Australian Government
Attorney-General's Department

Submission to the COAG Review of Counter-Terrorism Legislation

Australian Government Attorney-General's Department

October 2012

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1. Introduction

The Australian Government Attorney-General's Department (AGD) is pleased to provide this submission to the Council of Australian Governments Review of Counter-Terrorism Laws (referred to in this submission as the Review or COAG Review). As the portfolio department with policy responsibility for the Commonwealth legislation under consideration,[1] AGD welcomes the commencement of the Review. Its establishment reflects the commitment of all Australian governments to maintaining effective and appropriate counter-terrorism laws in a dynamic security environment.[2]

The focus of this submission is largely explanatory, in that it provides an overview of the Commonwealth legislative framework under review, with an emphasis on the provisions of Part 5.3 of the Criminal Code. The submission outlines the history of the relevant Commonwealth laws under review, and identifies the policy rationale underlying them.

Consistent with the requirements of the *Australian Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*,[3] AGD does not seek to advocate or defend the merits of the policy underlying the relevant laws. AGD looks forward to supporting the Government in considering the Committee's findings and recommendations, and to working collaboratively with state and territory governments on matters of implementation as appropriate. AGD would be pleased to assist the Committee with further information as necessary.

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1 Administrative Arrangements Order, 9 February 2012, Part 2 (Attorney-General's Department), pp 5-9.

2 See further, COAG, Communique, Special Meeting on Counter-Terrorism, 27 September 2005 (Canberra), p. 3. See also, *Anti-Terrorism Act (No 2) 2005,* s 4.

3 Accessible at http://www.dpmc.gov.au/guidelines/. See especially, paragraphs [1.1], [2.15]-[2.17], [6.1].

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Submission outline

This submission is organised into the following sections, which largely follow the list of provisions in the Terms of Reference:

(1) ***Background*** – Australia's legislative framework for counter-terrorism

(2) ***Criminal Code 1995*** – key definitions (Div 100) and the terrorist offences (Div 101)

(3) ***Criminal Code 1995*** – terrorist organisations (Div 102)

(4) ***Criminal Code 1995*** – financing terrorism offences (Div 103) and ***Financial Transaction Reports Act 1988*** – reporting suspect transactions (s 16)

(5) ***Criminal Code 1995*** – control and preventative detention orders (Divs 104, 105)

(6) ***Crimes (Foreign Incursions and Recruitment) Act 1978*** – the offence of incursions into foreign States with intention of engaging in hostile activities (s 6)

(7) ***Crimes Act 1914*** – the terrorism-specific search and information-gathering powers (Div 3A)

(8) ***Administrative Decisions (Judicial Review) Act 1977*** – exemptions of certain counter-terrorism related decisions from statutory judicial review (Schedule 1, paragraphs (dab) and (dac))

Provisions and other matters not addressed

AGD does not provide substantive comments on the provisions of the state and territory laws under review. References to state and territory laws are limited to observations about their broader context as part of a comprehensive, national legal response to terrorism.

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1. Background to the legislative framework

This section identifies, at a high level, some of the guiding principles underlying the overall legislative approach, and outlines key milestones in the history of the provisions under review. It also identifies major reviews (both completed and current) of the relevant provisions, and their outcomes, including government responses and consequent legislative amendments.

Guiding principles

As documented in the *Counter-Terrorism White Paper*, Australia's legal response to terrorism is premised on the rule of law.[4] As such, several hallmarks are evident in the laws under review, which could be divided into three broad categories.

First, the laws **apply specifically to terrorism**, in order to recognise, and condemn appropriately, its distinguishing features[5] from other forms of serious crime, consistently with Australia's international law obligations in respect of counter-terrorism.[6]

Secondly, the laws **adhere to established principles of criminal justice** through the adoption of a framework that places primacy on criminal offences and, consequently, the usual processes, standards and safeguards associated with investigation, arrest, charge, trial, proof, conviction and punishment for offences.[7]

Thirdly, the laws **focus on the prevention of terrorism**, in a manner consistent with established due process requirements arising under domestic and international law. Two aspects of the regime are particularly important in this regard. The first is the focus of the offences in Part 5.3 of the *Criminal Code 1995* (Code) on interrupting the preparatory stages of a terrorist attack, rather than being limited to punishing completed

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4 Australian Government, *Counter-Terrorism White Paper* (2010), especially [6.1.3].

5 The enactment of separate counter-terrorism legislation was supported in the *Report of the Security Legislation Review Committee* (2006) (Sheller Review) p. 3, and the Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006), foreword; p. 11 [2.23].

6 See especially, UN Security Council Resolution 1373, *Threats to international peace and security caused by terrorist acts* (28 September 2001), [1]-[2].

7 See generally, the terrorist offences in Divisions 101, 102 and 103 of Part 5.3 of the *Criminal Code 1995* (Cth); and the terrorism-specific investigation and enforcement powers in Division 3A and Part 1C of the *Crimes Act 1914* (Cth).

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attacks. A further preventative aspect of the regime is the availability of protective measures that operate separately to criminal offences – including control and preventative detention orders under Divisions 104 and 105 of the Code.[8] These orders do not depend on a prior finding of guilt, because they are directed to protective purposes, which include protecting the public from an apprehended terrorist attack, or to preserve evidence in the immediate aftermath of an attack. Importantly, these regimes operate under significant safeguards enshrined in their issuing criteria and processes. The rigorous nature of these safeguards further reflect the intention that these measures are intended to operate in limited circumstances, and supplement rather than replace offence-based responses.

As the Security Legislation Review (2006) identified, Commonwealth counter-terrorism laws are framed around two critical 'constructs' – the definition of a 'terrorist act' in s 100.1 of the *Criminal Code 1995* (Code), and the definition of a 'terrorist organisation' in s 102.1 of the Code. These constructs form the basis of the offences and protective measures contained in the Code, and in supporting procedural provisions (for example, those concerning investigation, arrest and other matters of criminal procedure).[9]

The origins of Commonwealth counter-terrorism laws

Prior to 2002, there was a limited range of Commonwealth legislation directed specifically to counter-terrorism. These laws were enacted largely to implement Australia's international law obligations concerning particular threats, such as aircraft hijacking. The assumption was that governments could rely, if necessary, on criminal laws of general application, including offences against the person under state and territory laws, such as murder or grievous bodily harm.[10]

In the aftermath of 11 September 2001, the Government of the day commissioned the (then) Secretary of the Attorney-General's Department, Robert Cornall AO, to lead a high-level review of Australia's domestic counter-terrorism arrangements (Cornall

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8 A further example of protective provisions (beyond the remit of the COAG Review) are the terrorism-specific intelligence-gathering powers in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (Questioning and Questioning and Detention Warrants).

9 *Report of the Security Legislation Review Committee* (2006), pp. 45-46, [5.14].

10 See generally, Robert Cornall AO, 'the Effectiveness of Counter-Terrorism Laws' in *Law and Liberty in the War on Terror,* Lynch, McDonald and Williams (eds) (2007), 50-74, 52.

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Review). The impetus for this review was to ensure that Australia had adequate capability to respond to the type of terrorist threat that had manifested itself in the US attacks.[11]

The Cornall Review delivered its report to the (then) Government in October 2001. In broad terms, it recommended a range of measures to consolidate and strengthen legal powers to investigate, prevent and respond to the challenges of the new type of terrorist threat.[12] It proposed a range of terrorism-specific laws. They included a single set of terrorist offences in the Criminal Code, which are aimed at persons who:

- engage in, train for, prepare, plan, finance or provide support for, terrorist acts; or
- are members of terrorist organisations.

Further recommendations were directed to new financial transaction reporting and asset-freezing laws, and enhanced investigation and intelligence-gathering powers.

On 18 December 2001, the (then) Attorney-General, the Hon Daryl Williams AM QC MP, announced the Howard Government's response to the Cornall Review. He stated that Cabinet had endorsed several measures arising from the Review, and that the Government would introduce a series of legislative reforms to implement them.[13]

The first tranche of specific counter-terrorism legislation was introduced to Parliament in March 2002 and was passed within the year. Further major amendments were enacted in 2003, 2004, 2005, 2006 and 2010. A summary of these legislative milestones is provided in **Appendix A, Table 1**.

Federal-state cooperation

In announcing the first tranche of reforms in December 2001, (then) Attorney-General Williams observed that many of the proposals would impact on matters of state and territory responsibility, and announced the former Government's commitment to

11 The Hon Daryl Williams AM QC MP, 'Upgrading Australia's Counter-Terrorism Capabilities', Media Release, 18 December 2001.

12 ibid.

13 ibid.

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inter-governmental consultation.[14] Key consultations and agreements include the following:

- On 5 April 2002, first ministers concluded an *Agreement on Terrorism and Multi-Jurisdictional Crime* at a National Leaders' Summit. The Agreement included a statement of in-principle support for a referral of states' powers to the Commonwealth, which would enable the Commonwealth to 'legislate across the board' in relation to terrorism.

- In 2003, the development of a referral scheme concerning Part 5.3 of the Code under the auspices of the former Standing Committee of Attorneys-General (now the Standing Committee on Law and Justice), and the introduction and enactment of referral legislation by all Australian Parliaments.

- On 25 June 2004, first ministers signed the *Intergovernmental Agreement on Counter-Terrorism Laws*, which established a process for consultation and agreement on future amendments to Part 5.3 of the Code, and the proscription of terrorist organisations by regulations made under Division 102.

- Inter-governmental consultations in late 2005 (largely under the auspices of COAG and the National Counter-Terrorism Committee) to establish the control and preventative detention order regimes in Divisions 104 and 105.

Major reviews of Commonwealth laws

Under its Terms of Reference, the Review is required to take account of the findings and recommendations of relevant reviews and monitoring activities. To aid this aspect of the Review, AGD draws the Committee's attention to several major completed and current reviews of Commonwealth laws.

Completed reviews

- The *Security Legislation Review*, chaired by the Hon Simon Sheller QC AO (2006) (Sheller Review);[15]

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14 ibid.

15 The Sheller Review was established pursuant to s 4 of the *Security Legislation Amendment (Terrorism) Act 2002*, which required the Attorney-General to cause a review of the operation, effectiveness and implications of amendments made by the first tranche

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- The Parliamentary Joint Committee on Intelligence and Security (PJCIS) *Review of Security and Counter-Terrorism Legislation* (2006) (2006 PJCIS Inquiry);
- The PJCIS *Inquiry into the Proscription of Terrorist Organisations Under the Australian Criminal Code* (2007) (2007 PJCIS Inquiry);[16] and
- The *Inquiry into the Case of Dr Mohammed Haneef* undertaken by the Hon John Clarke QC (2008) (Clarke Inquiry).

In broad terms, these inquiries led to several reforms, consistent with the Government's commitment to the continuous improvement of the legal framework for counter-terrorism.[17] In particular, the *National Security Legislation Amendment Act 2010* (Cth) implemented several of the recommendations of the above inquiries which were accepted by the Government.[18] Key reforms are summarised in **Appendix A, Table 1**.

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of specific counter terrorism laws. It was amended by the *Criminal Code Amendment (Terrorism) Act 2003* to add that Act to the legislation to be reviewed.

16 The 2007 PJCIS review was undertaken in accordance with s 102.1A(2) of the Code (repealed in 2010), which provided for a review of ss 102.1(2),(2A),(4)(5)(6)(17) and (18) to be conducted by the former PJC on ASIO, ASIS and DSD (now the PJCIS) as soon as practicable after the third anniversary of the commencement of s 102.1A(2).

17 AGD released the *National Security Legislation Discussion Paper on Proposed Amendments* (2009 Discussion Paper) to consult on proposed reforms.

18 As noted subsequently in this submission, the 2009 Discussion Paper included several proposed reforms to Part 5.3 of the Code, which were designed to implement recommendations of the Sheller Review, the PJCIS Inquiries and the Clarke Inquiry. The Government did not incorporate them in the 2010 reform package, in order to conduct further consultation with states and territories, consistent with the requirements in s 100.8 of the Code, and the *Intergovernmental Agreement on Counter-Terrorism Laws.* Specific deferred proposals are identified and discussed separately in this submission, under their respective Divisions.

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Current and recent reviews

Independent National Security Legislation Monitor

The Sheller Review, the 2006 and 2007 PJCIS Inquiries and the Clarke Inquiry recommended the establishment of an independent monitor of national security legislation.[19] These recommendations were implemented in 2010 with the enactment of the *Independent National Security Legislation Monitor Act 2010* (Cth).

The inaugural Monitor, Mr Bret Walker SC, was appointed on 21 April 2011. He submitted his first annual report to the Prime Minister on 16 December 2011, which was tabled in Parliament on 19 March 2012. The report outlined the Monitor's work program for subsequent reporting periods. The Government will give careful consideration to findings and recommendations made in future reports. The Monitor's next annual report is due to be submitted to the Prime Minister by 31 December 2012.

Administrative Review Council Inquiry into Judicial Review in Australia

In September 2012, the Administrative Review Council completed an inquiry into judicial review in the federal administrative law system.[20] The operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) is a focus of the inquiry. The Council examined national security-related exemptions to ADJR Act review rights, including those within the COAG Review's Terms of Reference (Schedule 1 of the ADJR Act, paragraphs (dab) and (dac)).[21] The Council made two recommendations, to the effect that the exemptions in paragraph (dab) concerning certain decisions in the issuing of control orders should be retained, and that the exemption in paragraph (dac) of all decisions concerning preventative detention orders in Division 105 should be removed.[22]

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19 Sheller Review, recommendation 1; 2006 PJCIS Inquiry, recommendation 2; 2007 PJCIS Inquiry, recommendation 7; Clarke Inquiry, recommendation 4.

20 The Council conducted this inquiry of its own motion in accordance with its statutory functions under s 51 of the *Administrative Appeals Tribunal Act 1975* (Cth), and provided a report on possible future directions and models for judicial review.

21 See Administrative Review Council, *Federal Judicial Review in Australia*, Final Report (September 2012), Appendix B, pp. 205-211 at [B.22]-[B.41]. See further Administrative Review Council, *Consultation Paper: Judicial Review in Australia* (April 2011), pp 70-72 and consultation question 9.

22 Recommendations B9 and B10 (pp. 208-211).

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The Government will consider these recommendations in due course, taking into account any further findings or recommendations of the COAG Review.

Parliamentary scrutiny of major legislative proposals

In considering major reviews of the relevant Commonwealth laws, it is also important to recognise the role of established democratic scrutiny mechanisms. In this regard, AGD notes the considerable work of the Australian Parliament in examining major legislative proposals, particularly by way of committee inquiries. This scrutiny has led to various Parliamentary amendments to proposed legislation, several of which were acknowledged by members of Parliament as improvements. Future legislative amendments will also be subject to the arrangements established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

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2. Criminal Code – Divisions 100 and 101

Overview

This section focuses on the offences in Division 101 of the Code concerning terrorist acts, and the definition of 'terrorist act' in Division 100.[23] These Divisions were among the original provisions of Part 5.3, which was enacted in 2002 as part of the first tranche of specific counter-terrorism legislation.

Terrorist act definition (s 100.1)

The concept of a 'terrorist act' is the cornerstone of the suite of offences and other protective provisions in Part 5.3, including those in Division 101. Consequently, the definition of this term in s 100.1 has received considerable attention in the process of its development,[24] enactment,[25] and subsequent review.[26]

Key elements of the definition

The definition in s 100.1 captures an act or a threat that is intended to:

- advance a political, ideological or religious cause;[27] and
- coerce or intimidate an Australian or foreign government or the public or section of the public (which includes foreign public).[28]

The action must also:

- cause serious physical harm to a person, or cause serious damage to property; or

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23 Namely, ss 100.1, 101.1, 101.2, 101.4, 101.5 and 101.6 (per the Review Terms of Reference, p. 2.)

24 See, for example, Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002, p. 9.

25 See, for example, Senate Legal and Constitutional Affairs Committee, *Report on the Consideration of Legislation Referred to the Committee* (May 2002), chapter 3.

26 See, for example, Sheller Review, chapter 6; 2006 PJCIS Inquiry, chapter 5.

27 Paragraph (b).

28 Paragraph (c)

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- cause a person's death or endanger a person's life (other than the person taking the action); or
- create a serious risk to the health and safety of the public or a section of the public; or
- seriously interfere with, seriously disrupt, or destroy, an electronic system (including an information, telecommunications or financial system; a system used for the delivery of essential government services; or a system used for, or by, an essential public utility or transport system).[29]

Conduct that constitutes advocacy, protest, dissent or industrial action (according to the ordinary meanings of these terms) is expressly excluded. This is provided that such conduct is not intended to:

- cause death or endanger the life of a person (other than the person taking the action); or
- create a serious risk to the health and safety of the public or a section of the public.[30]

Legislative history and policy rationale

The above definition was inserted in the Code by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). It is framed to provide a clear indication of Commonwealth responsibility in this part of the criminal law, as agreed with states and territories.[31] The definition as originally enacted incorporates several recommendations of the Senate Legal and Constitutional Affairs Committee, which were accepted by the (then) Government following consultation with the (then) Opposition.[32] The Committee's recommendations were incorporated in the following amendments to the Bill:

- clarification that lawful advocacy, protest, dissent or industrial action falls outside the ambit of 'terrorist act' in s 100.1(3);
- the intent requirement in ss 100.1(1)(c)(i)-(ii);

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29 s 100.1(2)(a)-(f).

30 s 100.1(3).

31 See further, AGD, *Submission to the Security Legislation Review* (February 2006), pp. 5-6.

32 A more detailed discussion of this process is provided in AGD's *Submission to the Security Legislation Review* (February 2006), pp 9-14.

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- the limitation of 'serious harm' in s 100.1(2)(a) to physical harm;
- inserting a reference to an action that causes death in s 100.1(2)(d); and
- using the word "cause" in s 101.2(a) and (b), which replaced the original language of "involves".[33]

The report of the Senate inquiry indicates that the Committee's motivation for recommending these amendments included a desire to align aspects of the definition more closely with those of other jurisdictions, including the UK and Canada.[34] The Committee also appeared to support a prescriptive definitional approach, which articulated the scope and limits of the definition in a fairly exhaustive way.[35]

International comparators

'Terrorist act' has not been formally defined under international law, with the result that definitions vary between the domestic laws of individual countries. However, as the PJCIS identified in its 2006 Inquiry, there is a considerable degree of consistency between key aspects of the Australian definition and those of other common law jurisdictions, including the UK, Canada, New Zealand and South Africa. As the PJCIS observed, a notable similarity in all jurisdictions' definitions is the inclusion of an element of political, religious or ideological motivation.[36]

External scrutiny and review of the definition (post-enactment)

Two external reviews have considered the definition of a terrorist act in s 100.1 – the Sheller Review and the 2006 PJCIS Inquiry. Key findings and recommendations – and the Government's responses to them – are detailed in **Appendix A, Table 2**.

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33 This amendment was supported by the Committee (at [3.98] of its report), but was not the subject of a recommendation. The intended effect of the amendment was to establish a closer nexus between the conduct and its result: *Senate Hansard,* 24 June 2002, pp 2479-80.

34 Senate Legal and Constitutional Affairs Committee, *Report on the Consideration of Legislation Referred to the Committee* (May 2002), pp. 34 [3.60], 39 [3.76].

35 See, for example, ibid, p. 39. [3.77].

36 PJCIS Report (2006), pp. 54-55.

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The Independent National Security Legislation Monitor has also identified the definition as an issue for consideration in his next annual report.[37]

Proposed reforms to the definition of terrorist act in s 100.1

The *2009 National Security Legislation Discussion Paper* included proposals implementing recommendations of the Sheller Review and 2006 PJCIS Inquiry directed to the following matters:

- clarifying the application of the definition to terrorist threats;
- extending its application to actions or threats directed to international organisations (such as the UN); and
- extending its application to actions or threats which cause mental harm.[38]

These proposals were not included in the 2010 security legislation reform package enacted in the *National Security Legislation Amendment Act 2010* (Cth). The Government considers that these reforms require additional consultation with states and territories, and would require states to amend their reference of power legislation to ensure that any amendments are fully constitutionally supported. In developing these proposals, the Government will also consider any views expressed by the Review Committee and the Independent National Security Legislation Monitor.

Other comments on s 100.1

Beyond the above commentary on the definition of 'terrorist act', this submission does not comment on other defined terms in s 100.1. AGD can provide information on other definitions if it would assist the Review.

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37 Independent National Security Legislation Monitor, *Annual Report* (16 December 2011), chapter VII.

38 ibid, pp. 44-49.

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Division 101 offences

Legislative history

As originally enacted in 2002, the Division 101 offences were:

- engaging in a terrorist act (s 101.1);
- providing or receiving training connected with a terrorist acts (s 101.2);
- possessing things connected with a terrorist act (s 101.4);[39]
- collecting or making documents likely to facilitate a terrorist act (s 101.5); and
- other acts done in preparation for, or planning, terrorists acts (s 101.6).

A handful of Parliamentary amendments were made to the Bill as introduced, to incorporate various recommendations of the Senate Legal and Constitutional Affairs Committee. These primarily concerned the fault elements in proposed sections 101.2, 101.4 and 101.5, which were originally offences of absolute liability. These provisions were amended to include the current 'tiered' approach to the fault elements.[40]

The provisions have been amended twice since their enactment. In 2003, they were repealed and substituted without substantive amendment, as part of the re-enactment of Part 5.3 in reliance on the states' referral of powers.[41] The offences were later amended by the *Anti-Terrorism Act 2005* (Cth) to clarify that they are not limited to preparation for a particular terrorist act, and that it is sufficient for the prosecution to establish that particular conduct was related to "a" terrorist act.

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39 A proposed s 101.3 was included in the *Security Legislation Amendment (Terrorism) Bill 2002* as introduced. This proposed section contained an offence of directing organisations concerned with terrorist activities. It was removed from Division 101 in debate, and was relocated to Division 102 (s 102.2) (and was enacted in this form).

40 Senate Legal and Constitutional Affairs Committee, *Report on the Consideration of Legislation Referred to the Committee* (May 2002), p. 44-45 [3.96]-[3.100] and recommendation 3. See further, AGD, *Submission to the Security Legislation Review Committee* (February 2006), p. 14.

41 *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

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Policy rationale

Other than the offence of engaging in a terrorist act in s 101.1, the Division 101 offences are directed to preparatory conduct. They reflect the recommendations of the Cornall Review, which concluded that existing offences, including those of general application, were inadequate because they were directed primarily to punishing an offender after the commission of an offence.

While the report of the Cornall Review is confidential, Mr Cornall later commented publicly on aspects of its findings, in his (then) capacity as Secretary of AGD. In an address in 2007, he commented that pre-existing criminal offences suffered an "almost fatal flaw" in their application to terrorism, because they were based on an assumption that the threat of conviction and punishment for a completed action would be an effective deterrent. He questioned how, for instance, the threat of imprisonment for a completed attack might deter a suicide bomber.[42] Accordingly, the Review recommended offences that were designed to interrupt the preparatory stages of a terrorist plot – including by establishing offences that would not be captured by the general ancillary offences in Part 2.4 of the Code. AGD's submission to the Sheller Review in February 2006 provides further discussion of the (then) Government's rationale for introducing these offences.[43]

External reviews

The Division 101 offences were considered in the Sheller Review and the PJCIS Inquiry. Notably, both reviews accepted the general policy intent underlying the offences, to disrupt the preparatory stages of a terrorist plot.[44] Key findings and recommendations, and the Government's responses to them, are summarised in **Appendix A, Table 3**.

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42 Robert Cornall AO, 'the Effectiveness of Counter-Terrorism Laws' in *Law and Liberty in the War on Terror,* Lynch, McDonald and Williams (eds) (2007), 50-74, 52.

43 See especially pp 4-7.

44 Sheller Review, pp.15, 45 [5.13]; 2006 PJCIS Inquiry Report, p. 11, [2.23].

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Proposed reforms deferred from the 2010 security legislation reform package

In addition to the proposed amendments to the definition of a terrorist act mentioned previously, the Government deferred consideration of a further recommendation of the Sheller Review and the 2006 PJCIS inquiry (detailed in **Appendix A, Table 3**). This recommendation concerned the establishment of a terrorism-specific hoax offence in Division 101. A proposal was included in the *2009 Discussion Paper on Security Legislation Reforms*,[45] and the Government intends to undertake further consultations with states and territories.

45 See pp. 50-51.

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3. Criminal Code – Division 102

Overview

Division 102 pertains to terrorist organisations and serves two key purposes. It establishes:

- methods of defining a **terrorist organisation**, including by listing an organisation in regulations made under s 102.1(1); and
- a series of **derivative offences**, which impose criminal liability on persons who are in some way connected or associated with a terrorist organisation (under ss 102.2 – 102.8).

These provisions, which were among the original counter-terrorism laws enacted in 2002, are a key component of the Commonwealth legislative framework. The definition enables organisations which engage in, prepare, plan, assist, foster or advocate the doing of a terrorist act to be formally identified as terrorist organisations. This identification is pivotal to the criminalisation of activities which would otherwise see such organisations prosper.

Division 102 further sends a clear message to Australian citizens that involvement in terrorist organisations will not be permitted, and communicates to the international community that Australia rejects claims to legitimacy by these organisations. This is in addition to Australia's implementation of its obligations in respect of the listing of terrorists and terrorist organisations pursuant to the decisions of the UN Security Council.[46]

Terrorist organisation – definition

The definition of 'terrorist organisation' in s 102.1(1) is central to the offence provisions in Division 102. It provides two ways for an organisation to be identified as a 'terrorist organisation' for the purposes of the Code.

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46 As to which, see the *Charter of the United Nations Act 1945* (Cth) (administered by the Foreign Affairs and Trade portfolio).

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The first occurs where 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 the terrorist act occurs).[47] In this situation, a court will determine whether or not the organisation is a terrorist organisation.[48]

Secondly, the Governor-General may make regulations listing an organisation as a terrorist organisation, provided that certain preconditions are satisfied.[49] In particular, under s 102.1(2), the Attorney-General must be satisfied, on reasonable grounds, that the organisation:

- is directly or indirectly engaged in preparing, planning or assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);[50] or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).[51]

The term 'advocates' is defined in s 102.1(1A) as meaning:

- directly or indirectly counselling or urging the doing of a terrorist act; or
- directly or indirectly providing instruction on the doing of a terrorist act; or
- directly praising the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.

In satisfying himself or herself of the existence of 'reasonable grounds', the Attorney-General considers an unclassified Statement of Reasons prepared by ASIO in consultation with DFAT. Having considered the Statement of Reasons, and prior to the making of a listing regulation, the Attorney-General considers, and if satisfied signs, a statement declaring that he or she is satisfied that the organisation meets the statutory criteria for listing. The Attorney-General then writes to the Prime Minister, the Leader of

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47 Per paragraph (a) of the definition of terrorist organisation in s 102.1(1).

48 See, for example, *R v Benbrika and Ors* [2009] VSC 21.

49 Per paragraph (b) of the definition of terrorist organisation in s 102.1(1).

50 s 102.1(2)(a).

51 s 102.1(2(b).

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the Opposition[52] and, where appropriate, state and territory Governments,[53] advising that he or she is satisfied the organisation meets the listing criteria, and that a regulation may be made proscribing the organisation. Further details of the listing process are provided in the joint submission of AGD, the AFP, ASIO and the CDPP to the 2007 PJCIS Inquiry (provided at **Appendix B** to this submission).

Section 102.1 further makes provision for:

- the Gazettal of regulations (which commence in accordance with the provisions of the *Legislative Instruments Act 2003* (Cth));
- the sunsetting of regulations three years after their commencement;
- the de-listing of terrorist organisations by declaration of the Attorney-General (the provisions allow individuals or organisations to bring de-listing applications, which the Attorney-General is required to consider);
- the PJCIS to review listing regulations as soon as possible after their making, and to report to each House of Parliament; and
- the Parliamentary disallowance of regulations.

Derivative offences

The derivative offences in Subdivision B of Division 102 are enlivened when an entity satisfies either limb of the definition of 'terrorist organisation' in s 102.1. The offences are directed to a wide spectrum of conduct, including membership, direction, recruitment, providing funds, providing support, and association. The ultimate objective of the Division 102 offences is to promote the disbanding of terrorist organisations in Australia, and contribute to global efforts to eradicate such organisations.

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52 Consultation with the Opposition Leader prior to the making of a regulation is required by s 102.1(2A).

53 The *Intergovernmental Agreement on Counter-Terrorism Laws* (2004) records jurisdictions' agreement to intergovernmental consultation in respect of listing decisions, and sets out an agreed process for consultation.

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Legislative history and policy rationale

Terrorist organisation – definition

The proscription of a terrorist organisation serves two objectives. The first allows for the Government and the Parliament to identify an organisation as a terrorist organisation, and thereby subject the organisation (and its members and associates) to the offence provisions of Division 102. The second objective is to provide notification to members of the organisation and the wider community of the organisation's proscribed status. Informing the public – including current members, associates or trading partners of terrorist organisations – places these persons on notice that they may be subject to criminal liability under Division 102 of the Code, and creates an incentive for them to end their association with the organisation (or to avoid associating with the organisation in future), with a view to disbanding the organisation in Australia.

As originally enacted, the listing regime applied exclusively to organisations which were identified in, or pursuant to, a decision of the UN Security Council relating wholly or partly to terrorism. As a result, in 2003, the Parliament enacted separate, organisation-specific legislation to enable the proscription of three organisations that were not the subject of a UN Security Council decision.[54]

The requirement of UN listing as a condition precedent to the exercise of listing powers under the Code was repealed by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth). As identified in the Explanatory Memorandum to the amending legislation, the limitation to UN Security Council-identified organisation operated as a significant restriction, as the Council identified only organisations with a link to the Taliban or Al Qaida. Many organisations whose activities and ambitions represent a threat to Australia have no apparent relationship to Al Qaida.[55]

The listing regime was subject to further amendments in 2005 and 2010. Major amendments include the following:

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54 These were the Hizballah, Hamas and Lashkar-e-Tayyiba organisations. See *Criminal Code Amendment (Hizballah) Act 2003* (Cth) and *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* (Cth).

55 Explanatory Memorandum, Criminal Code Amendment (Terrorist Organisations) Bill 2003, p. 1.

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- inserting the advocacy criterion for listing in s 102.1(1A);[56]
- clarifying the meaning of 'advocates' terrorism in s 102.1(1A), to make clear that the organisation must directly praise the doing of a terrorist act in circumstances where there is a *substantial risk* that praise might have the effect of leading a person to engage in a terrorist act;[57]
- extending the listing periods in s 102.1(3) from two years to three years.[58]

Derivative offences

As originally enacted in 2002, the Division 102 offences comprised all of the types of offences identified above other than the association offence. Key amendments were made in 2004 and 2005 and include:

- insertion of the association offence in s 102.8;[59]
- amendments to the training offence in s 102.5, which removed the requirement for the prosecution to prove that the person *knew* that the organisation was a terrorist organisation, and introduced a new offence in s 102.5(2) which applied strict liability to this element of the offence;[60] and
- amendments to the funding offence in s 102.6 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.[61]

AGD's submission to the Sheller Review (provided at **Appendix B**) includes a detailed discussion of these amendments (pp. 15-22).

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56 *Anti-Terrorism Act (No 2) 2005* (Cth).

57 *Security Legislation Amendment Act 2010* (Cth), implementing recommendations of the Sheller Review and the 2006 PJCIS Inquiry.

58 *Security Legislation Amendment Act 2010* (Cth), implementing recommendations of the 2006 PJCIS Inquiry.

59 *Anti-Terrorism Act (No 2) 2004* (Cth).

60 *Anti-Terrorism Act 2004* (Cth).

61 *Anti-Terrorism Act (No 2) 2005* (Cth). These amendments were inserted in response to a recommendation of the Financial Action Taskforce on Money Laundering – discussed in respect of Division 103 below.

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External scrutiny (post-enactment)

In addition to the ongoing parliamentary scrutiny of listing regulations, the provisions of Division 102 have been considered in several reviews, including:

- the Sheller Review;
- the 2006 PJCIS Inquiry;
- the 2007 PJCIS Inquiry; and
- the 2008 Clarke Inquiry

The relevant outcomes and reasoning of these reviews, including Government responses, are summarised in **Appendix A, Table 4** below. The joint AGD, AFP, ASIO and CDPP submission to the 2007 PJCIS Inquiry (at **Appendix** B) provides further commentary on the Government's position on the Sheller Review and 2006 PJCIS Inquiry recommendations.

Proposed reforms deferred from the 2010 security legislation reform package

Some proposed reforms included in the 2009 Discussion Paper on Security Legislation reforms were not included in the 2010 amendments, to enable further consultation with states and territories. These included the following proposals (as noted in **Appendix A, Table 4**):

- amending the offence in s 102.7 to that of providing *material* support to a terrorist organisation, and clarifying its physical and fault elements; and
- establishing a new ministerial authorization scheme in relation to the training offences, enabling the Attorney-General to declare certain organisations as 'aid organisations', with the result that these organisations are not liable to prosecution for training offences, in respect of their authorized activities.

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4. Criminal Code – Division 103

Division 103 was inserted by the *Suppression of the Financing of Terrorism Act 2002* (Cth). As originally enacted, the Division comprised the offence of financing terrorism in s 103.1. It was enacted to implement Australia's international law obligations to combat the financing of terrorism, as part of a broader legislative package directed to this objective.[62] The 2002 Act also made consequential amendments to the *Financial Transactions Reports Act 1988* to extend the reporting obligation under s 16 of that Act (in respect of 'suspect transactions') to the new financing terrorism offence in s 103.1 of the Code.

Division 103 was amended by the *Anti-Terrorism Act (No 2) 2005* (Cth) to insert the offence of financing a terrorist (s 103.2). This implemented a further recommendation of the Financial Action Task Force on Money Laundering[63] that terrorist financing offences should cover expressly the wilful provision or collection of funds, with the intention or knowledge that the funds will be used by an individual terrorist.[64]

Minor textual amendments were made by the *Anti-Terrorism Act 2005* (Cth), to clarify that the offences do not require that the funds are provided or collected for a specific terrorist attack. The amendments also clarified that the offences will apply where funds are provided or collected to facilitate or engage in more than one terrorist attack.

Division 103 was considered by the Sheller Review and the 2006 PJCIS inquiry. **Appendix A, Table 5** sets out the findings and recommendations of these inquiries and the Government's responses.

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62 Explanatory Memorandum, Suppression of the Financing of Terrorism Bill 2002, p. 1.

63 This Task Force is an inter-governmental body established in 1989 by the Ministers of its member jurisdictions. Its mandate is to set standards and promote effective implementation of legal, regulatory and operational measures to combat threats to the integrity of the international financial system (including money laundering and terrorist financing). It comprises 36 member jurisdictions from most major financial centres.

64 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005, pp 12-14.

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5. Criminal Code – Divisions 104 and 105

Overview

Divisions 104 and 105 are significant components of the Commonwealth's counter-terrorism laws. They establish, respectively, the control and preventative detention order regimes. These provisions were enacted in the aftermath of the London terrorist attacks in July 2005, and were inspired by similar sorts of provisions enacted in the UK.[65]

Control and preventative detention orders authorise, in limited circumstances, the imposition of temporary restrictions on a person's movements or activities, in order to protect the public from a terrorist attack. They do not depend on a finding of criminal guilt following an adjudication of a person's past conduct. This reflects Parliament's intention to extend the coverage of Australia's counter-terrorism laws to purely protective purposes.

As the control and preventative detention order regimes involved amendments to Part 5.3, the (then) Government engaged the consultative processes set out in s 100.8 of the Code and the *Intergovernmental Agreement on Counter-Terrorism Laws* in 2005. Pursuant to the agreement reached between jurisdictions, each Division contains a 10-year sunset clause and will expire in December 2015.

Policy rationale and legislative history

Inter-governmental consultations and negotiations

Jurisdictions reached a broad agreement to establish the control and preventative detention order regimes at the Special COAG Meeting on Counter-Terrorism on 27 September 2005. It was agreed that the National Counter-Terrorism Committee (NCTC) would settle the details of the amendments within the broad parameters agreed at COAG.[66]

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65 COAG, Meeting Communique, 27 September 2005, pp. 3-4.

66 These included a number of safeguards in the issuing process and criteria for both types of orders: See COAG Meeting Communique 27 September 2005, Attachment, pp. 8-10.

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Parliamentary scrutiny of the Anti-Terrorism Bill (No 2) 2005

The (then) Government introduced the proposed reforms in the House of Representatives on 3 November 2005 in the *Anti-Terrorism Bill (No 2) 2005.* The House passed the Bill on 29 November 2005, and it was introduced in the Senate on 30 November 2005. The Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report.

The Senate Committee inquiry into the Bill attracted significant public interest, and involved a detailed examination of its provisions. The human rights and constitutional implications of Divisions 104 and 105 were a focus of the inquiry. AGD witnesses gave evidence about the balance reached between ensuring effective public protection from terrorist threats, and maintaining individual rights and liberties. Much of this evidence focused on the design of safeguards in the issuing criteria and processes for these orders.[67]

In its report, the Committee acknowledged the importance of the proposed regime in protecting the public from terrorist threats, and the exceptional circumstances that prompted its introduction to Parliament.[68] It recommended that the Senate pass the Bill, subject to various amendments, which were intended to clarify or strengthen procedural safeguards in the issuing processes.[69]

The (then) Government supported several of the Committee's suggested amendments and, with the agreement of the requisite numbers of states and territories (per s 100.8 of the Code), introduced Parliamentary amendments.[70]

The Bill passed the Senate (with the amendments referred to above) on 6 December 2005. The House of Representatives agreed to the Senate amendments on 7 December 2005, and the Act received Royal Assent on 14 December 2005.

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67 See, for example, *Committee Hansard*, 14 November 2005 (Sydney), pp. 2-39; *Committee Hansard*, 18 November 2005 (Sydney), pp. 2-63; AGD, *Responses to Questions Placed on Notice by Senators – Monday 14 November 2005;* and AGD, *Responses to Questions Placed on Notice by Senators – Friday 18 November 2005*.

68 See, for example, Senate Legal and Constitutional Affairs Committee, *Report on the Provisions of the Anti-Terrorism Bill (No 2) 2005* (November 2005), p. 53 [3.150], p. 70 [4.53].

69 ibid, recommendation 52.

70 See Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005. See further, Schedule of Amendments made by the Senate, 6 December 2005.

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Other than a handful of consequential amendments made in 2006 and 2010, the Divisions have not been amended significantly since their enactment. The provisions have also been used judiciously to date – as at September 2012, two control orders have been issued, and no preventative detention orders have been issued. This reflects the policy intent that these orders should be invoked only in limited circumstances – consistent with the view that legal responses to terrorism should, as far as possible, adhere to general principles. Accordingly, AGD does not support the proposition that the limited use of these orders is evidence that they are no longer necessary.

Safeguards – issuing criteria and process

Given the significant attention devoted to safeguards and due process requirements in the development and enactment of the control and preventative detention order regimes, AGD provides a summary of several key measures.

Issuing criteria

Control orders

- the existence of a 'proportionality' test, by which the court must be satisfied (on the balance of probabilities) that each of the protective measures sought are reasonably necessary, and are reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.
- the requirement that the court must take into account the personal circumstances of the individual who is to be subject to the order, in applying the above proportionality test to each protective measure sought.
- the finite range of protective measures available (which do not include detention).
- the inclusion of rehabilitative measures in the range of protective measures available (such as participation in counselling or education, where the subject of the order agrees).
- the limited duration of orders (12-months maximum).

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Preventative detention orders

- the high threshold requirements that must be satisfied, including that the AFP member (and issuing authority) must be satisfied of three key matters:
    - the terrorist act is imminent (that is, within the next 14 days);
    - making the order would substantially assist in preventing an attack; and
    - detaining the person is reasonably necessary to achieve the preventative purpose.
- the limited duration of orders (48 hours maximum, with a requirement to seek approval of an issuing authority for extensions beyond the initial 24 hours).

Issuing processes

Control orders

- the appointment of a court as the issuing authority.
- the requirement for the AFP to obtain the Attorney-General's consent to bring an application (which must be made by a senior AFP member).
- the express right of a person subject to an order to seek its revocation or variation.
- the commencement of an order only when it is served on its subject.

Preventative detention orders

- only a senior AFP member is authorised to make the initial 24-hour order.
- extensions can only be granted by an independent issuing authority (being a judge, magistrate or senior AAT member acting in a personal capacity).
- the decision about the making or extension of order is subject to merits review by the Administrative Appeals Tribunal, which may award compensation if it finds the decision was not justified.
- investigative questioning is prohibited during preventative detention.
- express requirements for the humane treatment of detained persons, in accordance with Australia's human rights obligations.

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- the inclusion of an offence applying to law enforcement officers who do not comply with the requirements for the humane treatment of persons under preventative detention.

External scrutiny (post-enactment)

Policy reviews

The COAG Review represents the first comprehensive review of Divisions 104 and 105. These provisions were not included in the Sheller Review or 2006 PJCIS Inquiry, given their recent enactment in December 2005, and the fact that they were earmarked for consideration by the current Review (on the agreement of COAG). The provisions also fall within the remit of the Independent National Security Legislation Monitor.

Constitutional litigation

The control order regime in Division 104 was the subject of an unsuccessful constitutional challenge in *Thomas v Mowbray* (2007) 233 CLR 307. The High Court, in a 5:2 majority decision, upheld the validity of the provisions.[71]

71 Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; Kirby and Hayne JJ dissenting. Given the high-level approach to this submission, detailed discussion of constitutional issues is beyond its scope. AGD is able to provide the Review with further information if required.

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6. Crimes (Foreign Incursions and Recruitment) Act

Overview

Section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) prohibits Australian citizens and residents from engaging in hostile activities in a foreign state, under penalty of 20 years' imprisonment. This offence was among the original provisions of the Act. It was amended by the *Anti-Terrorism Act 2004* and the *Anti-Terrorism Act (No 2) 2005* to enhance its coverage in the counter-terrorism context, particularly in situations where terrorist organisations are operating as part of the armed forces of a foreign State.

Key elements of the offence

Section 6(1) provides that a person must not enter a foreign State with intent to engage in a hostile activity in that foreign State, or engage in a hostile activity in a foreign State.

'Hostile activities' are defined in s 6(3) as the doing of an act with the intention of achieving any one or more of the following objectives (whether or not such an objective is achieved):

- the overthrow by force or violence of the government of the foreign State or a part of the foreign State;
- engaging in armed hostilities in the foreign State;
- causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
- causing the death of, or bodily injury to, a person who is the head of the foreign State, or who holds or performs any of the duties of a public office of the foreign State; or
- unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or a part of the foreign State.[72]

72 Subsections 6(3)(a)-(d).

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Ancillary and inchoate offences

Section 6 is also supported by the ancillary and inchoate offences of general application,[73] as well as a specific inchoate offence in s 7,[74] and offences concerning recruitment in ss 8-9.[75] Section 10 requires the consent of the Attorney-General to commence a prosecution of an offence under the Act, or an ancillary offence under the Code or Crimes Act.

Defences

Subsection 6(4) effectively operates as a defence, in that it limits the reach of the offence in subsection 6(1) in two broad ways.

The first limitation (per subsection 4(a)) applies where a person is serving in the armed forces of the government of a foreign State. However this immunity is qualified by subsection 6(5), which provides that subsection 6(4)(a) does not apply if the relevant organisation with which the person is serving is prescribed under either:

- the terrorist organisation listing provisions in Division 102 of the Code; or
- (disallowable) regulations made under the Act.[76]

The second limitation on the offence in subsection 6(1) is contained in subsection 6(4)(b). It enables the Attorney-General to make a declaration to permit service in another specified armed force. The declaration may be of general application or limited to particular circumstances (for example, authorising the service of particular persons in particular capacities). It may be absolute or conditional.

Where the Attorney-General has made a declaration, and its conditions (if any) are satisfied, subsection 6(4)(b) provides that the offence in subsection 6(1) does not apply.

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73 See, for example, section 3A of the Act, which makes express provision for the application of Chapter 2 of the Code.

74 Namely, the offence of preparation for incursions into foreign States for purpose of engaging in hostile activities, with a maximum penalty of 10 years' imprisonment (s 7).

75 Namely, recruiting persons to join organisations engaged in hostile activities (s 8), and recruiting persons to serve in or with an armed force in a foreign State (s 9). Both offences carry maximum penalties of seven years' imprisonment.

76 Subsection 6(8) prescribes regulation-making criteria. The Minister's satisfaction of these criteria is a condition-precedent to the Governor-General's exercise of the regulation-making power.

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The Act provides for similar exemptions in respect of the preparatory and recruitment offences.

Legislative history and policy rationale

The 2004 and 2005 amendments were intended to improve the coverage of the offences in relation to counter-terrorism.

The 2004 amendments were designed to ensure that the Foreign Incursions Act could deal with circumstances, such as those arising in Afghanistan, in which foreign terrorist forces may be fighting as part of or alongside the armed forces of a foreign State. As noted in the Explanatory Memorandum to the Anti-Terrorism Bill 2004, "in some cases, those foreign forces may even be fighting against our own Defence Forces. In those circumstances, it is not appropriate that the s 6(4)(a) defence be available to excuse people from the reach of the Foreign Incursions Act".[77]

Accordingly, the 2004 Act created the counter-terrorism related exceptions in s 6(5) to the defence in s 6(4). This included the regulation-making power under s 6(7)(a) concerning the prescription of organisations for the purposes of the Foreign Incursions Act. The regulation-making power was intended to enable a rapid law enforcement response in respect of participation in new and emerging terrorist groups, from the moment it becomes evident that they pose a threat to Australia's security. It also enables listings to be considered on an individual basis.[78]

The 2005 amendments (enacted by the *Anti-Terrorism Act (No 2) 2005*) were largely consequential in nature, as a result of the amendments to the terrorist organisation provisions of Division 102 of the Criminal Code (detailed above).[79]

The proposed amendments to the provisions in 2004 were the subject of inquiry by the Senate Legal and Constitutional Affairs Committee.[80] A focus of the Committee's attention in 2004 was whether or not there was a need for the Foreign Incursions Act in the counter-terrorism context, in addition to the Code (and in particular the training offences and terrorist organisation offences and listing mechanisms in Part 5.3, and the

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77 Explanatory Memorandum, Anti-Terrorism Bill 2004, p. 4.

78 Explanatory Memorandum, Anti-Terrorism Bill 2004, pp. 17-18.

79 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005, p. 6.

80 Senate Legal and Constitutional Legislation Committee, Report on the Provisions of the Anti-Terrorism Bill 2004 (May 2004).

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treason offences in Division 80 of Part 5.1). The Committee was satisfied that there was such a need.[81] The (then) Government accepted the Committee's recommendation in respect of the prescription regime under s 6(7)(a), to create statutory listing criteria.[82] These are in s 6(8).

External scrutiny

Section 6 was not within the remit of the Sheller Review or the 2006 PJCIS Inquiry.

81 ibid, Chapter 4, especially [4.43]-[4.44].

82 ibid, [4.49], (recommendation 2).

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7. Crimes Act – Division 3A, Part IAA

As the principal focus of AGD's submission is the relevant provisions of Part 5.3 of the Code, the discussion in this section of the terrorism-specific search powers in Division 3A of the Crimes Act is brief. A more detailed amendment history is provided in **Appendix A, Table 1**,[83] and AGD is able to assist the Review Committee with further information if required.

Division 3A was inserted by the *Anti-Terrorism Act (No 2) 2005*. The 2005 amendments expanded the powers of the AFP and state and territory police forces in relation to terrorist acts, but only if in a Commonwealth place[84] and prescribed security zone[85] (consistent with the constitutional boundaries of Commonwealth legislative power). The operational imperatives for provisions of this nature were recognised by the Senate Legal and Constitutional Affairs Committee in its 2005 inquiry into the amending legislation. The Committee observed the importance of the "strong police capabilities" provided for in the legislation to "respond to, and combat, the threat of terrorism".[86]

The *National Security Legislation Amendment Act 2010* introduced a new power of entry, search and seizure (s 3UEA). The power is available without warrant in emergency circumstances so that police can render a premises safe. The power can only be used if it is necessary to prevent a thing that is on the premises from being used in connection with a terrorism offence, and there is a serious and imminent threat to a person's life, health or safety. In recommending that the Senate pass these provisions without amendment, the Senate Legal and Constitutional Affairs Committee acknowledged that the provision is a necessary measure, which contains adequate safeguards against potential abuse.[87]

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83 See further, the extrinsic materials to the *Anti-Terrorism Act (No 2) 2005* and the *National Security Legislation Amendment Act 2010* (including the respective Senate Committee reports on inquiries into each piece of legislation), and the 2009 *Discussion Paper on Proposed Amendments to National Security Legislation*, pp 147-155.

84 Defined in s 3UA by reference to the *Commonwealth Places (Application of Laws) Act 1970*.

85 Defined in s 3UA by reference to the prescription scheme established in s 3UJ (by way of written Ministerial declaration, including on police application per s 3UI).

86 Senate Legal and Constitutional Affairs Committee, *Report – Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005*, [6.62].

87 ibid, [4.31].

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8. Administrative Decisions (Judicial Review) Act

Overview

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) provides a statutory scheme for the judicial review of certain administrative decisions. In broad terms, the default position is that a decision of a kind falling within the ambit of the Act is reviewable, unless expressly excluded.[88]

Schedule 1 to the ADJR Act exempts two kinds of decisions made under Divisions 104 and 105 of the Code:

- **paragraph (dab)** – decisions of the Attorney-General under s 104.2 (concerning the granting of consent to a senior AFP member to make an application to the court for a control order.)
- **paragraph (dac)** – all decisions made under Division 105 (concerning the issuing of preventative detention orders).

Policy rationale and legislative history

In establishing the control and preventative detention order regimes, the *Anti-Terrorism Act (No 2) 2005* (Cth) also made consequential amendments to the ADJR Act to insert the exemptions in paragraphs (dab) and (dac) of Schedule 1.

The Explanatory Memorandum to the amending legislation indicates that the exempt decisions represent requirements that are not suitable for review in the context of the security environment. The Explanatory Memorandum further indicates these exemptions are consistent with pre-existing exemptions for decisions made in relation to criminal proceedings, and for decisions made in relation to warrants issued under the ASIO Act for intelligence-gathering purposes.[89]

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88 See s 5 (application for review of decisions) and s 3 (definition of 'decision to which this Act applies').

89 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005, pp. 70-71.

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External scrutiny (post-enactment)

As identified earlier in this submission, the exemptions in paragraphs (dab) and (dac) of Schedule 1 were examined in the Administrative Review Council's inquiry into Judicial Review in Australia, which recently reported to the Attorney-General (in September 2012). The Council recommended the retention of the exemption in paragraph (dab) (control orders),[90] and the removal of the exemption in paragraph (dac) (preventative detention orders).[91]

The Council's reasoning in respect of paragraph (dab) was to the effect that the issuing process for control orders incorporates a chain of decisions, in which subsequent decision-makers are required to consider the previous decision or decisions, with the final decisions made by the court. The Council concluded that ADJR Act review of the Attorney-General's decision under s 104.2 is unnecessary because it would interfere with another court process.[92]

In respect of paragraph (dac), the Council considered that "there seems to be limited utility" in exempting decisions under Division 105 from ADJR Act review.[93] The Council's reasoning appears to be informed by a view that, "as a general proposition, administrative decisions made in relation to criminal investigation processes where proceedings have not yet commenced are not excluded from review".[94] The Government will consider the recommendations of the Council and the COAG Review on these matters.

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90 Recommendation B10 (pp. 208-209).

91 Recommendation B 11 (pp. 210-211).

92 Administrative Review Council, *Federal Judicial Review in Australia* (Final Report) (September 2012), pp. 208-209, [B.39]-[B.41].

93 ibid, p. 210 [B.47].

94 ibid.

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Appendices

A. Tables of legislative milestones and review outcomes

1. **Table 1:** Selected Commonwealth legislative milestones
2. **Table 2:** Summary of review outcomes – definition of 'terrorist act' (s 100.1)
3. **Table 3:** Summary of review outcomes – terrorist act offences (Division 101)
4. **Table 4:** Summary of review outcomes – terrorist organisations (Division 102)
5. **Table 5:** Summary of review outcomes – financing terrorism (Division 103)

B. AGD submissions and government responses to previous inquiries

1. Australian Government Attorney-General's Department, *Submission to the Security Legislation Review Committee* (February 2006).
2. Australian Government Attorney-General's Department, Australian Security Intelligence Organisation, Australian Federal Police and Commonwealth Director of Public Prosecutions, *Combined Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Proscription of Terrorist Organisations under the Australian Criminal Code* (February 2007).
3. Australian Government, *Response to the PJCIS Inquiry into the Proscription of Terrorist Organisations under the Australian Criminal Code* (September 2007).
4. Australian Government, *Response to the PJCIS Review of Security and Counter-Terrorism Legislation* (December 2008).

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Appendix A:

Tables of legislative milestones and review outcomes

IMPORTANT

The tables in Appendix A identify key legislative provisions, review recommendations and Government responses, and include pinpoint references to the relevant primary source documents. The summaries of relevant provisions, review recommendations and Government responses have been compiled solely as an aid to identifying their relevant primary sources, and do not provide opinion or advice of any kind, on any issue. This caveat applies, in particular, to the summaries of legislative provisions (which are not intended to serve as statements of opinion or advice on their interpretation), and to the summaries of Government responses to review recommendations (which are not intended to modify the policy position announced and documented in the relevant primary sources).

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Table 1: Selected Commonwealth legislative milestones (2002-2010)[95]

Year	Legislation	Key reforms	Enacted
2002	Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002 (9 of 2002)	Established new offences in the **Code** (in Part 10.5) relating to the sending of dangerous, threatening or hoax material through the post or similar services, including hoax explosives and dangerous substances. The reforms were motivated, in part, by a significant increase in false alarms concerning packages containing apparently hazardous material in the aftermath of 9/11 (Explanatory Memorandum, p. 4.)	April 2002
	Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (58 of 2002)	Established new offences (Chapter 4, Division 72 of the **Code**) to implement the International Convention for the Suppression of Terrorist Bombings (1997). The offences cover the intentional delivery, placement, discharge or detonation of an explosive or other lethal device in designated public and governmental places.	July 2002
	Border Security Legislation Amendment Act 2002 (64 of 2002)	Amended a suite of border security-related legislation (**Customs** and **Customs Administration Acts, Fisheries Management Act, Migration Act** and **Evidence Act)** to expand security and enforcement powers in relation to persons, goods, vessels and certain entry and departure points. This included authorising Customs officials to access additional passenger information, and to inspect goods, on reasonable suspicion of a connection with a terrorist act.	December 2002

95 **Notes about Table 1:** some provisions summarised in this table are outside the Review's Terms of Reference, but have been included to provide the Review with a broader context to the legislative history of the provisions under consideration. The timeframe of 2002-2010 has been selected to provide a representation of major legislative reforms from the events of 9/11, which was a significant driver of counter-terrorism law reform in Australia and many like-minded countries. The end date of 2010 reflects the most recent major amendments to Australia's counter-terrorism laws.

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Year	Legislation	Key reforms	Enacted
	Security Legislation Amendment (Terrorism) Act 2002 (65 of 2002)	Relevantly inserted Part 5.3 in the **Code**, which in its original form comprised the offences in Div 101 (terrorist acts including preparatory and supporting acts) and Div 102 (organisations, including supporting and funding). The original Part 5.3 as inserted by this Act also made provision for the designation (listing) of terrorist organisations by regulation.	July 2002
	Suppression of the Financing of Terrorism Act 2002 (66 of 2002)	Relevantly amended Part 5.3 of the **Code** to insert Division 103 (financing). Also made a consequential amendment to the **Financial Transactions Reports Act** to extend the reporting obligations in s 16 to the new terrorist financing offences.	July 2002
	Telecommunications Interception Legislation Amendment Act 2002 (67 of 2002)	Relevantly amended the **Telecommunications (Interception) Act** to extend telecommunications interception powers to terrorism-related offences	July 2002
	Criminal Code Amendment (Terrorist Organisations) Act 2002 (89 of 2002)	Relevantly amended the regulation-making (listing) power under Division 102 of the **Code** (concerning the designation of terrorist organisations by regulation), to ensure that regulations take effect in accordance with s 48 of the Acts Interpretation Act (commencement on notification in the Gazette or a later date specified in the Regulations).	October 2002
2003	Criminal Code Amendment (Terrorism) Act 2003 (40 of 2003)	Re-enacted Part 5.3 of the **Code** partly in reliance on the referrals of power by the States to the Commonwealth in respect of Part 5.3.	May 2003
	Criminal Code Amendment (Hizballah) Act 2003 (44 of 2003)	Amended the regulation-making (listing) power under Division 102 of the **Code** to establish a specific scheme for Hizballah organisations. (At this time, the listing criteria in Division 102 required organisations to be listed by the UN Security Council, and Hizballah was not listed by the Council.) (See further, Attorney-General, *Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2003*, House of Representatives Hansard, 29 May 2003, especially pp 14930-31).	June 2003

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Year	Legislation	Key reforms	Enacted
	Australian Security Intelligence Organisation (Terrorism) Act (77 of 2003).	Inserted Part III, Division 3 into the **ASIO Act**, which established the regimes for questioning and questioning and detention warrants.	July 2003
	Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003 (109 of 2003)	Amended the regulation-making (listing) power under Division 102 of the **Code** to establish a specific scheme for the Hamas and Lashkar-e-Tayyiba organisations. (At this time, the listing criteria in Division 102 required organisations to be listed by the UN Security Council, and these organisations were not listed by the Council.) (See further, Explanatory Memorandum, p. 1).	November 2003
2004	Criminal Code Amendment (Terrorist Organisations) Act 2004 (7 of 2004)	Amended the listing requirements in Division 102 of the **Code** to repeal the requirement that the organisation be identified as a terrorist organisation by, or pursuant to, a decision of the the UN Security Council (enabling the Government to make unilateral listing decisions). Inserted new provisions requiring the briefing of the Opposition Leader on proposed listing regulations; parliamentary reviews of listings; and an application-based regime for de-listing.	March 2004
	Anti-Terrorism Act 2004 (104 of 2004)	Amended the following legislation: ***Crimes Act***: Part IA (specific provisions concerning bail and non-parole periods in respect of terrorist offences), Part IC (terrorism-specific arrest and investigation powers). ***Crimes (Foreign Incursions and Recruitment) Act***: including an increased penalty for s 6 offences to 20 years, and expanded the scope of the offence to cover persons who fought with rogue or terrorist states. (It limited the defence for persons who fought with overseas military forces, by excluding listed organisations from the defence.) ***Criminal Code***: amended the membership offence in s 102.3 of Division 102 (terrorist organisations) to remove the requirement that an organisation must be listed in order for the offence to apply. Also amended the training offence in 102.5 (separate fault elements for listed and non-listed organisations). ***Proceeds of Crime Act 2002***: extended the regime to literary proceeds transferred to Australia (not	June 2004

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Year	Legislation	Key reforms	Enacted
		only those proceeds which are derived in Australia).	
	Anti-Terrorism Act (No 2) 2004 (124 of 2004)	Relevantly amended Division 102 (organisations) of Part 5.3 of the **Code** to include association offences (s 102.8), and made consequential amendments to the bail provisions in the **Crimes Act** to exclude the association offence from the presumptive rule against bail. (Also amended the **Transfer of Prisoners Act** to insert Part IV (transfer for the purpose of security), and made consequential amendments to the **ADJR Act** (exemptions to statutory judicial review.)	August 2004
	Anti-Terrorism Act (No 3) 2004 (125 of 2004)	Relevantly amended the following legislation: ***Passports Act*** - provided for the surrendering of passports and foreign travel documents in security circumstances (for example, if the person was the subject of an arrest warrant, or was likely to prejudice Australia's security) ***ASIO Act*** - inserted the passport surrendering power once the Director-General of ASIO had sought the Attorney-General's consent to apply for a questioning warrant. ***Crimes Act*** - enabled the Minister to determine that Commonwealth, state and Territory officials could access the national DNA database for forensic purposes in the event of a mass casualty disaster occurring in Australia.	August 2004
	National Security Information (Criminal and Civil Proceedings) Act 2004 (150 of 2004)	Enacted the national security information regime, which implemented the Government's response to recommendations of the Australian Law Reform Commission (ALRC Report 98: *Keeping Secrets: The Protection of Classified and Security Sensitive Information*).	December 2004
2005	Anti-Terrorism Act 2005 (127 of 2005)	Amended the offences in Divisions 101 (terrorist acts) and 102 (organisations) of the **Code** to extend their coverage to circumstances where the terrorist act does not occur; and where the relevant conduct is not connected with a specific terrorist act, or is connected with more than one terrorist act. The amendments were designed to ensure that the provisions captured conduct during the formative	November 2005

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Year	Legislation	Key reforms	Enacted
		stages of a plot. The Act (s 4) also makes reference to the COAG agreement of 27 September 2005 to conduct the present COAG Review (in respect of the amendments introduced by the Act), and requires the Attorney-General to table the report in Parliament within 15 sitting days of receipt.	
	Anti-Terrorism Act (No 2) 2005 (144 of 2005)	***COAG Review*** The Act (s 4) makes reference to the COAG agreement of 27 September 2005 to conduct the present COAG Review (in respect of the Code, Crimes Act and other consequential amendments introduced by the Act, and certain state Acts). It requires the Attorney-General to table the Review report in Parliament within 15 sitting days of receipt. ***Major Code amendments*** Established the control and preventative detention order regimes in Divisions 104 and 105 of the Code, in accordance with the COAG agreement of 27 September 2005. The Act also amended Division 102 (terrorist organisations) to extend the definition of a terrorist organisation to enable the listing of organisations that advocate terrorism; and repealed the provisions allowing for the making of specific regulations listing Hizballah, Hamas or Lashkar-e-Tayyiba organisations (ss 102.1(7)-(16)). The Act further amended Divisions 102 and 103 (financing terrorism) to implement the recommendations of the Financial Action Task Force on Money Laundering to criminalise the wilful provision or collection of funds intending or knowing that they will be used by an individual terrorist. The Act also inserted new sedition (urging violence) offences in Division 80 (and repealed the offences in the Crimes Act). ***Major Crimes Act amendments*** The Act introduced a regime of police stop, question and search powers for the purposes of	December 2005

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Year	Legislation	Key reforms	Enacted
		investigating and preventing terrorism and other serious offences (inserted new Divisions 3A and 4B of Part IAA). ***ASIO Act amendments*** – strengthened ASIO's special powers warrants regime, and made other technical amendments. ***Customs Act and Customs Administration Act amendments*** – broadened Customs powers for security or intelligence purposes. ***Other consequential, technical and other minor amendments*** The Act made a range of technical, consequential and clarificatory amendments to legislation including the Financial Transactions Reports Act, Migration Act, Surveillance Devices Act, Aviation Transport Security Act, the Proceeds of Crime Act and the Administrative Decisions (Judicial Review) Act.	
2006	ASIO Legislation Amendment Act (54 of 2006)	Amended Part III, Division 3 (questioning and questioning and detention warrants) in response to the recommendations of the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the PJCIS) in November 2005, in its review of Division 3.	June 2006
2010	Independent National Security Legislation Monitor Act 2010 (32 of 2010)	Established the office of the Monitor, and prescribed the Monitor's role, functions and powers.	April 2010
	National Security Legislation Amendment Act 2010 (127 of 2010)	Implemented the Government's response to a series of independent reviews of Commonwealth counter-terrorism laws – the Sheller Review (2006), two PJCIS inquiries concerning counter-terrorism legislation (2006) and terrorist organisations (2007), the ALRC Review of Sedition Laws (2006) and the Clarke Inquiry (2008). Amended the following legislation: ***Criminal Code – key amendments*** <u>Division 102 of Part 5.3:</u> • Clarified the definition of 'advocates' in s 102.1(1A)(c), to make clear that an organisation advocates	November 2010

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Year	Legislation	Key reforms	Enacted
		the doing of a terrorist act if the organisation directly praises the doing of a terrorist act in circumstances where there is a *substantial risk* that such praise might have the effect of leading a person to engage in a terrorist act. • Extended the listing periods in s 102.1(3) from two years to three years. <u>Miscellaneous Part 5.3 amendments</u> • Amended the listing review provision in s 102.1A to reflect the name of the PJCIS. • Made various technical amendments to implement the Government's policy of ensuring equality of same-sex partnerships in Commonwealth legislation. <u>Division 80 of Part 5.1 amendments</u> • Amended the treason and sedition (urging violence) offences in line with external review recommendations. ***Crimes Act – key amendments*** • Amended the investigation regime for terrorist offences in Part 1C, in response to the findings and recommendations of the Clarke Inquiry. • Amended Part IAA of the Crimes Act to provide police with improved emergency search powers for the investigation of terrorism offences (a new provision authorising warrantless searches in emergencies; and amendments to existing search warrant provisions to allow re-entry in emergencies). • Amended Part IA to establish a specific right of appeal for both the prosecution and defendant against bail decisions made in respect of terrorist offences. ***Charter of the United Nations Act*** – inserted a 'reasonableness' requirement in the Minister's discretionary decision-making power in respect of listing terrorist organisations for asset-freezing purposes (such that the Minister must be satisfied, *on reasonable grounds*, of the prescribed matters,	

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Year	Legislation	Key reforms	Enacted
		before listing organisations). ***National Security Information (Criminal and Civil Proceedings) Act 2004*** – amendments addressed the application of the Act to legal representatives, the role of the Attorney, facilitating agreements between parties, and the streamlining of other procedural arrangements. ***Inspector-General of Intelligence and Security Act*** – extended the IGIS's powers of inquiry to the intelligence or security matters of any department or agency.	

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Table 2: Summary of review outcomes – definition of a 'terrorist act' (s 100.1)

Review	Recommendation/Finding/Proposal	Reasoning	Government Response[96]
Sheller Review	Delete the limitation to physical harm, so that serious mental harm is covered (**recommendation 6**)	Considered that serious mental harm can be as significant as serious physical harm (p. 50).	Per responses to 2006 PJCIS inquiry (see below).
	Repeal the references to 'threat' in the definition (**recommendation 7**) and insert a specific threat offence (**recommendation 8**).	Considered the potential application of the section to a bomb threat and concluded that it was problematic, in that paragraph (2) contemplates action. Therefore, if the action was not 'done' even though the threat was made, paragraph (2) could not apply (p. 51).	
	Retain the motive element in subparagraph (b) concerning political, ideological or religious motivation. (**finding only**)	Considered that the motive requirement appropriately emphasises a publicly understood quality of terrorism. It also reflects the intent of Australian governments about the meaning of the term, as the specific and narrowing provision in defining the scope of the definition (p. 57).	
	Retain paragraph (3) (**finding only**).	Considered that this provision is an important safeguard to the protection of lawful advocacy, protest, dissent and industrial action (p. 58).	
2006 PJCIS Inquiry	Retain the motive requirement in subparagraph (b) (**recommendation 7**)	Endorsed the reasoning of the Sheller Review. Commented that terrorism is qualitatively different from other types of serious crime [5.25].	**Accepted**

96 See Australian Government, *Government Response to Recommendations – Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation* (2008) (also taking into account recommendations by the Sheller Committee.

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[96]
	Retain paragraph (3) (**recommendation 8**)	Endorsed the reasoning of the Sheller Review. Commented on the importance of preventing the potential for the exception to be interpreted in a permissive rather than restrictive manner [5.23].	**Accepted**
	Retain the physical harm limitation, or alternatively consult with states and territories on this issue (**recommendation 9)**	Noted that other jurisdictions' definitions did not include psychological harm. Considered that the issue would require more detailed consideration, as it goes beyond a simple matter of harmonisation with the Criminal Code definition [5.36]-[5.37].	**Accepted the alternative recommendation** (state and territory consultation – consultations currently pending)
	Repeal references to threat and enact a separate threat offence (**recommendation 10**)	Endorsed the reasoning of the Sheller Review [5.40].	**Accepted in principle** (pending consultation with states and territories).
	Recognise that international organisations may be the targets of terrorist violence (**recommendation 11**)	Noted that European and international counter-terrorism laws recognise international organisations as potential targets of terrorism [5.41].	**Accepted.** (pending consultation with states and territories)
	Include a provision or note that expressly excludes conduct regulated by the law of armed conflict (**recommendation 12**)	Sought to proactively avoid doubt about the relationship between the international law of armed conflict and domestic counter-terrorism laws through a rule-based approach [5.47]-[5.48].	**Not accepted** (May encourage misapplication of public international law principles).

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Table 3: Summary of review outcomes – terrorist act offences (Division 101)

Review	Recommendation/Finding/Proposal	Reasoning	Government Response[97]
Sheller Review	Did not support stakeholder claims that the offences were unduly broad or uncertain (**finding only**, p. 60).	Commented that the provisions, including the fault elements, are drafted clearly (p. 60).	Per response to 2006 PJCIS inquiry (see below)
	Referred to stakeholder concerns about the textual amendments made by the *Anti-Terrorism Act 2005* (changing "the" terrorist act to "a" terrorist act). Did not recommend any changes, noting that the amendments had been subject to a full debate in Parliament, were the subject of pending proceedings, and were of recent origin (**finding only** pp. 150-1)	Referred to a stakeholder claim that the amendments cause the provisions to inappropriately criminalize conduct undertaken before the person formed a specific or 'genuine' criminal intent. It was argued that this ran contrary to ordinary principles of criminal responsibility. A further stakeholder argument was that the amendments may result in practical difficulties of proof, or may expose a range of innocent activities to criminal sanction (pp 150-151).	
	Recommendation 20 – Hoax offence: Recommended that a hoax offence be inserted in Part 5.3 in the terms of Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism.	Supported the proposal of the former HREOC, on the basis that the UN Convention offence appropriately excluded threats made in anger or as a joke (however distasteful). Suggested that the offence should apply to a credible and serious threat to commit a terrorist act, where the evidence does not support a finding that there was such an intention as described in the definition of terrorist act (p. 190)	

97 See Australian Government, *Government Response to Recommendations – Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation* (2008) (also taking into account recommendations of the Sheller Committee).

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[97]
2006 PJCIS Inquiry	**Recommendation 13 – Hoax offence:** Recommended a separate hoax offence, with penalties that reflected the 'less serious' nature of a hoax as compared to a threat of terrorism.	Considered that a hoax is conceptually distinct from a threat (at [5.53]).	**Accepted.** (Pending consultations with states and territories)

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Table 4: Summary of review outcomes – terrorist organisations – Division 102

Review	Recommendation/Finding/Proposal	Reasoning	Government Response[98]
Sheller Review	**Recommendation 3 – reform of the proscription process** Recommended reform of the proscription process to meet the requirements of administrative law – including to notify organisations and individuals who would be affected by a proposed listing decision (if made), and provide them with the right to be heard in opposition.	Analysed the proscription provisions against administrative law considerations. Noted stakeholder concerns about a perceived absence of natural justice-related mechanisms, and submissions that the duty to afford natural justice applied to listing decisions (pp. 78-83). Concluded that, while "it is not for this committee to rule upon whether the process for proscription generally or in a particular case fails to comply with the rule of the common law doctrine of natural justice … the operation an effectiveness of the legislation is clouded by this possibility". (p. 84).	Considered in responses to 2006 and 2007 PJCIS inquiries (see below).
	Recommendation 4 – proscription process Recommended two alternative reform models: **(i) *continuation of the regulation-based model***, subject to certain	Considered that the proscription process required reform in three respects (at p. 85): (1) proscription criteria need to be determined and stated; (2) In all but exceptional circumstances, a proposed proscription decision should be made public and an opportunity given for interested persons to make comment (including the organisation); and (3) Once an organisation has been proscribed, steps should be taken to	Considered in responses to 2006

98 See: Australian Government, *Government Response to Recommendations – Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation* (2008) (also taking into account recommendations by the Sheller Committee); and Australian Government, *Government Response to Recommendations – Parliamentary Joint Committee on Intelligence and Security Inquiry Into the Proscription of Terrorist Organisations Under the Criminal Code* (2007).

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[98]
	procedural amendments for the prior notification of affected organisations and persons (per rec 10), and the appointment of an independent expert advisory committee to the Attorney-General; or **(ii) *a judicial proscription process*** on application of the Attorney-General to the Federal Court (with public notification requirements on the making of an application).	publicise that fact widely. Noted a division of opinion between members of the Review Committee on the relative merits of executive and judicial review processes as the best way to achieve these reform objectives. Identified two possible reform models (one executive, one judicial) for government consideration (pp. 94-99).	and 2007 PJCIS inquiries (see below).
	Recommendation 5 – publicity of proscription Recommended that steps should be taken to publicise an organisation's proscription – which would have the effect of notifying any person connected to the organisation of their possible exposure to prosecution.	Per natural justice-related comments made in respect of recommendations 3 and 4 above.	
	Recommendation 9 – Definition of 'advocates' (s 102.1(1A)) Recommended the repeal of s 102.1(1A)(c), or the amendment of the term 'risk' to 'substantial risk'.	Agreed with submissions suggesting that paragraph (c) could lead to the proscription of an organisation that is in no way involved with terrorism, because a person identified as connected with the organisation praises a terrorist act (although that person had no intention to provoke a terrorist act) (at p. 71).	

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[98]
	Recommendation 10 – Definition of terrorist organisation (s 102.1) Built upon recommendation 3. Recommended that, if recommendation 3 is implemented, consideration should be given to repealing paragraph (a) of the definition of terrorist organisation, so that the process of proscription would be the only method by which an organisation would become an unlawful terrorist organisation.	Noted that this would give greater certainty to persons dealing with organisations, as there would be a defined process for them to identify whether or not an organisation was listed. Emphasised that that this not a firm recommendation for reform, but rather a recommendation to consider a potential reform if recommendation 3 is implemented (pp. 63, 67-68).	Considered in responses to 2006 and 2007 PJCIS inquiries (see below).
	Recommendation 11 – burden of proof in s 102.3(2) Recommended that the burden of proof placed on the defendant should be reduced from a legal burden to an evidential burden.	Noted a decision of the House of Lords, which found that a similar provision under the UK terrorism legislation was inconsistent with the presumption of innocence guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and therefore not a proportionate or justifiable legislative response to the threat of terrorism. On that basis, the legal burden was read down to be an evidential burden (pp 106-109).	
	Recommendation 12 – training offences (s 102.5) Recommended the urgent redrafting of the offence to: • insert an element that the training is connected with a	Expressed similar concern to that under recommendation 9 (above) that the section may catch "quite innocent training of persons who may, unknown to the teacher, be members of a terrorist organisation" (pp. 117-118). Also concluded that it was difficult to understand what the strict liability provisions are intended to mean (pp 113-117).	

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[98]
	terrorist act or could reasonably prepare the organisation or person to engage in or assist with a terrorist act; • expand the scope of the offence to cover participation in training; and • remove all elements of strict liability.		Considered in responses to 2006 and 2007 PJCIS inquiries (see below).
	Recommendation 13 – funding offences (s 102.6) Recommended that, at most, a defendant legal representative should bear an evidentiary burden. Further recommended that subsections (1) and (2) should not apply to a person's receipt of funds, if the funds were received solely for the purpose of: (a) providing legal representation, or (b) providing assistance to the organisation to comply with a Commonwealth or state or territory law.	Commented that the existence of client legal privilege may make it difficult for a defendant legal advisor to adduce evidence of the legal representation he or she has provided. Further considered it unreasonable that an organisation should not have access to its funds for the purposes of making an application for de-listing, or review of a listing, if that was the legislative intention (p. 120).	

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[98]
	Recommendation 14 – providing support to a terrorist organisation (s 102.7) Recommended that the provision be amended to ensure that support 'cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objectives'.	Referred to similar reasoning to that underlying recommendation 11 (above) (pp 122-123).	Considered in responses to 2006 and 2007 PJCIS inquiries (see below).
	Recommendation 15 – association offences (s 102.8) Recommended the repeal of s 102.8, or alternatively the repeal of s 102.8(5).	Agreed with reasons advanced in submissions supporting the repeal of s 102.8, including the submission of the former HREOC, that the breath of the offence, its lack of detail and certainty, and the narrowness of its exemptions suggest there are considerable difficulties in its operation. Such difficulties include the wide reach of the legislation (which may capture legitimate activities such as social and religious gatherings, and the provision of legal advice and representation) (pp 132-133).	
2006 PJCIS Inquiry	**Recommendation 14 – Advocacy as a basis for listing (s 102.1(1A))** (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	Disagreed with the recommendation of the Sheller Review for the repeal of s 102.1(1A)(c), noting a division of stakeholder views and the need to give further, more detailed consideration to the matter in its 2007 Inquiry into the listing process. Endorsed the reasoning of the Sheller Committee on the need for the risk to be 'substantial' (at [5.59]-[5.67]).	**Accepted.** The Government noted that the advocacy criteria will be considered in the COAG Review. The Government also noted that Recommendation 14(b) would be

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[98]
	subject to further review. (b) The Committee recommends that 'risk' be amended to 'substantial risk.		consistent with the policy intent (that the risk threshold must be real, and not fanciful or speculative), and with the language of the Code in regards to risk (for example, "substantial risk" in regards to recklessness).
	Recommendation 15 – terrorist organisations (ss 102.2 – 102.8) The Committee recommends that the Government consider: (a) replacing the membership offence (s 102.3) with an offence of participation in a terrorist organisation; and (b) whether 'participation' should be expressly linked to the purpose of furthering the terrorist aims of the organisation.	Favoured the approach taken under the New Zealand counter-terrorism laws, which captures 'informal membership' of a terrorist organisation via a participation offence. (Contrasted the approach taken under the Code, which criminalises the status of membership per se.) Suggested that the New Zealand approach has the benefit of capturing participation, while avoiding the difficulties of distinguishing between formal and informal membership. Also endorsed the New Zealand approach of requiring that participation in a group must be linked expressly to the purpose of furthering the terrorist aims of the particular group (at [5.76]).	**Not accepted.** The concept of participation is less formal than membership, and is likely to introduce ambiguity.
	Recommendation 16 – training (s 102.5) The Committee recommends that the training offence be redrafted to define more carefully the type of training	Endorsed the recommendation and reasoning of the Sheller Review. Considered that drafting the offence more precisely would achieve greater proportionality between the conduct that is criminalised and the penalty (at [5.81]).	**Accepted in part.** The Government accepted the recommendation to clarify that the offence does not capture legitimate activities (such as those provided by humanitarian aid

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Review	Recommendation/Finding/Proposal	Reasoning	Government Response[98]
	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.		organisations). The Government noted that the objective of the terrorist organisation offences is to ensure that terrorist organisations are disbanded. To achieve this, it is appropriate that the training provided or received does not have to be connected to a terrorist act. (Pending further stakeholder consultation)
	Recommendation 17 – terrorist financing (s 102.6) (a) there should be a defence that the funds were received for the sole purpose of representation in legal proceedings; and (b) the legal burden should be reduced to an evidential burden.	Endorsed the recommendation and reasoning of the Sheller Review (at [5.84] – [5.85]).	**Not accepted.** (a) This is already provided for in s 102.6(3) which effectively operates as a defence. (b) the legal burden is appropriate because the evidence concerned will be readily available to the defendant but not the prosecution.
	Recommendation 18 – Support to a terrorist organisation (s 102.7) Recommended that the offence	Noted the seriousness of the offence and the penalties attached to it, and suggested that these factors warranted amendments in order to provide certainty for the community (at [5.91]-[5.92]).	**Accepted**. The Government noted that this would clarify that the level of support required must

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	should be amended to refer to providing 'material' support.		go beyond 'mere support'.
	Recommendation 19 – Association offence (s 102.8) Recommended that the association offence be reconsidered in light of the Sheller Review's conclusions.	Referred to stakeholder concerns that the offence was cast too broadly. Endorsed the conclusion of the Sheller Review that the offence of association is almost impossible to define, too complex to prove, and that the reference to the constitutionally implied freedom of association was imprecise (at [5.96]-[5.97], [5.99]).	**Accepted.** The Government indicated this matter would be referred to the new Independent National Security Legislation Monitor.
	Recommendation 20 – strict liability (ss 102.3(2), 102.5(3), 102.6(3), 102.8(3)) Recommended that the strict liability provisions that attract a sentence of imprisonment be replaced with an evidential burden,	Endorsed the recommendation and reasoning of the Sheller Review (at [5.108]).	**Noted.** The Government indicated this would be referred to the new Independent National Security Legislation Monitor.
2007 PJCIS Inquiry	**Recommendation 1:** The Committee recommends that: (a) The Attorney-General's Department develop a communication strategy [about the operation of Division 102] that is responsive to the specific information needs of ethnic and religious communities; and (b) There be direct consultation on	Re-iterated comments made in the Committee's 2006 inquiry on the importance of promoting public understanding of the proscription regime, particularly in respect of vulnerable communities. Supported a comprehensive and pro-active strategy (at [3.13] – 3.24]).	**Accepted recommendation 1(a).** Noted that AGD had undertaken considerable community education and outreach activities, and noted future activities under consideration. **Noted recommendation 1(b).** Noted that ASIO is conscious of the need to avoid unnecessary delay in dealing with the

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	the management of visa security assessments between ASIO, the Inspector-General of Intelligence and Security and the UN High Commission for Refugees.		significant volume of matters for which it must undertake a security assessment, and has implemented a number of strategies to this end. This activity is monitored by the IGIS. As part of the Government's commitment to ensuring Australia's full compliance with the Refugee Convention, it will raise and address any issues of concern at Australia's next officials' level meeting with the UNHCR.
	Recommendation 2: non-statutory listing criteria The Committee recommends that the criteria 'ideology and links to other networks and groups' be restated so that: (a) the link between acts of terrorist violence and the political, ideological or religious goals it seeks to advance is clearly expressed; (b) links to other networks and groups that share the same world view is	Noted the concerns of some stakeholders, who considered that the criterion may have the effect of singling out certain groups (particularly Muslim groups). The committee considered that the separating of the criterion as recommended could address such misunderstandings (at [4.23]).	**Accepted**. Noted that ASIO and AGD will develop an unclassified protocol outlining the key indicators taken into consideration. Noted that the six non-statutory criteria are not exhaustive.

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	identified as a separate criteria.		
	Recommendation 3: listing process The Committee recommends that the mandate of the Committee to review the listing and re-listing of entities as 'terrorist organisations' for the purpose of the Criminal Code be maintained.	Did not support the Sheller Review recommendation 4(ii) which supported a judicial listing process. Further did not support the recommendation 4(i) of the Sheller Review which supported the appointment of an independent expert advisory committee to the Attorney-General. Considered that the existing model provided strong safeguards against the arbitrary use of the proscription power.	**Accepted.** Noted that the maintenance of s 102.1A provides a transparent and accountable mechanism for the Government to outlaw terrorist organisations.
	Recommendation 4: commencement of listing The Committee recommends that the Government give consideration to reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period has expired. The Committee recognises that the Attorney-General should, in exceptional cases, retain the power to begin the commencement of a listing on the date the instrument is lodged with the Federal Register of Legislative Instruments where the Attorney-General certifies that there are circumstances of urgency and the	Noted that AGD agreed, in evidence, that there had not been any circumstances, in respect of the 19 listed entities to date (at the time of writing), in which national security would have been prejudiced if a listing commenced at the end of the disallowance period. Further noted that this approach would ensure that specific urgent listings could be commenced immediately where necessary to preserve national security interests (at [5.30] – [5.33]).	**Accepted.** Noted the importance of flexibility to ensure that immediate commencement is available where necessary.

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	immediate commencement of the listing is required for reasons of national security.		
	Recommendation 5: strict liability The Committee recommends that strict liability not be applied to the terrorist organisation offences of Division 102 of the Criminal Code	Endorsed the recommendation and reasoning of the Sheller Review (at [6.6] and [6.7]).	**Noted**. The Government will refer the strict liability requirements to the National Security Legislation Monitor once appointed.
	Recommendation 6: expiry of listing regulations The Committee recommends that: (a) a regulation listing an entity should cease to have effect on the third anniversary of the date it took effect; and (b) the Government consult with the Committee on streamlining the administration of proscription to enable periodic review of multiple listings during the parliamentary cycle.	Commented that the automatic cessation of a listing has been effective in institutionalising the review, and ensuring that any changes in circumstances have been taken into account. This is a safeguard for both the entity and the Minister. The Committee suggested a three-year cycle based on its experience over the past three years (at [6.15]).	**Accepted**
	Recommendation 7: post-enactment review The Committee recommends that:	Noted that there was no single public source of comprehensive data on the use of terrorism law and related powers. Considered that this would benefit future reviews (at [6.19)].	**Accepted.**

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	(a) the Attorney-General's Department be responsible for the publication of comprehensive data on the application of terrorism laws; (b) an Independent Reviewer be established and the Committee be conferred with responsibility for examining the Independent Reviewer's reports to Parliament; and (c) the application of the proscription power be included in the review of counter-terrorism laws scheduled for 2010 under the auspices of the Council of Australian Governments.	Reiterated support for an independent reviewer of counter-terrorism legislation. Considered that this officer would provide a more integrated and ongoing approach to scrutiny, and consequently improve community confidence, and Parliamentary awareness (at [6.20]).	
Clarke Inquiry	**Recommendation 5** – **providing support to a terrorist organisation (102.7):** Recommended amendments to clarify the physical and fault elements in s 102.7(2)(a).	Identified uncertainties in the physical and fault element in s 102.7(2)(a). Noted that it was unclear whether there are two physical elements in the provision and identified a number of possible interpretations. Commented that the risk of judicial error warranted amendments (pp 258-260).	**Accepted.** The Government will consult with states and territories on possible reforms. (Consultations pending.)

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Table 5: Summary of review outcomes – Division 103

Inquiry	Recommendation/Finding/Proposal	Reasoning	Government Response[99]
Sheller Review	**Recommendation 16** Recommended the following amendment to s 103.1 to harmonise the language with that of s 103.2: *(1) A person commits an offence if:* *(a) the person intentionally provides or collects funds; and* *(b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.* *Penalty: imprisonment for life.* ~~*Note: Intention is the fault element for the conduct described in paragraph (1)(a). See subsection 5.6(1).*~~	The Sheller Committee considered that it was unclear why different language is used when dealing with the intention elements in ss 103.1 and 103.2. The Committee concluded that its proposed amendments would improve clarity (p. 161).	Considered in responses to 2006 PJCIS inquiry (see below).
	Recommendation 17: Recommended an amendment to s 103.2, to clarify that the intended recipient of funds is a	The recommendation was designed to reflect more clearly the recommendation of the Financial Action Task Force on Money Laundering, which prompted	

99 See Australian Government, *Government Response to Recommendations – Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation* (2008) (also taking into account recommendations by the Sheller Committee).

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Inquiry	Recommendation/Finding/Proposal	Reasoning	Government Response[99]
	terrorist.	the creation of the offence (pp. 161 -162).	
2006 PJCIS Inquiry	**Recommendation 21** Endorsed the recommendations of the Sheller Review, and **further** recommended that the fault element of recklessness in s 103.1(b) should be replaced with that of knowledge.	Endorsed the reasoning of the Sheller Review (at [6.14]-[6.15]). In addition, the PJCIS suggested a fault element of knowledge in s 103.1(b) would better align it with UN Security Council Resolution 1373 and the International Convention on the Suppression of the Financing of Terrorism, which require 'specific intent' (at [6.6] -[6.13]).	**Not accepted**, for the following reasons: **s 103.1** • The **note** to s 103.1 makes clear that the fault element in paragraph 103.1(a) is intention by virtue of the application of section 5.6 of the Criminal Code. • 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. **s 103.2** • The recommended amendments to s 103.2 would be problematic because **the term 'terrorist' is not used in the Code** (rather, 'terrorist act' and 'terrorist organisation' are the touchstones of culpability). • The use of 'terrorist' rather than 'person' would also **pre-empt that person's guilt** in relation to a terrorist act.

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Appendix B:

AGD submissions and Government responses to major inquiries

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