs with access to their computer reservation systems
 - allowed the Chief Executive Officer of Customs to authorise a person to perform the functions of a Customs officer by reference to their position

or office even if that position or office does not exist at the time of making the authorisation

- tightened provisions allowing the Chief Executive Officer of Customs to authorise the carriage of approved firearms and personal defence equipment by Customs officers for the safe exercise of powers conferred under the Customs Act and other Acts
 - restored the power to arrest persons who assault, resist, molest, obstruct or intimidate a Customs officer in the course of his or her duties, which was inadvertently removed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, and
 - provided that certain undeclared dutiable goods found in the unaccompanied personal and household effects of a person are forfeited goods.
- *Customs Administration Act 1985*
 - included the Australian Bureau of Criminal Intelligence as a Commonwealth agency for the purposes of section 16 of the Customs Administration Act.
 - *Fisheries Management Act 1991*
 - allowed the Australian Fisheries Management Authority to disclose vessel monitoring system data to Customs under the Fisheries Management Act.
 - *Migration Act 1958*
 - required certain airlines and shipping operators to report passengers and crew to the Department of Immigration and Multicultural and Indigenous Affairs electronically.
 - *Evidence Act 1995*
 - made consequential amendments to the definition of Commonwealth document in the Dictionary at the end of the Evidence Act.

The Department understands that Customs will be addressing these provisions in its submission to the Committee. The Department notes that the submission by the Australian Federal Police Association makes a number of comments about non-AFP agencies exercising AFP powers.³²

³² See Submission No. 8 available at www.ag.gov.au/slr/.

3.5 *Telecommunications Interception Legislation Amendment Act 2002*

The Telecommunications Interception Legislation Amendment Bill 2002³³ was introduced into the House of Representatives on 12 March 2002 and passed on 13 March 2002.

It was introduced into the Senate on 14 March 2002 and on 20 March 2002 it was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. The Committee subsequently reported on 14 May 2002. The Bill was debated and amended in the Senate and passed the House of Representatives in its amended form on 27 June 2005. It received Royal Assent on 5 July 2002.

The *Telecommunications Interception Legislation Amendment Act 2002* amended the *Telecommunications (Interception) Act 1979* to include offences constituted by conduct involving acts of terrorism as offences in relation to which a telecommunications interception warrant may be sought.

The remainder of the amendments relate to the day-to-day operation of the Interception Act. Those amendments:

- include child pornography related and serious arson offences as offences in relation to which a telecommunications interception warrant may be sought
- extend the purposes for which lawfully obtained information may be communicated and used to include cases where the intercepted information relates or appears to relate to an act or omission by a police officer that may give rise to the making of a decision by the relevant Commissioner to dismiss that officer
- extend the purposes for which lawfully obtained information may be used to include purposes connected with the investigation of serious improper conduct by the Anti-Corruption Commission of Western Australia
- include the Royal Commission into Police Corruption as an eligible authority for the purposes of the Act to permit the Commission to receive relevant intercepted information in certain circumstances
- correct a number of unforeseen consequences of the *Telecommunications (Interception) Legislation Amendment Act 2000*
- clarify the operation of warrants authorising entry onto premises issued under section 48
- reflect the merger of the Queensland Crime Commission and Criminal Justice Commission to form the Crime and Misconduct Commission
- effect a number of minor corrections to the Act, including amending definitions, headings and references to State legislation, and

³³ The Bill as introduced included a proposed regime for dealing with stored communications. These provisions were removed from the Bill during debate. As the provisions were not included in the Act as passed, the subject of access to stored communications is outside the scope of this Review. It has, however, recently been comprehensively reviewed by Mr A S (Tony) Blunn.

- exclude the monitoring or recording of communications to emergency service numbers from the definition of interception in section 6 of the Act, when the recording or monitoring is done in association with the lawful receipt and handling of such communications³⁴.

The Telecommunications Interception Amendment Act also amended the *Customs Act 1901* to enable Federal Magistrates to be nominated to be judges for the purposes of the listening device provisions of the Act, consistent with the position under the *Telecommunications (Interception) Act 1979* and *Australian Federal Police Act 1979*³⁵. The Customs and AFP provisions were later removed and included in the *Surveillance Devices Act 2004*.

3.6 Criminal Code Amendment (Terrorism) Act 2003

The Criminal Code Amendment (Terrorism) Bill 2003 was introduced into the House of Representatives on 12 December 2002 and passed on 27 March 2003. It was introduced into the Senate on 13 May 2003 and passed unamended on 15 May 2003. It received Royal Assent on 27 May 2003.

The *Criminal Code Amendment (Terrorism) Act 2003* amended the *Criminal Code* to re-enact Part 5.3 to give the federal counter-terrorism offences, which were originally enacted in June 2002 and amended in October 2003, comprehensive national application. This followed the State references of power in accordance with section 51(xxxvii) of the Constitution.

The amendments made by this Act have been discussed in the section of this Submission dealing with terrorist offences under the Security Legislation Amendment (Terrorism) Act.

3.7 Anti-terrorism Act 2004, Anti-terrorism (No.2) Act 2004 and the Anti-terrorism (No.3) Act 2004

For completeness the Department notes the following recently enacted pieces of national security legislation. Where the amendments made by these Acts have affected the provisions in the Acts that are the subject of the Committee's review, then those amendments have been discussed in the section of this submission dealing with each of those Acts.

Anti-terrorism Act 2004

The Anti-terrorism Bill 2002 was introduced into the House of Representatives on 31 March 2004 and referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 11 May 2004. The Bill passed the House of Representatives on 13 May 2004 and was introduced into the Senate on 15 June 2004. On 18 June 2004 the Bill passed the Senate in an amended form. On 22 June 2004, the House did not agree to certain of the Senate amendments. The Senate did not insist on these amendments and the Bill passed the Senate in the same form as the House of Representatives on 25 June 2004. It received Royal Assent on 30 June 2004.

The *Anti-terrorism Act 2004* amends Part 1C of the *Crimes Act 1914*, the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Criminal Code* and the *Proceeds of Crime Act 2002* to improve Australia's counter-terrorism legal framework.

³⁴ This amendment was added during the debate on Bill.

³⁵ The listening device provisions and other surveillance methods are now located in the *Surveillance Devices Act 2004*.

- amends Part 1C of the *Crimes Act 1914* by permitting the fixed investigation period applying to the investigation of federal terrorism offences to be extended by a maximum of 20 hours if judicially authorised and subject to all the existing procedural safeguards enshrined in Part 1C
- amends Part 1C of the *Crimes Act 1914* by permitting the authorities to reasonably suspend or delay questioning of a person arrested for a terrorism offence to make inquiries in overseas locations that are in different time zones to obtain information relevant to that terrorism investigation
- amends the *Crimes (Foreign Incursions and Recruitment) Act 1978* to enhance the foreign incursions offences, particularly in situations where terrorist organisations are operating as part of the armed forces of a state
- amends the *Criminal Code Act 1995* to strengthen the counter-terrorism legislation relating to membership of terrorist organisations and the offence of providing training to or receiving training from a terrorist organisation, and
- amends the *Proceeds of Crime Act 2002* to improve restrictions on any commercial exploitation by a person who has committed foreign indictable offences.

Anti-terrorism (No. 2) Act 2004

The Anti-terrorism (No.2) Bill 2004³⁶ was introduced into the House of Representatives on 17 June 2004 and on 23 June 2004 referred to the Senate Legal and Constitutional Legislation Committee, which reported on 9 August 2004. The Bill passed the House in an amended form on 25 June 2004 and was introduced into the Senate on 3 August 2004. The Bill passed the Senate with further amendments on 13 August 2004 and passed the House in the same form on the same day. It received Royal Assent on 16 August 2004.

The *Anti-terrorism Act (No.2) 2004*:

- amends the *Criminal Code* to strengthen the counter-terrorism legislation by extending the application of offence provisions under Division 102 of the Code to people whose associations with a listed terrorist organisation, or with a person who is a member or who promotes or directs the activities of such an organisation, assists the organisation to continue to exist or to expand
- amends the *Transfer of Prisoners Act 1983* to include security as a third ground for transfer between State or Territory prisons for federal, State and Territory prisoners, as well as for persons charged with and remanded in custody for an offence. The amendments to the Transfer of Prisoners Act will also provide for the return transfer of such persons, as well as the transfer of such persons for court proceedings
- amends the *Administrative Decisions (Judicial Review) Act 1977* to exempt decisions of the Attorney-General under Part IV of the *Transfer of Prisoners Act 1983*, as well as any decision of the Attorney-General under the Act on the grounds of security, from the application of the Act.

³⁶ The Bill as introduced included amendments that were moved to the Anti-terrorism (No.3) Bill 2004

Anti-terrorism (No.3) Act 2004

The Anti-terrorism (No.3) Bill 2004 was introduced into the House of Representatives on 24 June 2004. It passed the House on 4 August 2004 and was introduced into the Senate on the same day³⁷. The Bill passed the Senate on 13 August 2004 and received Royal Assent on 16 August 2004.

The *Anti-terrorism Act (No.3) 2004* amends:

- the *Passports Act 1938* to ensure that those subject to a warrant for an indictable offence or serious foreign offence, prevented from travelling internationally by force of an order of a court, a law of the Commonwealth or a condition of parole, or suspected of engaging in harmful conduct (such as terrorist activities) are prevented from leaving Australia on a foreign passport
- the *Australian Security Intelligence Organisation Act 1979* to ensure that those subject to a request by the Director-General of Australian Security Intelligence Organisation (ASIO) to the Minister for consent to apply for a questioning warrant are prevented from leaving Australia, and
- the forensic procedure provisions in the *Crimes Act 1914* to facilitate effective disaster victim identification in the event that disasters causing mass casualties (such as a terrorist attack or an aircraft disaster) were to occur within Australia.

The amendments made by this Act do not impact on the legislation which is the subject of this review.

3.8 *Anti-Terrorism Act 2005 and the Anti-Terrorism (No.2) 2005*

Anti-Terrorism Act 2005

The Anti-Terrorism Bill 2005 was introduced and passed the House of Representatives on 2 November 2005 and was introduced and passed the Senate on 3 November 2005. It received Royal Assent on 3 November 2005.

The *Anti-Terrorism Act 2005* amends to the existing offences in the *Criminal Code* to clarify that it is not necessary to identify a particular terrorist act to prove specified terrorism offences.

Anti-Terrorism (No.2) Act 2005

The Anti-Terrorism Bill (No.2) was introduced into the House of Representatives on 3 November 2005 and passed on 29 November 2005. It was introduced into the Senate on 30 November 2005 and passed (in an amended form) on 6 December 2005. The House agreed to the amendments on 7 December 2005 and it received Royal Assent on 14 December 2005.

The *Anti-Terrorism (No.2) Act 2005* resulted from a comprehensive review of existing federal legislation that criminalises terrorist activity and confers powers on law enforcement and intelligence agencies to effectively prevent and investigate terrorism.

³⁷ The subject of the Bill was considered by the Senate Legal and Constitutional Legislation Committee as part of that Committee's consideration of the Anti-terrorism (No.2) Bill 2004.

The principal features of the Bill are:

- an extension of the definition of a terrorist organisation to enable listing of organisations that advocate terrorism;
- a new regime to allow for ‘control orders’ that will allow for the overt close monitoring of terrorist suspects who pose a risk to the community;
- a new police preventative detention regime that will allow detention of a person without charge where it is reasonably necessary to prevent a terrorist act or to preserve evidence of such an act;
- updated sedition offences to cover those who urge violence or assistance to Australia’s enemies;
- strengthened offences of financing of terrorism by better coverage of the collection of funds for terrorist activity;
- a new regime of stop, question, search and seize powers that will be exercisable at airports and other Commonwealth places to prevent or respond to terrorism;
- a new notice to produce regime to ensure the AFP is able to enforce compliance with lawful requests for information that will facilitate the investigation of a terrorism or other serious offence;
- amendments to ASIO’s special powers warrant regime;
- amendments to the offence of providing false or misleading information under an ASIO questioning warrant;
- amendments to authorise access to airline passenger information for law enforcement and intelligence agencies;
- the creation of a legal basis for the use of video surveillance at Australia's major airports and on aircraft; and
- additional implementation of FATF Special Recommendations covering criminalising financing of terrorism, alternative remittance dealers, wire transfers and cash couriers.

Where the amendments made by these Acts have affected the provisions in the Acts that are the subject of the Committee’s review, then those amendments have been discussed in the section of this submission dealing with each of those Acts.

4. ADDITIONAL POINTS RAISED BY OTHER SUBMISSIONS

The Department notes that a number of submissions raise points that are not covered by the foregoing discussion.

4.1 Express references to attempt and conspiracy

The CDPP submission recommends (page 1) that there be an express provision in Chapter 2 of the *Criminal Code*, which deals with the general principles of criminal responsibility, to provide that attempt (which is set out in section 11.1) and conspiracy (which is set out in section 11.5) applies to the offences dealing with terrorism in Part 5.3 of the *Criminal Code*.

The Department raised this issue with the CDPP as there was no discussion of this point in the text of their submission. CDPP advised that the recommendation appeared in error and need not be pursued.

4.2 Admissibility of evidence obtained overseas

Both the AFP and the CDPP raise the need to clarify the admissibility of evidence obtained overseas. The Department advises that this issue is currently in the process of being worked

through with officer of the Criminal Law Branch, Civil Justice and Administrative Procedures Branch and Office of International Law.

4.3 *Protection of ASIO officers*

The CDPP submission draws the Committee's attention to the unreported decision of *R v Lee* (17/02/05) where Crispin J rejected an application made by the Director-General of Security for the identity of two ASIO officers to be withheld from the court and the jury. Crispin J rejected this application. The protection of the identity of the ASIO officers is an important issue, as reflected by protections in the ASIO Act.

The Department will consider the issue in conjunction with ASIO, the Australian Government Solicitor and the CDPP.

4.4 *Sharing of Information*

The submission by Mr John Watkins MP, Acting Premier of New South Wales, states that the "effective operation of the law enforcement powers will depend crucially upon effective information and intelligence-sharing arrangements to allow law enforcement agencies to intervene successfully to prevent terrorist attacks". The submission suggests that the Committee may consider the current information sharing arrangements between Commonwealth, State and Territory agencies. A similar issue is raised by the Australian Privacy Foundation³⁸ which also seeks an audit of international exchanges of information.

The Department agrees that effective law enforcement demands the free flow of information between all participating agencies. However, privacy issues must also be taken into account. The Department notes that Mr Peter Ford, former First Assistant Secretary of the Security Law and Critical Infrastructure Division of the Attorney-General's Department is currently undertaking a review of this issue.

4.5 *Education*

The submission by the Australian Muslim Civil Rights Advocacy Network refers to the community legal education that it conducts in relation to the effect and impact of the anti-terrorism laws. The Department recognises that education is a fundamental tool in explaining the new laws and notes that the HREOC recently conducted a forum on this issue.

In addition, the Department notes that the Attorney-General has consulted with Muslim leaders and has expressed support for providing greater explanation of the laws to the community at large.

4.6 *Penalties*

A number of submissions suggest that the penalties for the terrorist act and terrorist organisation offences are too high. The penalties range from imprisonment for life for engaging in a terrorist act (section 101.1) to imprisonment for 25 years for knowingly providing or receiving training connected with terrorist acts etc. The Department submits that these penalties are proportionate to the serious nature of the offence and are comparable to overseas penalties. For example, the United States imposes the death penalty if a terrorist act results in death, and not more than 15 years prison or if the death of a person results, imprisonment up to a life term for getting funds to a terrorist organisation. In France, the

³⁸ See Submission No. 7 available at www.ag.gov.au/slr

maximum custodial sentence is raised to life where the sentence for the underlying offence is 30 years; 30 years where the sentence for the underlying offence is 20 years; 20 years where sentence for the underlying offence is 15 years; 15 years where the sentence for the underlying offence is 10 years; 10 years where the sentence for the underlying offence is 7 years; 7 years where the sentence for the underlying offence is 5 years; and is doubled where the sentence for the underlying offence is up to 3 years.

The Department notes that the CDPP submission states that the penalties under traditional laws are in some cases clearly inadequate and fail to give effect to our obligations under international law.

4.7 *PJC oversight of the AFP*

The submission by the Australian Federal Police Association suggests that the Committee address the issue of the PJC for Intelligence and Security having oversight of the AFP. The Department submits that this is outside the scope of the Committee's terms of reference.

4.8 *Miscellaneous*

The submission by the CDPP raises the issue of the right of the CDPP to appeal a grant of bail in relation to terrorism offences and the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* to State and Territory national security cases. The Department notes that these issues are outside the scope of the Committee's reference and need to be addressed directly with the Department in the first instance.

*Crimes Act 1914***Section 24 - Treason offence as enacted in 1960³⁹**

24(1) A person who:

- (a) kills the Sovereign, does the Sovereign any bodily harm tending to the death or destruction of the Sovereign or maims, wounds, imprisons or restrains the Sovereign;
 - (b) kills the eldest son and heir apparent, or the Queens Consort, of the Sovereign;
 - (c) levies war, or does any act preparatory to levying war, against the Commonwealth;
 - (d) assists by any means whatever, with intent to assist, an enemy:
 - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
 - (ii) specified by proclamation made for the purposes of this paragraph to be an enemy at war with the Commonwealth;
 - (e) instigates a foreigner to make an armed invasion of the Commonwealth or any Territory not forming part of the Commonwealth; or
 - (f) forms an intention to do any act referred to in a preceding paragraph of this subsection and manifests that intention by an overt act,
- shall be guilty of an indictable offence, called treason, and liable to the death penalty⁴⁰.

(2) A person who:

- (a) receives or assists another person who is, to his knowledge, guilty of treason in order to enable him to escape punishment; or
 - (b) knowing that a person intends to commit treason, does not give information thereof with all reasonable despatch to a constable or use other reasonable endeavours to prevent the commission of the offence,
- shall be guilty of an indictable offence.

Penalty: Imprisonment for life.

- (3) On the trial of a person charged with treason on the ground that he formed an intention to do an act referred to in paragraph (a), (b), (c), (d) or (e) of subsection (1) and manifested that intention by an overt act, evidence of the overt act shall not be admitted unless the overt act was alleged in the indictment.
- (4) A sentence of death by a court in pursuance of this section shall be carried into execution in accordance with the law of the State or Territory in which the offender is convicted or, if the law of that State or Territory does not provide for the execution of the sentence of death, in accordance with the directions of the Governor-General.

³⁹ The provision was repealed and substituted by Act No. 84 of 1960

⁴⁰ The death penalty was substituted for life imprisonment by the *Death Penalty Abolition Act 1973* (No. 100 of 1973). Minor drafting amendments were made by Acts No. 33 of 1973 and No. 67 of 1982.

Terrorism Act 2000

Definition of terrorism

- (1) In this Act "terrorism" means the use or threat of action where-
- (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
- (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section-
- (a) "action" includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Definition of terrorist organisation

Section 102.1 Criminal Code

terrorist organisation means:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or
 - (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).
- (2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section, the Minister must be 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 (whether or not a terrorist act has occurred or will occur); or
 - (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).
- (2A) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.
- (3) Regulations for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:
- (a) the repeal of those regulations; or
 - (b) the cessation of effect of those regulations under subsection (4); or
 - (c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection).
- (4) If:
- (a) an organisation is specified by regulations made for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section; and
 - (b) the Minister ceases to be satisfied of either of the following (as the case requires):
 - (i) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);
 - (ii) that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

the Minister must, by written notice published in the *Gazette*, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.

(5) To avoid doubt, subsection (4) does not prevent the organisation from being subsequently specified by regulations made for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section if the Minister becomes satisfied as mentioned in subsection (2).

(6) If, under subsection (3) or (4), a regulation ceases to have effect, section 15 of the *Legislative Instruments Act 2003* applies as if the regulation had been repealed.

(17) If:

- (a) an organisation (the *listed organisation*) is specified in regulations made for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section; and
- (b) an individual or an organisation (which may be the listed organisation) makes an application (the *de-listing application*) to the Minister for a declaration under subsection (4), as the case requires, in relation to the listed organisation; and
- (c) the de-listing application is made on the grounds that there is no basis for the Minister to be satisfied that the listed organisation:
 - (i) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
 - (ii) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);as the case requires;

the Minister must consider the de-listing application.

(18) Subsection (17) does not limit the matters that may be considered by the Minister for the purposes of subsection (4).