

# Parliamentary Joint Committee on Intelligence and Security

## *Review of Security and Counter-Terrorism Legislation*

**Tabled 4 December 2006**

*(Note: This Review took into account recommendations made by the Security Legislation Review Committee (Sheller Committee))*

### **Government response to recommendations**

*(Note: Any legislative amendments to Part 5.3 of the Criminal Code require the approval of the majority of the States and Territories in accordance with the Inter-Governmental Agreement on the Counter-Terrorism Laws.)*

<b>Recommendation</b>	<b>Response</b>
<p><b>Rationale / Community education and publicity</b></p> <p>1. The Committee recommends that the Government support/sponsor a study into the causes of violent radicalisation in Australia to inform Australia's counter terrorism strategy.</p>	<p>The Government <b>supports</b> this recommendation.</p> <p>The Government recognises that communities have an important role to play in protecting our national security and is committed to engaging the community on a range of national security matters. Considerable research has already been undertaken by Australian and overseas universities and think tanks on the causes of violent radicalisation. The Government is actively considering how best to take this forward in the Australian context. Several jurisdictions have already undertaken relevant studies and begun specifically targeted programs.</p> <p>In addition, as an ongoing task, the Attorney-General's Department (the Department) has undertaken considerable work to educate communities and create public awareness of the counter-terrorism laws. This has included the distribution of pamphlets in eight different languages spoken in Australia and has involved Departmental officers speaking at public forums. Future activities could involve extending the range of languages in which information pamphlets are produced (depending on community needs), preparing supplementary explanatory material where a significant change to the counter-terrorism laws is introduced and providing presentations to a range of community groups and stakeholders about impending key amendments to counter-terrorism legislation. In order to enhance the effectiveness of existing education and public awareness programs, attention will be directed towards extending counter-terrorism public information arrangements.</p>

<p><b>Further reviews</b></p> <p><b>2.</b> The Committee recommends that:</p> <p>(a) the Government appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia.</p> <p>(b) the Independent Reviewer be free to set his or her own priorities and have access to all necessary information;</p> <p>(c) the Independent Reviewer report annually to Parliament</p> <p>(d) the <i>Intelligence Services Act 2001</i> be amended to require the PJCIS to examine the reports of the Independent Review tabled in the Parliament.</p>	<p>The Government <b>supports</b> the development of a framework for the regular reviewing of the counter-terrorism legislation through the establishment of a new statutory office in the Prime Minister’s Portfolio, to be known as the National Security Legislation Monitor, reporting to Parliament.</p> <p>Ongoing review of the counter-terrorism legislation is consistent with the Government’s policy imperative to ensure the laws operate in an effective and accountable manner.</p> <p>The National Security Legislation Monitor will bring a more consolidated approach to ongoing review of the laws. This will avoid the past practice of ad hoc reviews on particular aspects which has resulted in a less holistic approach and can be resource-intensive for both the reviewing body and the relevant agencies involved in the review.</p> <p>It is only after there has been experience with the legislation that its practical operation and effectiveness, and implications for national security and human rights can be fully assessed. A formal mechanism for regularly examining the use of the laws and drawing out lessons from their practical operation would ensure ongoing improvement of those laws.</p>
<p><b>Effectiveness and Implications: Impact on Arab and Muslim Australians</b></p> <p><b>3.</b> The committee recommends that Australian police forces review their media policies to ensure that official statements do not prejudice the right to fair trial and are sensitive to the wider implications for the community</p>	<p>The Government <b>supports</b> this recommendation.</p> <p>See discussion for recommendation 1.</p>
<p><b>4.</b> The Committee recommends that AGD increase its efforts to ensure comprehensive information about the terrorism law regime is available to the public in appropriate community languages.</p>	<p>The Government <b>supports</b> this recommendation.</p> <p>See discussion for recommendations 1 and 3.</p>

<p><b>5.</b> The Committee recommends that Australia’s counter terrorism strategy encompass:</p> <p>(a) a commitment to the rights of Muslims to live free from harassment and enjoy the same rights extended to all religious groups in Australia;</p> <p>(b) wide dissemination of information about mechanisms for complaint or redress in relation to law enforcement, intelligence agencies and the media; and</p> <p>(c) a statement on the importance of informed and balanced reporting to promote social cohesion.</p>	<p>The Government <b>supports</b> this recommendation.</p> <p>See discussion for recommendation 1.</p>
<p><b>Treason</b></p> <p><b>6.</b> The Committee recommends that:</p> <p>(a) the offence of treason be restructured so that conduct constituting treason apply only to persons who owe allegiance to Australia or who have voluntarily placed themselves under Australia’s protection;</p> <p>(b) the conduct of others, which falls within the scope of paragraphs 80.1(1)(a)(b)(c), should be dealt with separately;</p> <p>(c) the offence of assisting the enemy under paragraph 80.1(e) and (f) be clarified to cover ‘material assistance’;</p> <p>(d) paragraph 80.1(f) be amended to require knowledge of the existence of armed hostilities.</p>	<p>The Government <b>supports in part</b> recommendation 6.</p> <p>The Government <u>supports sub-recommendation (a)</u> in relation to providing an allegiance or duty requirement within the treason offence. Historically, it was always intended that the treason offence contain an allegiance element. Therefore, it is important that the provision expressly state this so it is clear that the presence of a betrayal of an allegiance or duty to the state is integral to the operation of the treason offence.</p> <p>The Government <u>supports sub-recommendation (c)</u>. The offence already requires that assistance provided to the enemy be real or concrete and not mere rhetoric or expressions of dissent. Clarifying the conduct standard as one of ‘material assistance’ is reflective of how the offence is intended to operate. The ALRC made similar recommendations in its Report entitled <i>Fighting Words: A Review of Sedition Laws in Australia</i> (ALRC 104) (see recommendation 11-2)</p> <p>The Government <u>does not support sub-recommendations 6(b) and 6(d)</u>. In recommendation 6(b), the PJCIS recommends that the types of treasonable conduct set out in subsections 80.1(a)-(c) be separated. Implementation of the recommendation would not serve to improve the operation of the offence.</p>

	<p>Recommendation 6(d) proposes amending the fault elements of the treason offence. This is not supported as it would confine the scope of the offence to those circumstances where the defendant knew about the existence of armed hostilities. The offence in section 80.1(f) currently requires that a person <i>intentionally</i> engage in conduct which is <i>intended</i> to assist an enemy (either country or organisation) which is engaged in armed hostilities against the Australian Defence Force. In proving that a person intended to assist the enemy, the prosecution would be required to prove that the defendant was aware that the ADF was engaged in armed hostilities against the enemy and provided assistance regardless. The defence of ‘good faith’ applies to the treason offence.</p>
<p><b>Definition of Terrorist Act</b></p> <p>7. The Committee recommends that the requirement that the person intends to advance a political, religious or ideological cause be retained as part of the definition of terrorism.</p>	<p>The Government <b>supports</b> recommendation 7 in relation to retaining the element ‘intention to advance a political, religious or ideological cause’ as part of the definition of terrorist act. The definition of terrorist act focuses on the motive associated with a terrorist act that distinguishes such violence from other non-terrorist acts.</p>
<p><b>Advocacy</b></p> <p>8. The Committee recommends that the current exemption for advocacy, protest, dissent and industrial action be retained as part of the definition of terrorism.</p>	<p>The Government <b>supports</b> recommendation 8 in relation to retaining the current exemption for advocacy, protest, dissent and industrial action within the definition of terrorist act. The policy objective in introducing this qualification was to distinguish terrorism from acts of legitimate political protest or unlawful civil protest with no ‘terrorist act’ connection.</p>
<p><b>Psychological harm</b></p> <p>9. The Committee recommends that psychological harm not be included in the definition of a terrorist act. Alternatively, that the Government consult with the States and Territories on this issue and give consideration to the question in light of other amendments to the definition.</p>	<p>The Government <b>supports the alternative option</b> in this recommendation to consult the States and Territories to give consideration to including psychological harm within the definition of terrorist act.</p> <p>The general definition of <i>harm</i> in the Criminal Code includes harm to a person’s mental health, whether temporary or permanent. In order to ensure consistency within the Criminal Code, the notion of harm which applies to the definition of ‘terrorist act’ in section 100.1(2)(a) (being serious harm that is physical harm) could be expanded to include psychological harm. Psychological harm can be just as damaging as physical harm. Fear associated with the</p>

	<p>threat of terrorism or the implications associated with the commission of a terrorist act manifest beyond tangible physical harm.</p> <p>Amendment to the definition would be consistent with the recommendations made by the Sheller Committee and the submissions made to the PJCIS by bodies such as the Law Institute of Victoria and the Gilbert &amp; Tobin Centre of Public Law.</p>
<p><b>Threat of a terrorist act</b></p> <p><b>10.</b> The Committee recommends that ‘threat’ of terrorist act be removed from the definition of terrorism and be dealt with as a separate offence.</p>	<p>The Government <b>supports in principle</b> recommendation 10, and will consult the States and Territories on clarifying the application of ‘threat of action’ within the definition of terrorist act.</p> <p>As the Sheller Review and PJCIS review both raised issues in relation to the concept of threat within the definition, a clarification to the definition would assist in making it clear that the threats of action relate to damage which is likely to be caused as a result of the terrorist threat as opposed to damage which is actually caused by a terrorist act.</p>
<p><b>International organisations</b></p> <p><b>11.</b> The Committee recommends that the definition of terrorism recognise that international organisations may be the target of terrorist violence.</p>	<p>The Government <b>supports</b> recommendation 11 to recognise that international organisations, such as the United Nations, may be the target of terrorist violence.</p>
<p><b>Law of armed conflict</b></p> <p><b>12.</b> The Committee recommends that to remove doubt the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict.</p>	<p>The Government does <b>not support</b> recommendation 12.</p> <p>Acts of terrorism may still occur during armed conflict; therefore the unqualified exclusion of armed conflict will encourage misapplication of the principles of public international law. The express exclusion of conduct regulated by the law of armed conflict from the definition of terrorist act would neither add to nor detract from Australia’s international obligations and is unlikely to add clarity to the operation of relevant Criminal Code provisions.</p>
<p><b>Hoax offence</b></p> <p><b>13.</b> The Committee recommends that a separate hoax offence be adopted but that penalties reflect the less serious nature of a hoax as</p>	<p>The Government <b>supports</b> recommendation 13.</p> <p>The Criminal Code currently contains offences for the commission of hoaxes that are made either via the post or a telecommunications network. However, if a terrorist-related hoax is committed without the use of</p>

<p>compared to a threat of terrorism.</p>	<p>the post or a telecommunications network, it will not be captured by the offence. Given the potential for a terrorist-related hoax to cause significant alarm to the community and to divert valuable law enforcement and emergency services, the creation of a terrorist-related hoax offence is warranted.</p>
<p><b>14. Advocacy as basis for listing terrorist organisation</b></p> <p>(a) The Committee does not recommend the repeal of ‘advocacy’ as a basis for listing an organisation as a terrorist organisation but recommends that this issue be subject to further review.</p> <p>(b) The Committee recommends that ‘risk’ be amended to ‘substantial risk.’</p>	<p>The Government <b>supports</b> recommendation 14.</p> <p>The advocacy criteria will be reviewed by the 2010 COAG review.</p> <p>Recommendation 14(b) provides that section 102.1 (1A) (the definition of advocacy) be amended so as to require there to be a ‘substantial’ risk that a person be led by the statement/praise to engage in a terrorist act as opposed to a ‘risk’.</p> <p>It has always been intended that the risk threshold associated with an organisation directly praising the doing of a terrorist act be real and apparent on the evidence presented and not fanciful or speculative. Accordingly, the inclusion of the word ‘substantial’ would expressly confirm that the level of risk associated with advocacy is not mere risk but heightened risk. Such an amendment would also be consistent with the language of the Criminal Code in relation to the concept of risk, for example, substantial risk in the definition of recklessness.</p>
<p><b>Terrorist organisations</b></p> <p><b>15.</b> The Committee recommends that the Government consider:</p> <p>(a) replacing the membership offence with an offence of participation in a terrorist organisation; and</p> <p>(b) whether ‘participation’ should be expressly linked to the purpose of furthering the terrorist aims of the organisation.</p>	<p>The Government does <b>not support</b> this recommendation.</p> <p>The concept of ‘participation’ is less formal than the concept of membership in an organisation and therefore has the propensity to introduce a level of ambiguity if included as an offence provision.</p>

<p><b>Training</b></p> <p><b>16.</b> The Committee recommends that the training offence be redrafted to define more carefully the type of training targeted by the offence. Alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act.</p>	<p>The Government <b>supports in part</b> recommendation 16 in relation to clarifying that the offence does not capture legitimate activities (such as those provided by humanitarian aid organisations).</p> <p>The purpose of the terrorist organisation offences is to ensure that terrorist organisations are disbanded. In order to achieve this, it is appropriate that providing training to, or receiving training from, such organisations is an offence without the training itself having to be connected to a terrorist act.</p>
<p><b>Terrorist financing</b></p> <p><b>17.</b> The Committee recommends that:</p> <p>(a) it be a defence to the offence of receiving funds from a terrorist organisation that those funds were received solely for the purpose of the provision of representation in legal proceedings; and</p> <p>(b) that the legal burden be reduced to an evidential burden.</p>	<p>The Government does <b>not support</b> recommendation 17.</p> <p>The Government does not support recommendation 17(a) as section 102.6(3) already provides that if funds are received for the sole purpose of funding legal representation, then the transaction does not fall within the ambit of the offence with the defendant bearing a legal burden of proof. This subsection effectively operates as a defence and as such recommendation 17(a) is already accommodated within the legislative framework.</p> <p>Further, the Government does not support recommendation 17(b). This legal burden requires the defendant to prove on the balance of probabilities that the funds were received solely for the purposes of legal representation. It is preferable that the defendant be required to prove the issue on the balance of probabilities as opposed to merely pointing to evidence which suggests that a reasonable possibility exists (evidential burden) because the evidence concerned will be readily available to the defendant but not the prosecution.</p>
<p><b>Support to a terrorist organisation</b></p> <p><b>18.</b> The Committee recommends that the offence of providing support to a terrorist organisation be amended to ‘material support’ to remove ambiguity.</p>	<p>The Government <b>supports</b> recommendation 18.</p> <p>Describing the type of support which will qualify for the purpose of the offence as ‘material support’ does not represent an elevation of the conduct standard because the level of support which must be proven needs to be real and concrete. This amendment will serve to clarify that the level of support required goes beyond ‘mere support’.</p>

<p><b>Association offence</b></p> <p><b>19.</b> The Committee recommends that the offence of ‘associating with a terrorist organisation’ be re-examined taking into account the recommendations of the Sheller Committee.</p>	<p>The Government <b>supports</b> recommendation 19. The Government will refer the matter for examination by the new National Security Legislation Monitor once appointed.</p>
<p><b>Strict liability</b></p> <p><b>20.</b> The Committee recommends that strict liability provisions applied to serious criminal offences that attract the penalty of imprisonment be reduced to an evidential burden.</p>	<p>The Government <b>notes</b> recommendation 20. The Government will refer the matter for examination by the new National Security Legislation Monitor once appointed.</p>
<p><b>Financing of terrorism</b></p> <p><b>21.</b> The Committee recommends that:</p> <p>(a) section 103.1 be amended by inserting ‘intentionally’ after ‘the person’ in paragraph (a) and removing the note;</p> <p>(b) that recklessness be replaced with knowledge in paragraph (b).</p> <p>(c) the Committee recommends that paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.</p>	<p>The Government does <b>not support</b> recommendation 21. The note within the offence makes it clear that the fault element in paragraph 103.1(a) of the terrorist financing offence is intention by virtue of the application of section 5.6 of the Criminal Code.</p> <p>Further, elevating the standard of proof from recklessness to knowledge would be contrary to the standard Criminal Code fault element for a circumstance which is recklessness.</p> <p>The PJCIS suggests that further clarity can be achieved by amending s 103.2(1)(b) to specify that the intended recipient of the funds is a ‘terrorist’. The inclusion of this term has no definitional point of reference as the term ‘terrorist’ is not used in the Criminal Code. Also, the use of the term ‘terrorist’ instead of ‘person’ in the offence would pre-emptively suggest that it has already been established that the person the subject of the offence is a person who has engaged in a terrorist act.</p>
<p><b>Charter of the United Nations Act</b></p> <p><b>22.</b> The Committee recommends that:</p> <p>(a) external merit review of a decision to list a person, entity or asset under section 15 of the COUNA should be made</p>	<p>The Government <b>supports in part</b> recommendation 22.</p> <p>(a) The Government does not support recommendation 22(a) but supports amendment of COUNA to incorporate a periodic review mechanism. As noted by the PJCIS, judicial review of decisions by the Minister for Foreign Affairs to list a person, entity or asset under section 15 of the COUNA is available</p>



<p>available in the Administrative Appeals Tribunal;</p> <p>(b) section 15 and regulation 6 be amended so that the Minister must be satisfied on reasonable grounds that the person, entity, asset or class of assets fall within the scope of UNSCR 1373;</p> <p>(c) COUNA should be amended to provide that a person or entity listed by regulation is entitled to seek review as a step in the process of review by the Sanctions Committee.</p>	<p>under the ADJR Act. There is also a mechanism in COUNA under which a person or entity listed by the Minister for Foreign Affairs under section 15 may apply to the Minister to have the listing revoked (see section 17 of the COUNA).</p> <p>(b) The Government supports recommendation 22(b) but notes that the legislation has been amended since the publication of the PJCIS report and section references in that report are now outdated. Regulation 6 referred to in the first PJCIS report no longer exists. Pursuant to changes introduced in the <i>International Trade Integrity Act 2008</i>, the relevant regulation is now regulation 20. The Government agrees that section 15 and regulation 20 should be amended to replace the word ‘satisfied’ with ‘satisfied on reasonable grounds’. This would bring Australia in line with international best practice which is reflected in the guidelines produced by the UN Counter-Terrorism Directorate and the Financial Action Task Force.</p> <p>(c) The Government does not support recommendation 22(c). All designations by the UN Al-Qaida and Taliban Sanctions Committee established pursuant to UNSCR 1267 are given effect through incorporation by reference in regulations made under section 6 of the COUNA. This is in accordance with Australia’s international obligations and Australia has no discretion in relation to individuals and entities listed or de-listed by this Committee. It is therefore inappropriate to provide for a review mechanism under COUNA.</p>
<p><b>Customs</b></p> <p><b>23.</b> That the Customs Act be amended to specify that access to passenger information for the purpose of another law of the Commonwealth is limited to the investigation of serious crimes proscribed by regulation.</p>	<p>The Government does <b>not support</b> recommendation 23.</p> <p>Adopting this recommendation would limit Customs’ ability to access passenger information for legitimate border security purposes other than the investigation of serious crimes.</p>
<p><b>Customs</b></p> <p><b>24.</b> The Committee recommends that:</p>	<p>The Government <b>supports in principle</b> recommendation 24.</p> <p>(a) The Customs Act currently allows the Australian Customs Service to retain data which is operationally</p>

<p>(a) the Customs Act be amended to specify that retention of passenger information be permitted for a limited time in order to conduct analysis;</p> <p>(b) that the Minister for Customs report to the Parliament on the status of negotiations with European States in relation to passenger information.</p>	<p>necessary to perform its border security function. However, the Government agrees that it is important that strict privacy principles are followed when data is retained by law enforcement and security agencies. The Privacy Commissioner conducts regular audits of Customs' records to ensure privacy principles of storage, handling and retention of data are strictly followed.</p> <p>(b) The <i>European Union – Australia Passenger Name Record Agreement</i> was signed on 30 June 2008. The Agreement has been presented to Parliament through the Joint Standing Committee on Treaties.</p>
<p><b>Customs</b></p> <p><b>25.</b> The Committee recommends that the Privacy Commissioner retain an ongoing oversight role in relation to passenger name records, which includes biannual monitoring of the Passenger Analysis Unit.</p>	<p>The Government <b>supports</b> recommendation 25 in relation to the oversight role of the Privacy Commissioner.</p> <p>The Privacy Commissioner and Customs have entered into an agreement to establish a rolling PAU privacy compliance audit program. Under the agreement, the Office of the Privacy Commissioner will perform a privacy audit of the Passenger Analysis Unit biennially.</p>
<p><b>26.</b> The Committee recommends that:</p> <p>(a) the subject of a seizure warrant involving entry to premises should be provided with a statement of rights and obligations;</p> <p>(b) that Customs bears the onus of proving the basis of the seizure.</p>	<p>The Government will give <b>further consideration</b> to recommendation 26 to ensure there are appropriate safeguards within all law enforcement and security seizure powers. A whole of government approach should be settled on this issue prior to determining an approach for specific warrants under the Customs Act.</p> <p>The Government does not support recommendation 26(b) which is understood to be directed at applications for return of goods after they have been lawfully seized. The Government considers that where Customs have lawfully seized an item in an investigation after obtaining a warrant issued by a judicial officer (in which the applicant would have had the onus of establishing the necessity in all the circumstances of the seizure in question), a person whose items have been seized should be required to prove why those seized items should be returned to them.</p>