# COAG Review of Counter-Terrorism Legislation

## COAG Counter-Terrorism Review Committee

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# Acknowledgement

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- Queensland Law Society;
- Law Institute of Victoria; and
- Law Society of New South Wales.

# Executive Summary

1. The Law Council is pleased to participate in the Council of Australian Governments' (COAG) Review of a range of provisions introduced by the Commonwealth and the States and Territories as part of a national approach to combatting the threat of terrorism ( the Review). These provisions include:

   - the terrorist act offences and terrorist organisation offences contained in Part 5.3 of the *Criminal Code Act 1995* (Cth) (the Criminal Code);
   - control orders and preventative detention orders contained in the Criminal Code and the preventative detention order provisions introduced by the States and Territories;
   - special Commonwealth police powers contained in Part 1AA Division 3A of the *Crimes Act 1914* (Cth) (the Crimes Act); and
   - special police powers contained in State and Territory laws.

2. In 2005, COAG agreed that a number of provisions should be reviewed after five years. It also agreed to ensure that "any strengthened counter-terrorism laws [are] necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and [are] exercised in a way that is evidence-based, intelligence-led and proportionate."[1] The Review provides an important opportunity to evaluate the counter-terrorism provisions identified above against these aims.

3. The Law Council appreciates that, at the time these measures were introduced, governments around Australia were seeking to respond to significant terrorist events. There was a moral and political imperative to act quickly to ensure Australia was fully equipped to protect its people against the threat of terrorism. However, the Law Council is of the view that the legislative response agreed by COAG went beyond what was necessary and proportionate to respond to this threat. The Law Council also considers that the legislative response unnecessarily departed from traditional criminal law principles and failed to adhere to rule of law or human rights standards.

4. Now, well over five years since these measures were introduced, there remains a lack of clear evidence justifying the need for these provisions, many of which have not been used. In addition, there remains little justification for many of the measures that depart significantly from established principles of criminal law and invest officers of the Executive with broad powers that have the potential to disproportionately impact on human rights. Limited safeguards and limited independent oversight of the use of these provisions have also raised concerns for the Law Council for many years.

5. The Law Council has been actively involved in advocacy to promote review and reform of Australia's counter-terrorism measures since their introduction in 2002. The Law Council's advocacy has primarily focused on the measures enacted at the Commonwealth level, such as the terrorist act offences, the terrorist organisation offences and the Commonwealth control order and preventative detention order regime. This continues to be the focus of the Law Council's submission to the

[1] COAG Communique, Council of Australian Governments' Special Meeting on Counter-Terrorism, 27 September 2005, available from http://archive.coag.gov.au/coag_meeting_outcomes/2005-09-27/index.cfm#Strengthening

Review. However, with the assistance of a number of its Constituent Bodies, the Law Council has also outlined a range of concerns relating to the powers introduced at the State and Territory level designed to complement the Commonwealth preventative detention regime, and to invest State and Territory police with special powers to respond to terrorist emergency situations.

6. In many instances, the Law Council's concerns with the provisions subject to review are so grave that they are unlikely to be addressed by the introduction of safeguards or other reforms. In these instances, the Law Council recommends that the provisions be repealed. However, in the event that law enforcement and intelligence agencies are able to demonstrate, on the basis of empirical evidence, that such provisions are necessary to protect the Australian community from the threat of terrorism, the Law Council has also offered a range of recommendations designed to provide the type of safeguards necessary to limit the impact of these provisions on individual rights, and to ensure that the use of intrusive powers by officers of the Executive is subject to independent oversight and review.

7. The Law Council's recommendations in relation to the key provisions subject to review are summarised below:

- The definition of 'terrorist act' in section 100.1 of the Criminal Code should be:
    - redrafted to ensure it is consistent with internationally accepted definitions of 'terrorist act'; and
    - amended to remove the reference to 'threat of action' and other references to 'threat' from the definition of 'terrorist act'.
- The terrorist act offence provisions in Division 101 of the Criminal Code should be sufficiently defined, for example by reintroducing the preposition 'the' before 'terrorist act' in the offence provisions, and their necessity and effectiveness should be subject to review by the Government.
- The current process for proscribing an organisation as a terrorist organisation in Division 102 of the Criminal Code should be repealed and replaced with a fairer and more transparent process.
- The terrorist organisation offences in Division 102 of the Criminal Code should be repealed or amended.
- The financing terrorism offences in Division 103 of the Criminal Code should be amended by inserting 'intentionally' after 'the person' in paragraph 103.1(1)(a) and replacing the term 'reckless' with 'has knowledge' in paragraph 103.1(1)(b). Section 103.2 should also be amended by replacing the term 'reckless' with 'has knowledge' in paragraph 103.2(1)(b).
- The control order regime in Division 104 of the Criminal Code should be repealed. If the provisions are retained, they should be amended to:
    - ensure a person who is the subject of a control order is provided with all the information and evidence that forms the basis of the application for such an order;

- subject the exercise of powers under Division 104 of the Criminal Code to full judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act); and

- appoint an independent body such as a Public Interest Monitor with access to all material upon which an application for a control order is based.

- The preventative detention order regime in Division 105 of the Criminal Code should be repealed. If the provisions are retained, they should be amended to contain the safeguards outlined above in respect of control orders and also to:

    - prescribe a maximum period for which a person can be held under successive continued preventative detention orders;

    - ensure a person subject to a preventative detention order is entitled to attend an application hearing and present his or her case;

    - provide that any contact between a detained person and his or her lawyer must not be monitored; and

    - include a requirement that the person subject to the order has been convicted of a relevant prior offence and be shown not to be rehabilitated.

- The preventative detention order regimes at the State and Territory level should also be repealed. If the provisions are retained, they should be amended so as to ensure that all regimes include safeguards that operate to limit the use of these powers and ensure adequate oversight of their use.

- The special police powers, including powers to search and seize without a warrant, contained in Part 1AA Division 3A of the Crimes Act should be repealed. If the provisions are retained, they should be amended to impose stricter conditions on the Minister's power to declare an area to be a prescribed security zone and to introduce greater judicial and parliamentary oversight of the use of search powers contained in section 3UEA.

- The special police powers at the State and Territory level should be reviewed to determine whether they remain necessary and effective. If these provisions are retained, amendments should be made to ensure that all regimes include provisions incorporating judicial oversight of the use of these powers and other safeguards.

# Introduction

8. The Law Council is pleased to provide this submission to the COAG Counter-Terrorism Review Committee (the COAG Review Committee) in response to the Review.

9. The Review, agreed to by COAG at its meeting of 27 September 2005,[2] provides an important opportunity to reflect upon a number of counter-terrorism provisions. It also provides an opportunity to consider whether these provisions continue to be "necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review."[3] The COAG Review Committee can also examine whether these provisions are "exercised in a way that is evidence-based, intelligence-led and proportionate."[4]

10. The Law Council has advocated strongly for a comprehensive review of Australia's counter-terrorism legislation and has consistently called for the commencement of the Review which, it notes, was originally scheduled to commence in December 2010.[5]

11. The Law Council has made more than 50 submissions regarding counter-terrorism and national security legislation in Australia since 2002.[6] Most recently, the Law Council has made submissions to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) inquiry into National Security Legislation Reform[7] and the Consultation conducted by the Independent National Security Legislation Monitor (the Monitor) regarding questioning and detention warrants, control orders and preventative detention orders.[8]

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[2] Council of Australian Governments' (COAG) Communique, Council of Australian Governments' Special Meeting on Counter-Terrorism, 27 September 2005, available from http://archive.coag.gov.au/coag_meeting_outcomes/2005-09-27/index.cfm#Strengthening

[3] Ibid.

[4] Ibid.

[5] Law Council of Australia Media Release, *Law Council calls for changes to anti-terror laws in wake of COAG review*, 10 August 2012. Available from http://www.lawcouncil.asn.au/media/news-article.cfm?article=0DECE32B-1999-B243-6E6F-15B33890B33F

[6] These include submissions to the Senate Standing Committee on Legal and Constitutional Affairs in response to its inquiry into the *Intelligence Services Legislation Bill 2011* on 3 May 2011, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=417AA84D-E8CD-4FEF-4B15-87BDA316CFB8&siteName=lca; Senate Committee on Legal and Constitutional Affairs Committee in response to its inquiry into the *Anti-Terrorism Laws Reform Bill* in August 2009, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=3397DB8D-1E4F-17FA-D297-BD5010231D6E&siteName=lca; Parliamentary Joint Committee on ASIO, ASIS and DSD in response to its review of ASIO Questioning and Detention Powers on 4 April 2005; Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional Legislation Committee in response to their inquiries into the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* on 29 April 2002, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=60562866-0623-D0CF-C884-AEEDFAC6ED75&siteName=lca. A full list of the Law Council's advocacy on national security and counter-terrorism issues is included at the end of the Law Council of Australia's *Anti-Terrorism Reform Project*, updated in June 2012 which is available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/anti-terror/reform-project.cfm (the Anti-Terrorism Reform Project).

[7] Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security in response to its inquiry into National Security Legislation Reform, 20 August 2012. Available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=7620C594-1999-B243-6E65-83CA09ABEF4A&siteName=lca

[8] Law Council of Australia, Submission to Independent National Security Legislation Monitor in response to his inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention Orders, 10 September 2012.

12. The Law Council has consolidated its advocacy about Australia's counter-terrorism and national security legislation in its Anti-Terrorism Reform Project. This document was updated in June 2012.[9]

13. This past advocacy informs the Law Council's comments on the following provisions that are being considered as part of the Review:

- the terrorism provisions in Divisions 100 -105 of the Criminal Code, focusing in particular on:
  - the definition of 'terrorist act' in Division 100.1;
  - the terrorism offences in Division 101;
  - the terrorist organisation offences in Division 102;
  - the 'financing terrorism' offences in Division 103; and
  - the control order and preventative detention order regimes in Divisions 104 and 105; and
- Part 1AA Division 3A of the Crimes Act.

14. The focus of the Law Council's advocacy has been on Commonwealth provisions. However, with the assistance of a number of its Constituent Bodies, including the Law Society of New South Wales (NSW), the Law Institute of Victoria, and the Queensland Law Society, the Law Council will also include some general comments about the State and Territory laws introduced to complement the Commonwealth's preventative detention powers and special police search and seizure powers, such as those contained in the *Terrorism (Police Powers) Act 2002* (NSW).

15. Many of the Law Council's Constituent Bodies have also engaged in advocacy in relation to Commonwealth counter-terrorism laws, as well as raising concerns about the counter-terrorism laws in force in their respective jurisdictions.[10]

16. When commenting on the Commonwealth, State and Territory provisions, the Law Council will focus on the Review's terms of reference that consider whether the provisions are necessary and proportionate and whether they contain appropriate safeguards against abuse. Where the particular provisions have been used, the Law Council will also offer some comments as to whether these provisions has been exercised in a way that is evidence-based, intelligence-led and proportionate.

[9] Op.cit., *Anti-Terrorism Reform Project* .

[10] See for example Law Institute of Victoria, submission to Victorian Parliaments Scrutiny of Acts and Regulations Committee (SARC) in relation to the *Terrorism (Community Protection) (Amendment) Bill 2006,* 23 January 2006, available at http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Terrorism-%28Community-Protection%29-Amendment-Bill?glist=0&rep=1&sdiag=0; Law Institute of Victoria, supplementary submission to Scrutiny of Acts and Regulations Committee on the *Terrorism (Community Protection) (Amendment) Bill 2006,* 2 February 2006, available at http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Terrorism-%28Community-Protection%29-%28Amendment%29-Bill-?glist=0&rep=1&sdiag=0; Law Society of New South Wales, submission to the *Criminal Law Review of the Terrorism (Police Powers) Act 2002*, 23 September 2009, available at http://www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/063376.pdf; Law Society of New South Wales, submission to the Department of Justice and Attorney General on *Monitoring detainee-lawyer communications under the Terrorism (Police Powers) Act 2002,* 18 February 2011, available at http://www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/435293.pdf

However, in many instances, the provisions have not been used, raising questions about their continued necessity and appropriateness in light of the range of other provisions available to law enforcement and intelligence agencies to combat terrorism.

17. The Law Council accepts that intelligence and law enforcement agencies need adequate powers to be able to effectively carry out their investigations into terrorism-related activity and offences. However, many of the provisions subject to ths Review were introduced quickly in response to significant terrorist events. As a result, the Law Council considers that many of these provisions go beyond what is necessary and proportionate to respond to the threat of terrorism and unnecessarily depart from rule of law principles and human rights standards.

18. As will be outlined in detail below, the Law Council urges the COAG Review Committee to carefully examine each provision against the background of pre-existing provisions relating to offences and law enforcement and intelligence agency powers, and to assess whether a case can still be made for the continuation of each provision. Where the provision has a particularly intrusive impact on the rights of an individual, such as restricting a person's liberty or movement prior to being charged with a criminal offence, the Law Council suggests that the COAG Review Committee consider whether the provision should be retained.

19. The Law Council also submits that the Review should have regard to the impact that the range of counter-terrorism provisions listed above have had and are having on the Australian community and on the development and implementation of criminal law. As the Law Council has argued elsewhere,[11] the fact that almost all of these provisions constitute a departure from fundamental rule of law principles and human rights standards has led to a normalisation of some of these extraordinary measures and the incorporation of features of the counter-terrorism laws into other areas of criminal law, such as laws criminalising certain associations and authorising the use of control orders against members of those associations.

20. The Law Council's submission provides a brief outline of the key provisions; summarises the Law Council's key concerns; and makes a number of recommendations for repeal or reform.

21. The Law Council hopes that the Review builds upon similar and concurrent reviews of certain aspects of Australia's counter-terrorism laws and leads to the types of reforms necessary to ensure that traditional principles of criminal law and human rights standards are utilised rather than ignored when implementing an effective legislative response to the threat of terrorism.

## Background to Review and Referral of Powers

22. Following the 11September 2001 terrorist attacks in the United States, COAG agreed to a national framework to combat terrorism.[12] In 2002, legislation was

[11] See Law Council of Australia, submission to Senate Legal and Constitutional Affairs Committee in response to its inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, August 2009, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=331C7F69-1E4F-17FA-D28C-C89D3899B450&siteName=lca

[12] See Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, 5 April 2002, available at http://archive.coag.gov.au/coag_meeting_outcomes/2002-04-05/docs/terrorism.cfm

introduced creating a range of terrorist offences in Part 5.3 of the Criminal Code.[13] Under the 2002 COAG agreement, the States and Territories committed:

> *"To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation."*[14]

23. In 2003, the States enacted legislation to refer power in these matters to the Commonwealth under the Constitution.[15] The Commonwealth then amended Part 5.3 of the Criminal Code to note the referral of these powers.

24. Following further terrorist attacks in Bali on 12 October 2002, Madrid on 11 March 2004 and London on 7 July 2005, a Special COAG Meeting was held in 2005 to discuss existing counter-terrorism arrangements. At the meeting, it was agreed Australia's counter-terrorism laws should be strengthened.[16] However, it was also agreed that any strengthened counter-terrorism laws must be necessary, effective and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.

25. Under the 2005 COAG Agreement, State Premiers and the Northern Territory (NT) and Australian Capital Territory (ACT) Chief Ministers agreed to enact legislation to give effect to measures which it was considered that the Commonwealth could not enact because of "constitutional constraints".[17] Such measures included preventative detention for up to 14 days and stop, question and search powers in certain areas, such as transport hubs and other mass gatherings.

## Part 5.3 - Criminal Code Act 1995 (Cth)

26. Part 5.3 of the Criminal Code contains counter-terrorism provisions that are designed to prevent potential acts of terrorism in Australia; prosecute the perpetrators of terrorist acts when they occur; and restrict the movement of those who are considered to pose a terrorist threat to the Australian community. Part 5.3 was inserted into the Criminal Code by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (the SLAT Act) in 2002.

27. In addition to introducing a series of terrorism offences, the SLAT Act also introduced a definition of 'terrorist act' into the Criminal Code. The then Attorney-

[13] For further discussion see submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* , April 2002, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C71F642-1C23-CACD-222C-B26E197A5E8F&siteName=lca

[14] Op.cit., Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, para 3.

[15] For example, *Terrorism (Commonwealth Powers) Act 2003* (Vic).

[16] Op.cit., COAG Communiqué, 27 September 2005, p. 3

[17] Ibid.

General described the amendments as being new measures that were necessary to"strengthen Australia's counter-terrorism capabilities and bolster Australia's armory in the war against terrorism.'[18] The need for the new laws was explained further by Government agencies. For example, the then Director-General of Security, Dennis Richardson, said that legislation was "necessary to deter, to punish and to seek to prevent terrorist activity".[19] The Attorney-General's Department expressed a similar view, stating that specific laws were needed to address "legislative gaps", particularly in relation to providing or receiving training, directing an organisation that fosters preparation for a terrorist act and possessing things connected with a terrorist act.[20]

## Meaning of 'terrorist act'

Outline of Section 100.1

28. Under section 100.1(1) of the Criminal Code, a 'terrorist act' is defined as an action or threat of action where:[21]

- the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

- the action is done or the threat is made with the intention of:

  - coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

  - intimidating the public or a section of the public.

29. Action will be considered to be a 'terrorist act' if it causes serious harm that is physical harm to a person; [22] causes serious damage to property; [23] causes a person's death; [24] endangers a person's life, other than the life of the person taking the action;[25] or creates a serious risk to the health or safety of the public or a section of the public.[26]

30. Action will also be deemed to fall within the definition of a 'terrorist act' if it seriously interferes with, or seriously disrupts, or destroys, an electronic system including an information system; a telecommunications system; a financial system; a system used for the delivery of essential government services; a system used for, or by, an essential public utility; or a system used for, or by, a transport system. [27]

[18] House of Representatives Hansard, Second Reading Speech, *Security Legislation Amendment (Terrorism) Bill 2002,* 12 March 2002, p. 1040. The Second Reading Speech was subsequently incorporated into Hansard when the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]* was introduced into the House of Representatives by the Parliamentary Secretary to the Minister for Finance and Administration, Mr Slipper, on 13 March 2002.
[19] Report of Senate Legal and Constitutional Legislation Committee Inquiry into *Security Legislation Amendment Bill 2002*, (May 2002) p.23, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/terrorism/index.htm; Legal and Constitutional Legislation Committee Hansard, 19 April 2002, p. 166.
[20] Ibid., p.24.
[21] *Criminal Code Act 1995*, s.100.1(1)
[22] Ibid., s.100.1(2)(a)
[23] Ibid., s.100.1(2)(b)
[24] Ibid., s.100.1(2)(c)
[25] Ibid., s.100.1(2)(d)
[26] Ibid., s.100.1(2)(e)
[27] Ibid., s.100.1(2)(f)

31. Actions that take place as a result of advocacy, protest, dissent or industrial action,[28] and are not intended to cause serious harm that is physical harm to a person; cause a person's death; endanger the life of a person other than the person taking the action; or create a serious risk to the health or safety of the public or a section of the public, fall outside the definition of a 'terrorist act'. [29] Whilst the exemption of actions that take place as a result of advocacy, protest, dissent or industrial action from the definition of 'terrorist act' is arguably a safeguard against misuse of the terrorism powers, the use of this safeguard is untested. Concerns have been raised that similar safeguards in the context of 'move on' powers have not been effective. It has been suggested that guidelines should be developed to govern the investigation and prosecution of 'Issues Motivated Groups' which emphasise the importance of respecting the right to peaceful protest, association and freedom of expression and draw a distinction between the activities of such groups and terrorist groups. [30]

Law Council Concerns

32. Since its introduction, the Law Council has considered the definition of 'terrorist act' to be problematic. This view has been shared by a number of national and international review bodies,[31] as well as by members of the judiciary writing extra-judicially.[32]

33. The Law Council has highlighted its concerns with respect to the definition of a 'terrorist act' in a number of submissions to Parliament and Government bodies.[33] These concerns relate to the fact that the current definition:

- extends beyond internationally accepted definitions of terrorism; and
- includes threats of action.

34. The definition of 'terrorist act' is the gateway to a number of serious offence provisions and the trigger for a range of exceptional Executive powers which would, in all but emergency circumstances, be regarded as unjustified and unnecessary. The broad nature of the definition results in offences and powers that are unduly wide in scope; difficult to apply and enforce; and open to misuse.

[28] Ibid., s.100.1(3)(a)
[29] Ibid., s.100.1(3)(b)
[30] Professor Simon Bronitt, Centre of Excellence in Policing and Security (CEPS), *Ten years on: Critical perspectives on Terrorism Law Reform in Australia*, CEPS Public Lecture, 9 September 2011, p.15.
[31] For example, see Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006), [10]-[16] (Report of UN Special Rapporteur 2006'). Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement . See also Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Review of Security and Counter-Terrorism Legislation*, December 2006, para 5.30, available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report.htm
[32] For example see Justice Peter McClellan, *Terrorism and the Law* Twilight Seminar at the Supreme Court of NSW, 28 February 2008 at p. 9, available at http://www.judcom.nsw.gov.au/publications/terror.pdf
[33] See for example Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill 2004* (26 April 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill (No. 2) 2004* (15 July 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010*. See also, Law Council's Anti-Terrorism Reform Project.

*The definition of 'terrorist act' goes beyond internationally accepted definitions of terrorism*

35. Australia is a party to 11 of the 12 United Nations (UN) terrorism related conventions.[34] Australia has also supported a number of relevant UN resolutions, including UN Security Council Resolution 1566[35] which provides a summary of the internationally accepted understanding of the term 'terrorist act'.

36. Resolution 1566 requires member States to cooperate fully in the fight against terrorism and prevent and punish acts that are committed:

- with the intention of causing death or serious bodily injury or the taking of hostages;[36] and
- for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organisation to do or to abstain from doing any act (irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature).[37]

37. The Law Council is of the view that the definition of 'terrorist act' extends beyond this internationally accepted definition as it encompasses acts that cause serious damage to property; acts that interfere with telecommunications or financial systems;[38] and includes *threats* of action, as well as completed acts. The Law Council considers that the Australian definition of 'terrorist act' should go no further than its international obligations in this area.

38. Similar concerns have been expressed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism who has noted that the definition of 'terrorist act' is broader than the Security Council's characterisation of the term, [39] and that it is important for Australia's legislative response to terrorism to distinguish between conduct that can be classified as ordinary criminal conduct and conduct that constitutes terrorism.[40]

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[34] These include the *International Convention for the Suppression of the Financing of Terrorism,* adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Available from http://www.un.org/law/cod/finterr.htm; *International Convention for the Suppression of Terrorist Bombings,* adopted by the General Assembly of the United Nations on 15 December 1997. Available from http://treaties.un.org/doc/db/Terrorism/english-18-9.pdf*; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,* Annexed to General Assembly resolution 3166 (XVIII) of 14 December 1973. Available from http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf*; International Convention against the Taking of Hostages,* adopted by the General Assembly of the United Nations on 17 December 1979. Available from http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf.

[35] UN Security Council Resolution 1566 'Threats to international peace and security caused by terrorist acts' (adopted 8 October 2004), S/RES/1566 (2004). Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement

[36] Ibid., para 3.

[37] Ibid.

[38] It is not limited to those acts done with the intention of causing serious bodily injury or the taking of hostages.

[39] Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism,* UN Doc A/HRC/4/26/Add.3 (2006), para 15, Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement

[40] Ibid., para.16.

*Definition of 'terrorist act' and threats of action*

39. The second issue of concern to the Law Council is that 'terrorist act' is defined as an action or a *threat of action* which, amongst other things, causes serious physical harm, results in death, endangers life or causes serious property damage.[41]

40. The Law Council considers that it is almost impossible to conceive of how a simple threat of action, on its own and if not carried out, could cause serious harm, death, or serious property damage.[42] A threat to commit an act is materially different from actually committing the act. A threat to commit an act is also different from an attempt, a conspiracy or an incitement to commit that act. Although it might be reprehensible, it is conduct of a different type that should be addressed separately.

41. The Law Council is of the view that the reference to a 'threat of action' should be removed from the definition of terrorist act, and that threats to commit a terrorist act should be the subject of a separate offence provision.[43] The creation of a separate threat offence would allow the fault elements of such an offence to be properly addressed and an appropriate penalty set.[44] The PJCIS has also recommended that the reference to 'threat of action' be removed from the definition of 'terrorist act',[45] and dealt with as a separate offence.[46] International human rights bodies have also recommended that the definition of 'terrorist act' should be amended in this regard.[47]

Law Council Recommendations

42. Because of its concerns with the definition of 'terrorist act', the Law Council submits that the definition should be redrafted with greater care and specificity. It must be possible to precisely determine the type of conduct that it captures, so that an

[41] *Criminal Code Act 1995*, s.100.1(2)
[42] For further discussion of this point – see Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, June 2006, para 6.11, available at http://www.ag.gov.au/Documents/SLRC%20Report%20Version%20for%2015%20June%202006%5B1%5D.pdf
[43] Op.cit., Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010,* p.11; Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Laws Reform Bill ,* p.6; Law Council Submission to Senate Legal and Constitutional Affairs Committee on *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010*, p.1.
[44] Op.cit., Anti-Terrorism Reform Project, p.32
[45] Op.cit., *Security Legislation Review Committee Report*, para 6.14.
[46] Op.cit., Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Review of Security and Counter-Terrorism Legislation*, recommendation 10. See also Attorney-General's Department, *National Security Legislation Discussion Paper*, July 2009, p.49. Available from http://www.ag.gov.au/Documents/SLB%20-%20National%20Security%20Discussion%20Paper.pdf . The Australian Government has not acted on the recommendations of either the Security Legislation Review Committee or the PJCIS regarding removal of the phrase 'threat of action' from the definition of 'terrorist act.' Instead, it has argued that removing the threat of action from the definition of terrorist act would dilute the policy focus of criminalising threats of action within the offences in Division 101.
[47] For instance, in its Concluding Observations on Australia's human rights compliance, the UN Human Rights Committee recommended that Australia "…should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, to ensure that its application is limited to offences that are indisputably terrorist offences." See UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 19 February 2008, CCPR/C/AUS/5, available at: http://www.unhcr.org/refworld/docid/48c7b1062.html para [11]. The UN Special Rapporteur also urged Australia to exercise caution if including a 'threat of action' in the 'terrorist act' definition "…to ensure compliance with the requirements of legality." See Report of UN Special Rapporteur 2006 at [17]. Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement

assessment can be made of whether the measures available to prevent, investigate and prosecute that conduct are proportionate to the risk that is sought to be averted.

43. The Law Council submits that the COAG Review Committee should recommend that the Government:

- Redraft the definition of 'terrorist act' to ensure that the Australian definition is consistent with internationally accepted definitions of 'terrorist act'.
- Remove the reference to 'threat of action' and other references to 'threat' from the definition of 'terrorist act' in section 100.1(1). [48]

## Divisions 101- 103 Criminal Code – Terrorism offences

Outline of Key Provisions

44. Under Divisions 101-103 of the Criminal Code it is an offence to:

- engage in a terrorist act (penalty of life imprisonment).[49]
- provide or receive training connected with a terrorist act (penalty of imprisonment for 15 or 25 years, depending on knowledge).[50]
- possess things connected with terrorist acts (penalty of imprisonment for 10 or 15 years, depending on knowledge).[51]
- collect or make documents likely to facilitate terrorist acts (penalty of imprisonment for 10 or 15 years, depending on knowledge).[52]
- do another act in preparation for or planning a terrorist act (penalty of life imprisonment).[53]
- finance a terrorist act (penalty of life imprisonment).[54]

45. The Law Council is of the view that a number of these offences contain features that depart from traditional criminal law principles and have a disproportionate impact on the rights of individuals. For example, many of the offences: [55]

- capture conduct that is already criminalised under existing legislation;
- attempt to capture preparatory conduct at a very early stage and give rise to broad prosecutorial and enforcement discretion; and

[48] The *Anti-Terrorism Act 2005* (Cth) made a number of small but significant amendments to the offence provisions in sections 101.2, 101.4, 101.5, 101.6 and 103.1 of the *Criminal Code.* One such amendment was the removal of the word 'the' before the term 'terrorist act' and the replacement of this with the word 'a'. Whilst this amendment appeared minor, it significantly broadened the nature of the offences and removed the requirement for the prosecution to make a connection between the prohibited act and the existence of, or threat of, a *particular* terrorist act.
[49] *Criminal Code Act 1995*, s101.1(1)
[50] Ibid., s101.2
[51] Ibid., s.101.4
[52] Ibid., s.101.5
[53] Ibid., s.101.6
[54] Ibid., s.103.1
[55] Op.cit, Law Council of Australia, submission to Senate Legal and Constitutional Legislation Committee in response to its inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*, p.39.

- are characterised broadly which may lead to difficulties in identifying and comprehending the precise elements of the offences.

Law Council Concerns

*Offences capture conduct that is already criminalised under existing legislation*

46. The Law Council has previously questioned the need for many of the terrorism offences in Division 101 of the Criminal Code, given that similar conduct is already captured by existing legislation.[56]

47. Prior to the events of 11 September 2001, Australia's response to terrorist activity was contained within the boundaries of existing criminal law principles and existing offence provisions, even for significant terrorist events. For example, the Sydney Hilton Hotel bombing during the Commonwealth Heads of Government Regional Meeting in 1978 was widely regarded as a terrorist attack,[57] but it did not result in the introduction of terrorism offences. Instead, it was considered that "[t]he best safeguard against new terrors and apprehensions may lie in the rigorous enforcement of existing criminal law rather than in making new laws expressly about 'terrorism'."[58]

48. Even in the immediate aftermath of 11 September 2001, the Commonwealth Government expressed the view that Australia's existing criminal laws were sufficient to effectively counter terrorism, advising the UN Counter-Terrorism Committee on Implementation of Security Council resolution 1373, that Australia "already had in place extensive measures to prevent in Australia the financing of, preparation and basing from Australia of terrorist attacks on other countries."[59]

49. Despite this advice, the resulting legislative response was unprecedented in volume and scope and went well beyond established criminal law principles. Offence provisions, such as engaging in a terrorist act;[60] providing or receiving training connected with terrorist acts;[61] possessing things connected with terrorist acts;[62] and collecting or making documents likely to facilitate terrorist acts[63] were introduced in the SLAT Act and swiftly passed despite concerns that these offences were unnecessary and unwarranted.[64]

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[56] Ibid., para 46.
[57] See for example, Mr John Hatton, NSW Legislative Assembly Hansard, 9 December 1991, p.5940, available at http://www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/0/CA256D11000BD3AA4A2564B3001C61ED
[58] Quoted in J Hocking, *Beyond Terrorism—the Development of the Australian Security State* (St Leonards: Allen and Unwin, 1993), p 109, cited by Professor Simon Bronitt, Centre of Excellence in Policing and Security Public Lecture, Ten Years On: Critical Perspectives on Terrorism Law Reform in Australia, 9 September 2011, p.4.
[59] See Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Councill Resolution 1373 (2001) of 28 September 2001, quoted in Department of the Parliamentary Library, Information and Research Services, Research Paper No.12 2001-02, at pp.29-30.
[60] *Criminal Code Act 1995*, s 101.1
[61] Ibid., s 101.2
[62] Ibid., s 101.4
[63] Ibid., s 101.5
[64] See for example, Senator Bolkus, Second Reading speech for the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]; Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002;TelecommunicationsInterception Legislation Amendment Bill 2002,* 24 June 2002, p.2393. Available from http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2002-06-24/0004/hansard_frag.pdf;fileType=application%2Fpdf. See also Senator Bob Brown, Second Reading speech for the *Security Legislation Amendment*

50. At the time of their introduction, the Law Council submitted that the conduct that these offences sought to capture was already addressed in Commonwealth, State and Territory legislation.

51. For example, Part 2.4 of the Criminal Code provides for an extension of criminal responsibility in circumstances of attempt,[65] complicity and common purpose,[66] joint commission,[67] incitement[68] and conspiracy.[69] In each of these cases, the person is taken to have committed an offence and is punishable accordingly. The Law Council submitted that these ancillary offences could capture conduct covered by new offences such as collecting or making documents likely to facilitate terrorist acts.

52. The Monitor has also expressed the view in his 2011 Annual Report that at the time the new terrorist offences were introduced in Division 101 of the Criminal Code "[t]he pre-existing modes of ancillary criminal liability …were just as available for a group of terrorists as for a gang of drug traffickers."[70]

53. The Review provides an important opportunity to identify:

- which, if any, of the substantive offences introduced into Division 101 remain necessary;
- which offences are designed to capture the type of conduct already covered by the extended liability provisions of the Criminal Code; and
- which offences are aimed at purely preparatory conduct that should not be the subject of criminal liability and gives rise to prosecutorial and other difficulties.

*Offences capture preparatory conduct and give rise to broad prosecutorial and enforcement discretion*

54. A number of the offences in Division 101 of the Criminal Code can be described as preparatory in nature. For instance, it is an offence to possess a thing;[71] collect or make a document;[72] or do any act in preparation for, or planning, a terrorist act.[73] In each of these offences, the thing or document may, in and of itself, be innocuous. In addition, since amendments to these offence provisions in 2005, these preliminary acts do not have to be related to *any* specific planned terrorist act. These amendments removed the previous link to 'the terrorist act' in these offence provisions and replaced it with a link to 'a terrorist act'.[74]

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*(Terrorism) Bill 2002 [No. 2]; Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002;TelecommunicationsInterception Legislation Amendment Bill 2002,* 24 June 2002, p.2400. Available from http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2002-06-24/0007/hansard_frag.pdf;fileType=application%2Fpdf.

[65] *Criminal Code Act 1995*, s.11.1

[66] Ibid., s.11.2

[67] Ibid., s.11.2A

[68] Ibid., s.11.4

[69] Ibid., s.11.5

[70] Bret Walker SC, *Independent National Security Legislation Monitor (INSLM) Annual Report*, 16 December 2011, p.5, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf

[71] *Criminal Code Act 1995*, s.101.4(1)

[72] Ibid., s.101.5(1)

[73] Ibid., s101.6(1)

[74] The *Anti-Terrorism (No 1) Act 2005* removed the term 'the' before the term 'terrorist act' and replaced it with the term 'a', effectively removing the requirement for the prosecution to make a connection between the prohibited act and the existence of, or threat of, a *particular* terrorist act in respect of the offences in ss 101.2, 101.4, 101.5, 101.6 and 103.1 of the *Criminal Code.*

55. A person will commit an offence under section 101.4 if they possess a thing;[75] and the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act;[76] and the person knows of that connection.[77]

56. Similarly, a person will commit an offence under section 101.5 if they collect or make a document;[78] and the document is connected with the preparation for, the engagement of a person in, or assistance in a terrorist act;[79] and the person knows of that connection.[80]

57. In sections 101.4 and 101.5, a person will also be guilty of a lesser offence if they are reckless as to the existence of such connections.[81]

58. According to subsections 101.4(3) and 101.5(3), these offences will be committed even if a terrorist act does not occur; or the thing or document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or the thing or document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

59. These offences effectively invoke criminal liability for actions performed before the person has formed a definite plan to commit a criminal act. In this regard, they are a departure from common forms of criminal liability.[82] Indeed, unlike common forms of criminal liability, there is nothing inherently culpable about the commission of the physical element of the offence (such as 'possess a thing', 'collect a document', or 'do any act'). Rather, culpability attaches to what *might be done* following the preliminary act (such as preparation of a terrorist act).

60. The preparatory nature of these offences was noted by Chief Justice Spigelman in *Lodhi v The Queen* where he commented that*:*

> *"Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier state than is usually the case for other kinds of criminal conduct …"*[83]

61. The Law Council is concerned that these features of the offences in Division 101 allow a very broad discretion for prosecutorial and law enforcement authorities to determine when an innocuous preliminary act becomes criminal by virtue of its connection with 'preparation for, the engagement of a person in, or assistance in a terrorist act'. As noted by the Monitor in his 2011 Annual Report, the combination of the attributes of the section 101.6 offence "means there is perhaps not a great distance between the activity of thinking about committing terrorist acts in general and committing an offence under these provisions."[84]

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[75] *Criminal Code Act 1995*, s.101.4(1)(a)
[76] Ibid., s.101.4(1)(b)
[77] Ibid., s.101.4(1)(c)
[78] Ibid., s.101.5(1) (a)
[79] Ibid., s.101.5(1) (b)
[80] Ibid., s.101.5(1) (c)
[81] Ibid., ss.101.4(2)(c), 101.5(2)(c)
[82] See A. Lynch, 'Legislating with urgency – The enactment of the *Anti-Terrorism Act (No 1) 2005,*' *Melbourne University Law Review,* p.762. Available from http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/04_Lynch.pdf
[83] *Lodhi v The Queen* [2006] NSWCCA 121 at [66].
[84] Op.cit, *INSLM Annual Report 2011*, p.55.

62. Whilst some may argue that the creation of broad-based terrorism offences is unlikely to cause harm due to the fact that prosecutorial authorities are unlikely to lay terrorism charges without evidence of the existence of the most serious and dangerous plans, the Law Council considers that an unacceptable element of arbitrariness and unpredictability arises when the determination of whether a person is charged with a terrorist offence under Division 101 of the Criminal Code is left to the broad discretion of prosecutorial authorities.[85] Similar views have been expressed by counter-terrorism experts such as Professor Simon Bronitt, who notes that:

> *"…safeguards against misuse rest primarily with the discretion of the police (not to investigate or charge); the discretion of the prosecutors (whether the prosecution is in the public interest); and the consent of the federal Attorney-General (for those prosecutions under this Criminal Code (Cth) that require this additional consent). While discretion in law enforcement and prosecution is unavoidable (and quite legitimate), it should never be resorted to as a 'cure-all' for poorly conceived and drafted laws."*[86]

*Difficulties in identifying precise elements of the offences*

63. The Law Council is also concerned that the broad and ambiguously defined terms on which many of the offences in Division 101 are based leads to difficulties determining the precise ambit of the terrorist act offences.

64. The use of words such as 'thing', 'preparation' and 'assistance' in section 101.4; 'document' in section 101.5, and 'any act' in section 101.6 are not defined in the Criminal Code and are not terms with precise meanings. The use of such terms increases the ambiguity of these provisions. As noted by the Monitor in his 2011 Annual Report:

> *"People can possess many different 'things'. There are few words in the English language more inclusive than 'thing'."* [87]

65. The Law Council considers that offences should be drafted clearly so that the prosecution and defence are aware of the elements required to prove the offence. The Law Council does not consider that sections 101.2, 101.4, 101.5 or 101.6 are drafted as clearly as they should be.

<u>Law Council Recommendations</u>

66. The Law Council submits that the COAG Review Committee should recommend that the Government:

- reintroduce the preposition 'the' before 'terrorist act' in sections 101.2, 101.4, 101.5, and 101.6 of the Criminal Code*;* and
- review the necessity and effectiveness of the offences in sections 101.2, 101.4, 101.5 and 101.6 of the Criminal Code and consider whether those offences should be repealed.

[85] This concern was shared by the PJCIS in its 2006 Review of the offence provisions at paras 2.34 -2.35.
[86] Op.cit., Professor Simon Bronitt, *Ten Years On: Critical Perspectives on Terrorism Law Reform in Australia*, p.15.
[87] Op.cit., *INSLM Annual Report 2011*, p.57.

## Division 102 – Terrorist organisations

Outline of Key Provisions

67. Terrorist organisations are defined and regulated under Division 102 of the Criminal Code.[88] A 'terrorist organisation' is defined in subsection 102.1(1) as:

    (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or

    (b) an organisation that is specified by the regulations for the purposes of this paragraph.

68. There are two ways for an organisation to be identified as a 'terrorist organisation' - either an organisation may be found to be such an organisation by a court as part of the prosecution for a terrorist organisation offence; or it may be specified or 'listed' in regulations.

69. Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition above, the Attorney-General must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);[89] or advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).[90]

70. An organisation 'advocates' the doing of a terrorist act if the organisation directly or indirectly counsels or urges the doing of a terrorist act; or the organisation directly or indirectly provides instructions on the doing of a terrorist act; or 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 (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.[91]

71. The listing of an organisation ceases to have effect three years after listing, or if the Minister ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act, whichever occurs first.[92]

Law Council Concerns

72. The Law Council has a number of concerns about the proscription of terrorist organisations by regulations. These concerns relate to the broad nature of the Executive discretion involved, the basis for listing, the lack of transparency in the process, the denial of natural justice and limited review rights.

[88] Division 102 of the *Criminal Code* was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). It was subsequently amended in 2003 and 2004 by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) and the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).
[89] *Criminal Code Act 1995,* s.102.1(2)(a)
[90] Ibid., s.102.1(2)(b)
[91] Ibid., s.102.1(1A)
[92] Ibid., ss102.1(3), 102.1(4).The listing period was originally 2 years. However, s. 102.1(3) was amended by the National Security Legislation Amendment Act in 2010 to increase the period from 2 to 3 years

*Broad executive discretion to proscribe terrorist organisations*

73. Due to the broad definition of 'terrorist organisation' contained in Division 102, a considerable number of organisations around the world are potentially eligible for proscription under the regulations.[93] However, as at 20 September 2012, only 17 organisations were listed.[94] The rationale behind how and why those organisations in particular have been chosen and the order in which their proscription has been pursued is difficult to discern.

74. The lack of transparency surrounding the criteria used for proscribing certain organisations was raised by the PJCIS in its 2006 review of the listing of the Kurdistan Workers' Party. In its report on this review, the PJCIS stressed "the need for clear and coherent reasons explaining why it is necessary to proscribe an organisation under the Criminal Code."[95]

75. Additionally, there is no publicly available information about other organisations which have been considered for proscription, but not listed, or about organisations which are currently under consideration for listing.[96]

76. The Law Council considers that conferring a broad Executive discretion to ban a particular organisation is unacceptable in circumstances where the consequences of outlawing the group are to limit freedom of association and expression and to expose people to serious criminal sanctions.

*Absence of clear criteria for listing an organisation as a terrorist organisation*

77. The absence of publicly available, clear criteria to be applied to the listing of organisations exacerbates the lack of transparency and accountability flowing from the broad exercise of Executive discretion.

78. The PJCIS has repeatedly called for the Australian Security Intelligence Organisation (ASIO) and the Attorney-General's Department (AGD) to provide a statement of the criteria applied to the listing process, and to adhere to those criteria when listing (or re-listing) organisations in the future.[97] The PJCIS has expressed concern that some link between the organisation and Australia be demonstrated before the organisation is listed,[98] noting that "without a specific Australian link, the

[93] *Criminal Code Regulations 2002*

[94] For an up-to-date list of listed terrorist organisations, including when the organisations were listed and re-listed as terrorist organisations and for details as to their key objectives and activities, see the Australian Government's National Security website at http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument. See also *Criminal Code Regulations 2002* which were amended on 18 August 2012.

[95] PJCIS, *Review of the listing of the Kurdistan Workers' Party (PKK)*, April 2006, para *2.8.* Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/pkk/report.htm

[96] Op.cit., *Anti Terrorism Reform Project*, p.57.

[97] For example see PJCIS, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code Act 1995*,16 October 2006, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/al_qaida_ji/report.htm; Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD'), *Review of the listing of six terrorist organisations*, 5 September 2005, para 2.36, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/terrorist_listingsc/report.htm

[98] See for example Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, 16 June 2004, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/pij/report.htm.

new proscription power would appear to be either unnecessary or, at best, poorly focused".[99]

79. During its 2005 review of the listing of six terrorist organisations,[100] the then Parliamentary Joint Committee on ASIO, ASIS (the Australian Security Intelligence Service) and DSD (the Defence Signals Directorate) (PJCAAD), which later became the PJCIS, received from the Director-General of ASIO a summary of ASIO's evaluation process in selecting organisations for proscription under the Criminal Code. Factors included:[101]

- engagement in terrorism;
- ideology and links to other terrorist groups/networks;
- links to Australia;
- threats to Australian interests;
- proscription by the UN or like-minded countries; and
- engagement in peace/mediation processes.

80. Despite recommendations by the PJCAAD that ASIO and the Attorney-General address each of the six criteria referred above in all future statements of reasons, particularly for new listings,[102] ASIO has since advised that these criteria are only a guide and can be applied flexibly. Moreover, it is not necessary for each of the criteria to be considered by ASIO before a decision is made to list an organisation.[103] The absence of transparent criteria has inevitably made it difficult to allay public fears that the proscription power might be used arbitrarily.

81. The lack of clear, publicly available criteria has also contributed to the fear and alienation felt by certain groups within the Australian community, particularly Arab and Muslim Australians, who are unable to obtain a clear sense of what attributes, beyond religious and ideological commonality, render an organisation susceptible to being proscribed as a terrorist organisation. This uncertainty gives rise to concern that innocent associations could attract criminal liability.[104]

82. Despite indications by the Government that it supported the PJCIS' recommendation that ASIO and the AGD "develop an unclassified protocol which outlines the key indicators which are taken into consideration when determining whether an

[99] Op.cit, PJCAAD, *Review of the listing of six terrorist organisations* at para 2.36.
[100] Ibid.
[101] Ibid.
[102] Ibid., recommendation 2.
[103] Op.cit., PJCIS, *Review of the listing of the Kurdistan Workers' Party* at para 2.3.
[104] See for example, comments by the Australian Muslim Civil Rights Advocacy Network that: "*In reality, most people think of terrorist organisations as large international organisations with sufficient resources to carry out deadly attacks. However, the law is drafted so broadly that it is subject to wide application. While we appreciate that a comprehensive proscription list is not possible, the effect and implication of this is that a person could be charged with committing a "terrorist organisation" offence despite there being no known terrorist organisation until the moment he is charged. This places a heavy burden on ordinary individuals to be suspicious of all those around them. It is also clearly undesirable in that members of the wider non-Muslim community are more likely to distance themselves from Muslims."*Australian Muslim Civil Rights Advocacy Network, submission to the Security Legislative Review Committee, Report of the Security Legislation Review Committee (2006), p.67. Available at http://www.ag.gov.au/Documents/SLRC%20Report-%20Version%20for%2015%20June%202006%5B1%5D.pdf

organisation meets the statutory test for proscription,"[105] to date, no such protocol has been developed.

*Attribution of characteristics to a group*

83. A further concern with the proscription process is that it necessarily involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people. If the group does not have a formal constitution, corporate plan or some other statement of an organisation's goals and mandate, the attribution of this motive can be based on the statements or activities of certain individuals within the group.

84. For example, as noted above, one of the grounds on which the Attorney-General may list an organisation as a terrorist organisation is if the organisation *advocates* the doing of a terrorist act.[106] Subsection 102.1(1A) of the Criminal Code defines what advocacy means in this context,[107] but does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole.

85. 'Advocacy' is intended to include 'all types of communications, commentary and conduct,'[108] however, s.102.1(1A) fails to precisely identify:

- The form in which the 'advocacy' must be published;
- The extent to which the 'advocacy' must be publicly distributed;
- Whether an individual who 'advocates' must be specifically identified as a member of the organisation; or
- Whether the relevant individual must be the group's leader.

86. The result is that, under the Criminal Code, a person who is a member of an organisation could be prosecuted for a criminal offence if another member of that group 'praises' a terrorist act, even when the person who praised the terrorist act is not the leader of the group, or when the statement is not accepted by other members as representing the views of the group.[109]

87. This approach assumes homogeneity of the group and ignores the likely scenario that the group, although formed around a common interest or cause, may represent a forum in which some members' tendencies towards a violent ideology can be effectively confronted and opposed by other members. The result is likely to be the legitimisation of a process of guilt by association.

*An organisation should not be listed on the basis of 'advocacy' alone*

88. As outlined above, an organisation can be listed as a terrorist organisation on the basis that it 'advocates' the doing of a terrorist act, whether or not a terrorist act has

[105] See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptionofterroristorganisationsundertheAustralianCriminalCode-December2008 .

[106] *Criminal Code Act 1995* (Cth), s 102.1(2).

[107] Pursuant to s102.1(1A), an organisation 'advocates' the doing of a terrorist act if:
*the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*
*the organisation directly or indirectly provides instructions on the doing of a terrorist act; or*
*the organisation directly praises the doing of a terrorist act in circumstances where there is a 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.*

[108] Explanatory Memorandum for Anti-Terrorism Bill (No.2) 2005, p. 7. Available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2469_ems_59e71bb2-3256-491d-b843-d42e1cb3186c/upload_pdf/75082.pdf;fileType=application%2Fpdf

[109] Op.cit, *Report of the Security Legislation Review Committee* at para 8.10.

occurred or will occur.[110] The definition of what it means to advocate the doing of a terrorist act is set out in section 102.1(1A).

89. The Law Council is of the view that the power to proscribe an organisation on the basis of advocacy alone is unjustified and unnecessary and that subsections 102.1(1A) and 102.1(2)(b) should be repealed.

90. The Law Council is not opposed to laws which criminalise incitement to violence or other criminal acts. However, the Law Council submits that subsection 102.1(1A) and paragraph 102.1(2)(b) extend well beyond criminalising incitement.

91. Without paragraph 102.1(2)(b), the Government is already empowered to proscribe any organisation which is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).[111] In the Law Council's view, if it can not be demonstrated that an organisation's activities fall under this very broad umbrella then the organisation should not be outlawed as a terrorist organisation and its members exposed to serious criminal penalties.

92. Whilst the *National Security Legislation Amendment Act 2010* amended subsection 102.1(1A)(c) so that an organisation may now be listed as a terrorist organisation only if it directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that it might have the effect of leading a person (regardless of his or her age or any mental impairment that he or she might suffer) to engage in a terrorist act,[112] the Law Council does not consider that this minor amendment was sufficient to remedy the problem with the subsection.

93. The Government justified its inclusion of advocacy as a basis for proscription by arguing that it is necessary for "early intervention and prevention of terrorism."[113] The Law Council considers that disproportionate restraints on freedom of association and speech do not achieve this aim and, in fact, are likely to prove counter-productive.

94. Similarly problematic terms in the section dealing with the basis for proscription include 'indirectly fostering' the doing of a terrorist act by an organisation. Indirectly fostering the development of a terrorist act becomes even more uncertain if the terrorist act is a 'threat of action'. This term lacks certainty and introduces unclear terminology that may encompass a very wide spectrum of acts or representations.[114]

*Denial of natural justice*

95. Another concern that the Law Council has with the proscription of terrorist organisations relates to the lack of opportunity provided to affected parties to be heard *prior to an organisation* being listed or to effectively challenge the listing of an organisation after the fact, without exposing themselves to prosecution. If an organisation is proscribed by regulation as a terrorist organisation there is no opportunity for the members of the community who might be affected by the listing to make a case against the listing *before* the regulation comes into effect.

[110] *Criminal Code Act 1995,* s.102.1(2)(b)
[111] Ibid., s102.1(2)(a)
[112] Op.cit, Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010*, p.9
[113] Op.cit., PJCIS, *Review of security and Counter-terrorism Legislation*, para 5.60.
[114] Dina Yehia, NSW Public Defender, *Anti Terror Legislation Consideration of Areas of Legal And Practical Difficulties,* Presentation at Federal Criminal Law Conference, Sydney, 5 September 2008 p. 12-13.

96. A similar concern has been expressed by the PJCIS who, when reviewing the listing of terrorist organisations, has repeatedly requested that the key government agencies engage in public consultation before organisations are listed in an effort to ensure the community is aware of the proposed listing before it takes place. [115]

97. The Law Council notes that in December 2008 the Government responded to a number of recommendations for reform to the proscription process made by the PJCIS in its 2007 Inquiry into the Terrorist Organisation Listing Provisions. One of the recommendations made by the PJCIS was that the Government consider reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period for the relevant regulation had expired.[116]

98. Whilst the Government indicated it supported this recommendation, it also expressed the need for this approach to be flexible:

> *"… flexibility must be maintained within this approach so in circumstances where the Attorney-General considers that a listing should commence immediately (for example for security reasons), there remains scope for a regulation to commence when it is lodged with the Federal Register of Legislative Instruments (FRLI).* [117]

99. The Government appears to have adopted this recommendation in its approach to the listings of a number of terrorist organisations since the 2007 PJCIS report.[118]

*Inadequacies of Existing Review Processes*

100. The Law Council recognises that there are avenues for review *after* an organisation has been listed.[119]However it considers that the available forms of post facto review provide inadequate protection for the rights of persons who may be affected by the proscription process. These avenues of review are discussed below.

- Review by the PJCIS

101. Section 102.1A of the Criminal Code stipulates that the PJCIS *may* review a regulation proscribing an organisation within 15 sitting days of the regulation being laid before the House.[120]

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[115] PJCAAD, *Review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a Terrorist Organisation*, 25 May 2005, recommendation 1, available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/al_zarqawi/report.htm

[116] PJCIS, *Report of the Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code 1995*, recommendation 4, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/proscription/report.htm.

[117] Op.cit., Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations, December 2008.

[118] Al Shabaab was listed on 26 October 2009 with the relevant regulation taking effect the day after registration 'for security reasons'. The PJCIS in its review of the listing stated that it was comfortable with this approach, see http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/al%20shabaab/report.htm. The listing of Al Qu'aida in the Arabian Peninsula came into effect after the disallowance period for the relevant regulation, see the PJCIS report on the review of the listing at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/aqap_6%20terrorist%20orgs/report.htm.

[119] See for example, *Criminal Code Act 1995*, s102.1A

[120] The PJCIS has noted that 'since Parliament is able to disallow a regulation, the Parliament should have the clearest and most comprehensive information upon which to make any decision on the matter.' Accordingly, as part of its review the PJCIS may seek submissions from Australian members of the relevant organisation

102. Although the Parliament is likely to rely upon the judgement of the PJCIS in deciding whether to disallow the proscribing regulation, particularly where classified material is involved, the primary problem with review by the PJCIS is that it takes place after a decision to proscribe an organisation has been made and comes into effect.

103. Notwithstanding the fact that the PJCIS has been diligent in reviewing listings, robust in its questioning of relevant government officers, and critical of some aspects of the current listing process, it has not succeeded in forcing the Government to commit to a fixed set of criteria for selecting organisations for listing or to address its reasons for listing according to those criteria. At present the only criteria that the PJCIS is able to use to gain an understanding of why particular organisations are selected for listing are those that were provided by the Director-General of ASIO during the PJCAAD's 2005 review of the listing of six terrorist organisations.[121]

- Consultation with States and Territories

104. Mandatory consultation on a proposed new listing with State and Territory leaders, pursuant to the Inter-Governmental Agreement on Counter-Terrorism laws,[122] has provided only doubtful additional accountability. For example, in the case of the Kurdistan Workers' Party listing, although the matter was under consideration for over a year, State and Territory leaders were advised of the proposed listing just six days before the relevant regulation was made and were only provided with the three and half page unclassified statement of reasons in support of the listing.[123] The Law Council questions how consultation of this type acts as a genuine safeguard.

- Judicial Review

105. Once listed, an organisation may apply to the Attorney-General for delisting, 'on the grounds that there is no basis for the Minister to be satisfied that the listed organisation is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act.' [124]

106. If de-listing is denied by the Minister, the organisation has the opportunity, under the ADJR Act to have this decision reviewed (it should be noted however that this review involves testing the legality of the decision rather than its merits.)[125]

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and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister's decision was based. See PJCAAD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, (16 June 2004).

[121] Op.cit., PJCAAD *Review of the listing of six terrorist organisations.*

[122] Inter-Governmental Agreement on Counter-Terrorism laws was signed by the Prime Minister, Premiers and Chief Ministers on 24 October 2002. The text of the agreement is available at http://www.coag.gov.au/meetings/250604/iga_counter_terrorism.pdf.

[123] Op.cit., PJCIS, Review of the listing of the Kurdistan Workers Party (PKK) as a terrorist organisation, p.4.

[124] *Criminal Code Act 1995* ss 102.1(4) and 102.1(17).

[125] See Commonwealth Attorney-General's Department, *Protocol for Listing Terrorist Organisations under the Criminal Code*, available from http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29~LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf/$file/LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf. ASIO has also advised the PJCIS that 'the making of the regulation is subject to judicial review under section 75(v) of the Australian Constitution, and section 39B of the *Judiciary Act 1903*. ' However, this is not an avenue for merit review. See PJCAAD, Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004, (16 June 2004). p. 9.

Law Council Recommendations

107. The Law Council submits that the COAG Review Committee should recommend that the Government:

- Repeal the current procedure for proscribing organisations as terrorist organisations by regulation pursuant to subsection 102.1(2); and
- Introduce a fairer and more transparent process for proscribing an organisation as a terrorist organisation. Such a process should have the following features:
  - a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected parties and a hearing in open court;
  - clear and publicly stated criteria for proscription;
  - detailed procedures for revocation, including giving the right to a proscribed organisation to apply for review of that decision; and
  - that once an organisation has been proscribed, that fact should be publicised widely, notifying any person connected to the organisation of the possible risk of criminal prosecution.

## Division 102 - Terrorist Organisation Offences

Outline of Key Provisions

108. Division 102 of the Criminal Code, which was introduced by the SLAT Act and later amended in 2003[126] and 2004,[127] contains a number of 'terrorist organisation offences'. These offences relate to the conduct of a person who is in some way connected or associated with a 'terrorist organisation'.

109. Terrorist organisation offences include :

- Directing the activities of a terrorist organisation (penalty of 15-25 years imprisonment, depending on knowledge);[128]
- Being a member of a terrorist organisation (penalty of 10 years imprisonment);[129]
- Recruiting for a terrorist organisation (penalty of 15-25 years imprisonment, depending on knowledge);[130]
- Training or receiving training from a terrorist organisation (penalty of 25 years imprisonment);[131]
- Getting funds to, from or for a terrorist organisation (penalty of 15-25 years imprisonment, depending on knowledge);[132]

[126] See *Criminal Code Amendment (Terrorism) Act 2003* (Cth).
[127] See *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).
[128] *Criminal Code Act 1995*, s.102.2
[129] Ibid., s.102.3
[130] Ibid., s.102.4
[131] Ibid., s.102.5

- Providing support to a terrorist organisation (penalty of 15-25 years imprisonment, depending on knowledge);[133] and

- Associating with a terrorist organisation (penalty of 3 years imprisonment).[134]

Law Council Concerns

110. When the SLAT Bill was introduced in 2002, the Law Council queried whether the terrorist organisation offence provisions were necessary to meet the objectives espoused by the Government, namely to protect the community from organised terrorist activities.[135]

111. The Law Council noted that the types of criminal conduct engaged in by terrorist organisations, such as possession of weapons or materials to construct weapons, money laundering or conspiring to commit an act of violence, were already criminalised by existing offence provisions.[136]

112. In addition to querying the necessity of these provisions, the Law Council has a number of general concerns about the terrorist organisation offences relating to the offences being based on association rather than conduct; the breadth of key terms; and the discretion afforded to law enforcement and intelligence agencies to use such offences as a hook for gathering information and intelligence. [137]

113. These provisions shift the focus of criminal liability from a person's individual conduct to their associations and can have a disproportionately harsh effect on certain sections of the community who, because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.

114. The Law Council is also of the view that the breadth of the key terms upon which the terrorist organisation offences are based, and the uncertainty this creates as to how they will be applied, contributes to ignorance and prejudice within the Australian community; it generates confusion, fear and alienation, particularly among some Arab and Muslim Australians.[138]

115. In the context of the terrorist organisation offences, the Government has often been quick to point out that, before a person could be found guilty of the majority of offences under Division 102 of the Criminal Code, the prosecution would have to prove beyond reasonable doubt that the accused person either knew or was reckless as to whether the relevant organisation that he or she had somehow

[132] Ibid., s.102.6
[133] Ibid., s.102.7
[134] Ibid., s.102.8
[135] Op.cit., Law Council of Australia, submission to Senate Legal and Constitutional Legislation Committee in response to its inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*, p.10. This view, along with a number of the concerns listed below, was also separately advanced by a number of the Law Council's Constituent Bodies, see for example Law Institute of Victoria Submission, *UN Special Rapporteur Report on Australia's human rights compliance while countering terroris*m (03 May 2007); Law Institute of Victoria Submission, *Parliamentary Joint Committee on Intelligence and Security's Security Legislation Review* (05 July 2006).
[136] Op.cit., Law Council of Australia, *Anti Terrorism Reform Project*, June 2012, p.57.
[137] Op.cit., Law Council's Submissions to the Senate Legal and Constitutional Affairs Committee on the *National Security Legislation Amendment Bill 2010 & Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010) and to the PJCIS Inquiry *into the Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* ( 16 April 2002).
[138] Op.cit., PJCIS, *Review of Security and Counter-terrorism Legislation*, para 3.13. See also Wheeler, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81 *Australian Law Journal* 743 at 744.

interacted with was a terrorist organisation. Therefore, according to the Government, no sanction can follow from innocent interaction and association.

116. However, the danger with the terrorist organisation offences is not just that they potentially expose a person to criminal sanction, but that they are available to serve as a hook for the exercise of a wide range of law enforcement and intelligence gathering powers. For example, without more, innocent interaction and association with a suspected member of a suspected terrorist organisation may not result in conviction and punishment,[139] but it may generate sufficient interest on the part of police to lead to a search warrant, a telephone interception warrant, other surveillance measures and even arrest and detention.

117. Given the terrorist organisation offences do not focus on conduct distinct from association, the offences potentially afford police very wide latitude to intrude upon people's privacy and liberty, based purely on who they know and interact with. The element of intention in the terrorist organisation offences may operate to limit the risk that entirely innocent interaction will be subject to criminal sanction. However, the intent element of the offences may not always be considered by police when deciding whether to arrest, question, search and detain.

118. In addition to these more general concerns, the Law Council is also concerned about aspects of particular terrorist organisation offences: membership of a terrorist organisation; association with a terrorist organisation; funding a terrorist organisation; providing support to a terrorist organisation; and providing training to or receiving training from a terrorist organisation.

*Membership of a terrorist organisation (s102.3)*

119. Section 102.3 of the Criminal Code makes membership of a terrorist organisation an offence carrying a penalty of ten years imprisonment. To prove this offence, the prosecution must establish beyond reasonable doubt that the person *knew* that the organisation was a terrorist organisation. A person will not commit an offence under this section if they are able to prove that they took all reasonable steps to cease their membership of the organisation as soon as they realised that the organisation was a terrorist organisation.[140]

120. A person will be a member of a terrorist organisation if they are an informal member of the organisation; have taken steps to become a member of the organisation; and in the case of an organisation that is a body corporate, if they are a director or an officer of the body corporate.[141]

121. The Law Council has the following concerns about the membership offence:

- Criminalising membership of a group assumes the existence of a formal membership process which demonstrates at any particular point in time, whether or not a specific person is a member of that group or organisation. Such formal membership structures may not exist in terrorist or criminal groups.[142]

[139] For example there was no conviction for the offence of receiving funds from a terrorist organisation in the case of Jack Thomas.
[140] *Criminal Code Act 1995,* s102.3
[141] Ibid., s102.1
[142] See for example, comments by Bongiorno J in *R v Benbrika* [2009] VSC 21 at para 11, where he stated "Because of the complexity of the statutory definitions involved in the concept of a terrorist organisation as proscribed in Pt 5.3 of the Code, there are many forms in which such an organisation could exist."

- The broad nature of the definition of a terrorist organisation means that the potential class of persons that fall within the definition of 'member' is very wide.[143]

- It is difficult to determine with precision who is a member of a group and when membership begins or ends. This has significant implications for those persons seeking to rely on the defence to the membership offence set out in paragraph 102.3(2).[144] It will be very difficult to discharge this burden in circumstances where there is no formal 'membership resignation' process and no membership or subscription fees which can be cancelled.[145]

122. Judicial commentary has provided some guidance as to how these complex provisions should be applied.[146] While membership may be formalised in the manner of a pledge, it may also be determined through statements or acts. There is no definition within the Criminal Code which provides assistance in clarifying the steps that are required to determine membership or to indicate rescinding of membership.

123. For these reasons, the Law Council recommends that the membership offence in section 102.3 be repealed, or, at the very least, the definition of 'member' in section 102.1 of the Criminal Code be amended so as to limit the concept of membership to formal members of the organisation who are directly participating in the activities of the organisation.[147] These views are consistent with an earlier recommendation of the PJCIS that the Government consider replacing the membership offence in section 102.3 with an offence of participation in a terrorist organisation, and consider whether participation should be expressly linked to the purpose of furthering the aims of the organisation.

*Training a terrorist organisation or receiving training from a terrorist organisation (s102.5)*

124. Under section 102.5 of the Criminal Code it is an offence to provide training to, or receive training from, a terrorist organisation. The Law Council has previously raised a number of concerns about this offence.[148] These can be summarised as follows:

[143] The similarly broad definition of a 'member' which includes 'informal members' and any person who has taken 'steps to become a member' broadens the scope of this offence even further.
[144] This paragraph provides a defence where "the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation."
[145] 'Ceasing to be a member' may equate to little more than subtly withdrawing and removing oneself from the group's activities – without announcement of any sort. Such subtle withdrawal may be difficult to prove. A similar view was expressed by the Security Legislation Review Committee when it reviewed the terrorist organisation offences in 2006. See Report of the Security Legislation Review Committee, (2006), at para 10.20.
[146] For example, in *R v Benbrika* [2009] VSC 21, those convicted of offences under Divisions 101 and 102 of the Criminal Code gave the bayat, which is an Islamic word for allegiance and is akin to making an oath, to Abdul Nacer Benbrika, who was found to have directed the terrorist organisation. The significance of the bayat in determining membership in that case was acknowledged by Bongiorno J in relation to Amer Haddara at [230]. Whilst the time at which Amer Haddara's membership of the terrorist organisation commenced may have been clear, this will not be the case every time. For example, for Ezzit Raad, membership was determined based upon recordings of conversations he had with other members as well as the activities that he was involved in. See comments by Bongiorno J in *R v Benbrika* [2009] VSC 21 at para [217].
[147] Law Council of Australia, Submission to Attorney-General's Department on National Security Legislation Discussion Paper, October 2009, p.14, available at http://www.ag.gov.au/Documents/SLB%20-%20Submission%20on%20National%20Security%20Legislation%20Amendment%20Bill%202009%20-%20Law%20Council%20October%202009.pdf
[148] Ibid., p.16.

- That the section is fundamentally flawed due to the failure to distinguish between training which may assist an organisation in preparing for and carrying out a terrorist act and training which is otherwise benign;[149] and

- That legitimate activities should not be subject to criminal sanctions simply because it is easier for the Government to place a blanket prohibition on certain conduct rather than to have to properly investigate and prosecute the specific misconduct it actually seeks to target.[150]

125. The PJCIS has made similar observations and recommendations in relation to section 102.5, noting in particular that "the excessive complexity of the provisions has contributed further to the uncertainty about the scope and application of the offence,"[151] and that unless amendments were made to section 102.5, there would be no guarantee that legitimate activities (such as those provided by aid organisations and other humanitarian groups) would not be captured by this provision.

126. The PJCIS also recommended that section 102.5 should be "redrafted to define more carefully the type of training targeted by the offence, or 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."[152]

127. While the Government indicated that it supported these recommendations in principle, the Government proposed instead the establishment of a Ministerial authorisation scheme "which would allow legitimate and reputable humanitarian aid organisations to be exempt, in limited circumstances, from the offence of providing training to a terrorist organisation."[153]

*Getting funds to, from or for a terrorist organisation (section 102.6)*

128. Under section 102.6 of the Criminal Code it is an offence to receive funds from, or make funds available to, a terrorist organisation. There are two separate offences under section 102.6. The first is based on the person *knowing* that the organisation which he or she intentionally receives funds from, or makes funds available to, is a terrorist organisation. The penalty for this offence is 25 years imprisonment. The second offence is based on recklessness as to whether the organisation is a terrorist organisation. The penalty for this offence is 15 years imprisonment.

129. Under subsection 102.6(3) a person will not be guilty of a section 102.6 offence if he or she receives funds from the organisation solely for the purpose of providing:

    (a) legal representation for a person in proceedings relating to terrorist organisation offences; or

    (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.

    The defendant bears a legal burden in relation to these exceptions.

[149] Ibid. Similar concerns were also raised by the Sheller committee which noted, the type of training received or provided and whether or not it has any relevance to terrorist activity is not material to establishing the offence. This means that section 102.5 can catch innocent training and the mere teaching of people who may be members of a terrorist organisation. See Security Legislation Review Committee Report, at p.117.
[150] Ibid.
[151] Op.cit., PJCIS, *Review of Security and Counter Terrorism Legislation*, p.74.
[152] Ibid., p.75
[153] Op.cit, *National Security Legislation Discussion Paper*, p.67.

130. This means that if a legal practitioner is charged with receiving funds from a terrorist organisation, he or she must establish, on the balance of probabilities, that the funds were received for the purpose of providing legal assistance in relation to terrorist organisation proceedings or in relation to some other form of regulatory compliance.[154]

131. Communications between a legal adviser and their client made for the purpose of obtaining or giving legal advice are generally subject to client legal privilege. This makes it very difficult, if not impossible, for the legal practitioner to prove that the services, for which he or she receives funding from a terrorist organisation, fall within the s 102.6(3) exception.

132. To exonerate him or herself from a section 106.2 offence, the legal practitioner must gain the client's consent to waive privilege so that evidence can be adduced about the nature of the legal assistance rendered. Where privilege is not waived, the documents subject to client legal privilege cannot be produced even if they will establish the innocence of the legal adviser charged with a crime. If a legal adviser cannot prove that the services provided to a terrorist organisation fall within the legal representation exception, they face up to 25 years imprisonment. The Law Council, like the Security Legislation Review Committee considers these provisions, and in particular the exception in subsection 102.6(3), to be unreasonably restrictive.[155]

*Providing support to a terrorist organisation (section 102.7)*

133. Section 102.7 makes it an offence for a person to intentionally provide support or resources to an organisation that would assist the organisation to engage in an activity that involves preparation, planning, assistance or fostering the doing of a terrorist act if the person knows that the organisation is a terrorist organisation.[156] This offence carries a penalty of 25 years imprisonment.

134. A person will also commit an offence under section 102.7 if they engage in the activity above and are reckless as to whether the organisation is a terrorist organisation.[157] This offence carries a penalty of 15 years imprisonment.

135. The Law Council considers that section 102.7 is unduly complicated. A similar view was expressed by the Hon John Clarke QC in his inquiry into the case of Dr Mohamed Haneef. Dr Haneef was an Indian doctor working in Australia who was arrested and detained in July 2007 for 12 days without charge on suspicion of having been involved in a terrorist attack in London. After this period, Dr Haneef was charged with providing support to a terrorist organisation. Mr Clarke considered the elements of this offence and noted that they were highly confusing.[158]

136. Mr Clarke expressed particular concern at the difficulties which would be encountered when attempting to direct juries as to the correct physical and mental elements of the offence and recommended that section 102.7 of the Criminal Code be amended to remove these uncertainties.[159]

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[154] Op.cit., *Anti-Terror Reform Project*, p.69.
[155] Op.cit., *Report of the Security Legislation Review Committee*, p.120.
[156] *Criminal Code Act 1995,* s102.7(1)
[157] Ibid., s102.7(2)
[158] See MJ Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef,* November 2008, p.260, available at http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/%283A6790B96C927794AF1031D9395C5C20%29~Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf, p.260.
[159] Ibid., p.260.

137. The Government indicated that it supported Mr Clarke's recommendation to review section 102.7 and, in the 2009 National Security Legislation Discussion Paper, proposed to narrow and clarify the scope of the provision by:

- inserting a new requirement into s.102.7 that would mean the support provided must be *material* support;[160] and

- inserting a new requirement into s.102.7 that would mean a person must provide the relevant resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.[161]

138. Unfortunately, these amendments were not pursued by the Government in the *National Security Legislation Amendment Act 2010* (Cth). The Law Council is of the view that these amendments should be made to section 102.7.

*Associating with a terrorist organisation (section 102.8)*

139. Under section 102.8, it is an offence to, on two or more occasions, associate with a member of a listed terrorist organisation or a person who promotes or directs the activities of a listed terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist.[162] This offence attracts a penalty of 3 years imprisonment.

140. Subsection 102.8(4) provides limited exemptions for certain types of association, such as those with close family members or legal counsel. Subsection 102.8(6) also provides that the offence provision in section 102.8 does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

141. The Law Council's concerns with respect to this offence are similar to its concerns with the other terrorist organisation offences, which cast the net of criminal liability too widely by criminalising a person's associations, as opposed to their conduct.

142. The Law Council does not consider that it was necessary to expand the scope of criminal liability in this way, given that existing principles of accessorial liability in Part 2.4 of the Criminal Code already provide for an expansion of criminal responsibility in circumstances of attempt, aiding and abetting, common purpose, incitement and conspiracy. These established principles draw a more appropriate line between direct and intentional engagement in criminal activity and peripheral association.

143. The current offence in section 102.8 criminalises mere association without clearly or precisely identifying any particular conduct worthy of attracting criminal punishment. The offence is couched in broad terms, such as 'associates', 'promotes' and 'supports', making the prosecution of such offences inherently difficult.

144. Moreover, given that the elements of the association offence are so difficult to define and the scope of the offence so broad, it potentially applies indiscriminately to large sections of the community without any clear justification. This gives rise to the risk

[160] Op.cit., *National Security Legislation Discussion Paper*, p.63.
[161] Ibid.
[162] *Criminal Code (Cth)* ss 102.8(1), 102.8(2).

that the association offence will capture a range of legitimate activities, such as some social and religious festivals and gatherings.[163]

Law Council Recommendations

145. The Law Council submits that the COAG Review Committee should recommend that the Government:

- repeal the terrorist organisation offences in Division 102, or at least:
  - repeal the association offence in section 102.8 of the Criminal Code;
  - repeal the membership offence in section 102.3 or, at least, amend the definition of 'member' in section 102.1 of the Criminal Code to limit membership to formal members of the organisation who are directly participating in the activities of the organisation;
  - amend subsections 102.2(2), 102.5(1), 102.6(2) and 102.7(2) to require *knowledge* rather than *recklessness* as to whether the organisation was a terrorist organisation.
  - amend the providing support offence in section 102.7 so that:
    - the support provided must be *material* support; and
    - a person must provide the resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.
  - amend the providing training offence in section 102.5 so that the type of training that is targeted is better defined.

## Division 103 – Financing Terrorism

Outline of Key Provisions

146. A number of legislative measures were introduced in 2002 in an effort to bring Australia's laws relating to money laundering and financing criminal activity into line with Australia's international obligations to criminalise the financing of terrorist activity.

147. Schedule 1 of the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* (Cth) inserted Division 400 into the Criminal Code, replacing pre-existing money laundering offences in sections 81 and 82 of the *Proceeds of Crime Act 1987* (Cth).[164]

148. The money laundering offences in Division 400 make it an offence for a person (whether an individual or corporation) to:

[163] This view was shared by the Security Legislation Review Committee, see *Report of the Security Legislation Review Committee* (2006) at para 10.75.

[164] The Division 400 provisions were added to the *Criminal Code* to reflect the serious nature of money laundering offences and to implement the recommendations made by the Australian Law Reform Commission in its report *Confiscation that Countss: A Review of the Proceeds of Crime Act 1987* (ALRC 87) (June 1999) available at http://www.austlii.edu.au/au/other/alrc/publications/reports/87/

- receive, possess conceal or dispose of money or property;[165]
- import or export money or property from Australia;[166] and
- engage in banking transactions with any money or property[167]

where that money or property is proceeds of crime or could become an instrument of crime in relation to any indictable offence.

149. The *Suppression of the Financing of Terrorism Act* 2002 (Cth)[168] was enacted in 2002 and amended the *Extradition Act 1988* (Cth), the *Financial Transaction Reports Act 1988* (Cth)*, the Mutual Assistance in Criminal Matters Act 1987* (Cth), and the *Charter of the United Nations Act 1945* (Cth). It also created a new offence in section 103.1 of the Criminal Code in relation to financing terrorism.

150. In 2005 an additional 'financing a terrorist' offence was inserted into section 103.2 of the Criminal Code.[169] That same year the term 'the terrorist act' in the terrorism offences was changed to 'a terrorist act', removing the requirement that the prosecution prove that the person was engaged in financing a specific terrorist act.[170]

151. Under section 103 of the Criminal Code it is an offence to:[171]

- provide or collect funds being reckless as to whether the funds will be used to facilitate or engage in a terrorist act (penalty of imprisonment for life);[172]
- intentionally make funds available to another person or collect funds for another person, whether directly or indirectly, being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act (penalty of imprisonment for life).[173]

152. A person will commit one of the above offences even if:[174]

- a terrorist act does not occur; or
- the funds will not be used to facilitate or engage in a specific terrorist act; or
- the funds will be used to facilitate or engage in more than one terrorist act.

[165] *Criminal Code Act 1995,* s.400.2(a)
[166] Ibid., ss400.2(b), 400.2(c)
[167] Ibid., s400.2(d)
[168] The *Suppression of the Financing of Terrorism Act 2002* (Cth)) was enacted to implement Australia's international legal obligations under the *International Convention on the Suppression of the Financing of Terrorism* and UN Security Council resolutions 1267 and 1373. It also responded to the international Financial Action Task Force (FATF) recommendations on terrorist financing.
[169] *Anti-Terrorism Act (No 2) 2005* (Cth)*.*
[170] Ibid.
[171] Each offence applies the fault element of intention to the actual provision, collection, the making of funds available or collection of funds on behalf of another. The fault element that applies to the connection between the conduct to acts of terrorism is the lower threshold of 'recklessness'. Chapter 2 of the Criminal Code defines the fault elements of 'intention', 'knowledge', 'recklessness' and 'negligence'. Recklessness requires awareness of a substantial risk that the result will occur and, having regard to the circumstances known to the person, it is unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact.
[172] *Criminal Code Act 1995* (Cth) s103.1.
[173] Ibid., s103.2.
[174] Ibid., ss103.1(2), 103.2(2)

Law Council Concerns

153. The Law Council has previously expressed concerns about the financing terrorism offences in Division 103.[175] These concerns relate to the broad and imprecise nature of the offences and the fact that they go further than what is required by the international instruments they were introduced to implement.

*Financing terrorism and financing a terrorist offences (sections 103.1 and 103.2)*

154. The Law Council considers the offence in section 103.1 of the Criminal Code to be unacceptably imprecise for an offence which carries life imprisonment. The offence created by section 103.1 contains no requirement that the prosecution prove that a person charged had *actual knowledge* of circumstances that indicate a connection with a terrorist act or *intended* to provide funds to be used to facilitate or engage in a terrorist act. Rather, the fault element of the offence in relation to whether the funds will be used to facilitate or engage in a terrorist act is satisfied if it can be shown that the person was *reckless* as to that fact.

155. As noted by the Law Council in previous submissions,[176] when the Government introduced this new offence, it was stated that section 103.1 implemented Article 2 of the *Convention for the Suppression of the Financing of Terrorism*; paragraph 1(b) of United Nations Security Council resolution 1373, and drew on the language used in those international instruments.[177]

156. However, Article 2 of the Convention contains a requirement of specific intention when attributing criminal liability for the financing of terrorism. Article 2(1) provides that a person commits an offence within the meaning of the Convention if that person by any means "*directly or indirectly, unlawfully and wilfully, provides or collects funds with the **intention** that they should be used or in the knowledge that they are to be used, in full or in part…*"[178]

157. In addition to this, paragraph 1(b) of UN Security Council resolution 1373, provides that State parties shall:

> *"Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the **intention** that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts."*[179]

158. Unlike the offence in section 103.1, both international instruments contain a clear requirement of specific intent in relation to the use of the funds.

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[175] Op.cit., Submission by the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, p.51.
[176] Ibid.
[177] Explanatory Memorandum to the *Suppression of Financing of Terrorism Bill 2002* (Cth) available at http://www.austlii.edu.au/au/legis/cth/bill_em/sotfotb2002453/memo1.html.
[178] *International Convention for the Suppression of the Financing of Terrorism*, Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, available at http://www.un.org/law/cod/finterr.htm

[179] UN Security Council Resolution 1373 (2001) 28 September 2001 at para 1(b). Available at http://www.un.org/News/Press/docs/2001/sc7158.doc.htm

159. The Law Council expressed similar concern regarding the introduction of the 'financing a terrorist' offence in section 103.2 of the Criminal Code in 2005.[180]

160. Section 103.2 makes it an offence to intentionally make funds available to another person or collect funds (whether directly or indirectly) for or on behalf of another person reckless as to whether the funds will be used by that person to facilitate or engage in a terrorist act. The offence is committed notwithstanding the fact that no terrorist act occurs, that the funds will not be used for a specific terrorist act, or that they will be used for a number of terrorist acts.

161. In its 2006 Report, the PJCIS expressed some concern about the current breadth of the offences in section 103 and recommended that:

- subsection 103.1(a) be amended by inserting 'intentionally' after 'the person';
- recklessness be replaced with knowledge in subsection 103.1(b); and
- paragraph 103.2(1)(b) be redrafted to make it clear that the intended recipient of the funds must be a terrorist.[181]

The Government indicated that it did not support these recommendations.[182]

Law Council Recommendations

162. The Law Council submits that the COAG Review Committee should recommend that the Government:

- Amend section 103.1 by:
  - inserting 'intentionally' after 'the person' in subsection (a) and removing the note; and
  - replacing the term 'reckless' with 'has knowledge' in subsection 103.1(1)(b).
- Amend section 103.2 by replacing the term 'reckless' with 'has knowledge' in paragraph 103.2(1)(b).

## Divisions 104 and 105- Control Orders and Preventative Detention Orders

Outline of Key Provisions – Control Orders

163. The *Anti-Terrorism (No 2) Act 2005* (Cth) introduced a system of control orders and preventative detention orders into the Criminal Code.

164. A control order is made by an issuing court, for example, the Federal Magistrates Court.[183] Before making an order, the court must be satisfied either:[184]

[180] Op.cit, Law Council of Australia Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into Anti-Terrorism (No 2) Bill 2005*.
[181] Op.cit., PJCIS, *Review of Security and Counter-Terrorism Legislation* , recommendation 21.
[182] Op.cit., Australian Government response to PJCIS Review of Security and Counter-Terrorism Legislation - December 2008.
[183] An issuing court is defined in s100.1 *Criminal Code Act 1995* (Cth) (the Criminal Code) to include the Federal Court, the Family Court or the Federal Magistrates Court.
[184] *Criminal Code Act 1995,* s104.4 (interim order); s104.16 (confirmed order).

- that the order would substantially assist in preventing a terrorist act; or
- that the person who is to be subject to the control order has provided training to or received training from a terrorist organisation.

165. Interim control orders are obtained on application by an Australian Federal Police (AFP) officer after obtaining the consent of the Attorney-General.[185] The application may be made without having to notify the person concerned of the application.[186] If the AFP officer applies to confirm the order, the person subject to the order must be notified, and may appear and give evidence before the issuing court.[187] The issuing court may then revoke, confirm or vary the interim control order.[188]

166. The court must be satisfied that, on the balance of probabilities, each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act, before confirming the order.[189]

167. Pursuant to section 104.29 of the Criminal Code the AFP is required to report annually to the Attorney-General and provide information on a number of matters including the number and type of orders made, whether they were confirmed and the particulars of any complaints made to the Ombudsman.[190] Since their introduction in 2005, control orders have been issued on only two occasions - once in the case of Jack Thomas following his successful appeal against conviction and sentence for terrorist organisation offences,[191] and once in the case of David Hicks,[192] following his release from prison in Adelaide after his transfer from the Guantanamo Bay where he pleaded guilty to a US terrorism offence.

168. Control orders may limit a person's liberty, freedom of movement and freedom of association in the following ways:[193]

- a prohibition or restriction on the person being at specified areas or places;
- a prohibition or restriction on the person leaving Australia;
- a requirement that the person remain at specified premises between specified times each day, or on specified days;
- a requirement that the person wear a tracking device;

[185] Ibid., s104.2
[186] Ibid., s104.3
[187] Ibid., s104.12
[188] Ibid., s104.14
[189] Ibid., s104.4 (interim order); s104.16 (confirmed order).
[190] An example of such a report can be found at the AFP website, see http://www.afp.gov.au/__data/assets/pdf_file/62633/Preventative_Control06_07.pdf
[191] *R v Thomas* [2006] VSCA 165 (18 August 2006). See also *Thomas v Mowbray* (2007) 237 ALR 194.
[192] David Hicks is an Australian citizen who undertook combat training in al Qaeda-linked camps and served with the Taliban regime in Afghanistan in 2001. Mr Hicks was apprehended and detained by the US Government in Guantanamo Bay until 2007. In 2007 Mr Hicks pleaded guilty to a US charge of "providing material support for terrorism" and was returned to Australia to serve the remaining nine months of a suspended seven-year sentence. When Mr Hicks was released from prison in December 2007, he was placed under an interim control order. The order was issued on the basis that Mr Hicks, having allegedly trained with a terrorist organisation and once expressed support for a violent ideology, represented an unacceptable risk to the community. The interim control order was confirmed (with some changes to the conditions of the order) by a Federal Magistrate on 19 February 2008. See *Jabbour v Hicks* [2007] FMCA 2139.
[193] *Criminal Code Act 1995*, s104.5(3).

- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunications or other technology (including the Internet);
- a prohibition or restriction on the person possessing or using specified articles or substances;
- a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- a requirement that the person report to specified persons at specified times and places;
- a requirement that the person allow himself or herself to be photographed;
- a requirement that the person allow impressions of his or her fingerprints to be taken; and
- a requirement that the person participate in specified counselling or education.

These restrictions may be imposed on a person for up to 12 months.[194]

Outline of Key Provisions – Preventative Detention Orders

169. Preventative detention orders are dealt with in Division 105 of the Criminal Code. As in the case of control orders, preventative detention orders were introduced into the Criminal Code by the *Anti-Terrorism (No.2) Act 2005 (Cth).*

170. A preventative detention order enables a person to be taken into custody and detained by the AFP in a State or Territory prison or remand centre for an initial period of up to 24 hours, with an option to have the order continued for a total period not exceeding 48 hours.[195]

171. Preventative detention orders can be issued where there are reasonable grounds to suspect that the person will engage in a terrorist act or engage in the preparation or planning of a terrorist act.[196]

172. There are two types of preventative detention orders: (1) initial preventative detention orders issued by senior members of the AFP; and (2) continued preventative detention orders and extensions of continued preventative detention orders, issued by an 'issuing authority' such as a Judge, Federal Magistrate or Tribunal member on application by an AFP officer.[197]

173. Continued preventative detention may last for a further period that is not more than 48 hours from the time the person was first taken into custody.[198] Before making a continued preventative detention order, an issuing authority must be satisfied that:[199]

- there are reasonable grounds to suspect that the person will engage in a terrorist act, possess a thing that is connected with the preparation for, or the

[194] Ibid., s104.5.
[195] Ibid., ss 105.8(5) and 105.12(5).
[196] Ibid., s105.4.
[197] Ibid., ss s 105.10 and 105.11
[198] Ibid., s 105.14.
[199] Ibid., s 105.4(4).

engagement of a person in a terrorist act; or has done an act in preparation for or planning a terrorist act; and

- making the order will substantially assist in preventing a terrorist act occurring; and
- detaining the person for the period of the order is reasonably necessary.

174. Similarly to control orders in Division 104 of the Criminal Code, section 105.47 requires the AFP to report annually to the Attorney-General and provide information on a number of matters including the number and type of orders made, whether they were confirmed and the particulars of any complaints made to the Ombudsman.[200] Since their introduction in 2005, no preventative detention orders have been made.

Law Council Concerns

175. Under the control order regime, a person's liberty can be controlled or restricted *without* the person being charged or convicted or even suspected of committing a criminal offence.

176. When introducing control orders, the Government took the view that these restrictions on the right to liberty were necessary to empower police to act to prevent terrorist related activity from occurring.[201] However, despite the bipartisan support at the time of their introduction, these powers have attracted considerable controversy and a High Court challenge as to their constitutional validity.[202]

177. Although the High Court has ruled that the control order regime contained in Division 104 of the Criminal Code is constitutionally valid and does not invest the judiciary with powers contrary to Chapter III of the Constitution,[203] the Law Council continues to hold serious concerns about the operation of this Division. The Law Council has made these concerns known at a number of forums, and made a number of recommendations for reform, before and after the constitutional challenge.[204] These

[200] An example of such a report can be found at the AFP website, see http://www.afp.gov.au/__data/assets/pdf_file/62633/Preventative_Control06_07.pdf

[201] See Hon. J. Howard (Prime Minister), *Counter-Terrorism Laws Strengthened*, Media Release, Canberra, 8 September 2005, available at http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media_releases/media_Release1551.html; Hon. J. Howard (Prime Minister), *Anti-Terrorism Bill*, Media Release, Canberra, 2 November 2005, Available from http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media_releases/media_Release1659.html

[202] *Thomas v Mowbray* (2007) 237 ALR 194.

[203] In *Thomas v Mowbray* (2007) 237 ALR 194 Mr Thomas challenged the constitutional validity of the control order regime in two key respects. First, he argued that the Commonwealth Parliament did not have legislative power to enact the control order regime because it was not connected to any of the subjects that the Commonwealth Parliament is permitted to legislate on. Secondly he contended that the regime required the judiciary to exercise a type of decision making power, (namely the power to decide whether restrictions should be imposed on the liberty of a person who has not been convicted of a criminal offence), that is inconsistent with the exercise of judicial power. Under the *Australian Constitution*, except where it is incidental to and consistent with the exercise of their judicial functions, it is considered a violation of the separation of powers doctrine for non-judicial functions to be conferred on federal judges. The majority of the High Court upheld the validity of the control order regime. It found that the legislation was supported by power to make laws with respect to the defence of Australia, and that this included the power to make laws in response to international terrorism. The majority also found that the type of power the control orders regime vested in the judiciary was not contrary to the *Australian Constitution*.

[204] Op.cit., Law Council of Australia, Submission to Independent National Security Legislation Monitor , 10 September 2012; Law Council of Australia, Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism (No. 2) Bill 2005*, 11 November 2005; Law Council of Australia Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document*, 29 August 2008 ; Law Council of Australia Submission to the Attorney-General's Department, Australia's response to the concluding observations of the UN Committee against torture (1 September 2008). A number of the Law Council's constituent bodies have also engaged in advocacy on this issue, see for example Law Institute of Victoria Submission *Anti-Terrorism Bill* (No.2) 2005 (Vic) (09 November 2005).

concerns relate to: a lack of demonstrated necessity for such extraordinary powers; the restriction of an individual's liberty based on suspicion rather than charge; the undermining of traditional criminal justice safeguards; and the absence of independent review.

178. The Law Council has also raised these concerns in its recent submission to the Monitor's Consultation regarding control orders, preventative detention orders and questioning and detention warrants.[205]

*Absence of demonstrated need*

179. The Law Council does not consider that sufficient justification has been provided for the introduction of control orders. The Law Council considers the absence of demonstrated necessity for such extraordinary powers, particularly in light of the broad range of alternative provisions providing for the prevention and prosecution of terrorist acts, to be unacceptable.

180. Under the Criminal Code it is an offence to attempt, procure, incite or conspire to commit any offence.[206] Such offences incur the same penalties as the completed offence. Each of these ancillary offences allows police to take pre-emptive action to prevent the commission of a terrorist act. However, unlike the control order regime, these offences require police to establish a connection between a suspect and the planned commission of a particular offence before action can be taken to arrest and charge a person.

181. As the Law Council has previously submitted,[207] the need for preventative detention orders was not demonstrated at the time of their introduction and remains unclear, particularly when regard is had to the range of other powers available to law enforcement officers to enable them to take a preventative approach to terrorist activity.

*Restriction of liberty based on suspicion rather than charge*

182. Another concern about control orders and preventative detention orders relates to the restriction of an individual's liberty based on suspicion rather than charge.

183. The extremely broad scope of control orders can effectively target any person suspected of involvement, even peripheral involvement, in terrorist activity. For example, there is no need to demonstrate a link between the person subject to the order and any particular or likely terrorist offence. A person can be detained under Division 104 even though no relevant offence has been committed.

184. The control orders regime effectively renders some individuals, namely those who have trained with a listed terrorist organisation, at constant risk of having their liberty curtailed. Once branded a risk, a person remains forever vulnerable to executive intrusion, since there is no obvious expiry date on a person's 'potential terrorist' status.

185. Preventative detention orders are also based on suspicion rather than charge. This form of suspicion based detention runs counter to the long standing common law principle that orders restricting liberty should be made only following an independent

[205] Law Council of Australia, submission to Bret Walker SC in response to his inquiry into *Questioning and Detention Warrants, Preventative Detention Orders and Control Orders*, 10 September 2012.
[206] C*riminal Code Act 1995*, Part 2.4.
[207] Op.cit., Law Council Submission to INSLM, 10 September 2012. See also Law Council Submission to Senate Legal and Constitutional Committee, on *Anti-Terrorism (No.2) Bill 2005*, 11 November 2005.

and impartial trial by a judge and jury. As Professors Andrew Lynch and George Williams explain, the control order and preventative detention order regime:

> *"…represent(s) an attempt to avoid the accepted judicial procedures for testing and challenging evidence in criminal trials that are normally applied before a person is deprived of their liberty. This is clearly so in respect of the preventative detention orders, which may be issued by an individual officer simply on the basis of reasonable suspicion, but also applies to the use of a lower standard of proof by courts charged with issuing control orders. The broad scope of the latter – as well as their longer duration – makes this concern particularly strong."*[208]

186. The control orders regime can provide the Executive with a 'second chance' to restrict the liberty of persons of interest where there is insufficient evidence to convict them of a criminal offence. For example, when former Guantanamo Bay prisoner, David Hicks, was released from prison, he was placed under a control order. The order was issued on the basis that Mr Hicks, having allegedly trained with a terrorist organisation and once expressed support for a violent ideology, represented an unacceptable risk to the community. All the evidence relied upon to establish that risk was more than six years old. Mr Hicks' long period of incarceration at Guantanamo Bay, his willingness to assist police and other authorities during his detention, and his purported change of views did not dissuade the authorities from applying for a control order.

*Undermine criminal justice system safeguards*

187. Under the control order regime, a person's liberty may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge that restriction of liberty.[209]

188. Control orders remove the right to be presumed innocent until proved guilty according to law.[210] They also limit the right of the person subject to the order to challenge the legality of the order by restricting access to relevant information. The ability of the person subject to a control order to challenge the confirmation of the order is limited by their restricted access to information. In circumstances where it is claimed that the release of information might prejudice national security, the person subject to the order may be excluded from accessing information relied upon by police to support the control order application.[211]

189. As the Law Council's former President, John North, observed when control orders were introduced in 2005:

> *"Australia's formal criminal justice system embraces critically important guarantees and safeguards, including the right of an accused to a fair trial, rules of evidence which are fair, the presumption of innocence and the requirement that guilt be established beyond reasonable doubt. These safeguards and minimum guarantees have been in place for centuries to try and punish those who can be convicted beyond reasonable doubt. It is unheard of in Australian law to have*

[208] Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006).
[209] Op.cit., Anti-Terrorism Reform Project, p.91.
[210] *Criminal Code Act 1995* (Cth) s104.5(3).
[211] Ibid., s104.12A(3)(a)

*people held or detained for long periods under very strict conditions unless we follow these legal safeguards."*[212]

190. The Law Council is also concerned that initial preventative detention orders undermine criminal justice safeguards as they can be issued by senior members of the AFP rather than judicial officers.

*The absence of independent review*

191. Despite the extraordinary nature of the control order and preventative detention order regime, these powers exist without adequate structures for independent review.

192. Decisions made under section 104.2 or Division 105 of the Criminal Code are specifically excluded from judicial review under the ADJR Act.[213] This, coupled with inadequate access to information and limited access to legal representation, makes it very difficult for persons subject to these orders to ascertain the true basis for the order being made, challenge the legality of the order, or challenge the conditions of their detention.

193. To address this lack of independent review, the Law Council is of the view that the Government should:

- ensure that the exercise of Executive power under Division 104 of the Criminal Code is subject to full judicial review under the ADJR Act;

- appoint a Public Interest Monitor or other independent body to monitor and report on the use of control orders and to appear before decision-making authorities where decisions would otherwise be made ex parte, to represent the public interest and to assist the court in its scrutiny of evidence placed before it. Such a model already exists in the UK. [214]

194. The Law Council notes that, while the Monitor has a broad mandate to review Australia's counter-terrorism laws, including those relating to control orders, he will not perform the function of a Public Interest Monitor or the UK Independent Reviewer of Terrorism Laws (the UK Reviewer) in respect of applications for and the making of control orders.

195. The Law Council also notes that significant changes to the UK control order regime have been made as a result of a recent review of UK counter-terrorism powers.[215] Central to these changes is the replacement of control orders with Terrorism Investigation and Prevention Measures (TPims).[216] TPims commenced operation in January 2012.

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[212] " Rule of Law and Changes to Human Rights in the Age of Terror: The Impact of New Terrorism Law on the Innocent" Speech given by John North, President, Law Council of Australia at the Western Australian Summer School (22 February 2006) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=A83111A2-1E4F-17FA-D20E-DC9DC0FE2580&siteName=lca

[213] *Administrative Decisions (Judicial Review) Act 1997* (Cth) Schedule 1 s3 (dab), (dac).

[214] See the *Terrorism Act 2000* (UK) s126*, Prevention of Terrorism Act 2005* (UK) s4(3). For further information see Law Council of Australia Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (15 September 2008).

[215] Lord Macdonald of River Glaven QC, *Review of Counter-Terrorism and Security Powers,* January 2011. Available from http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary

[216] TPims differ from control orders in a number of ways. For instance, TPims are limited to a maximum duration of two years; require a higher evidentiary test to be satisfied before they can be made; and impose fewer restrictions on a person compared to the control order regime.

196. In his March 2011 report on control orders, the UK Reviewer made a series of recommendations for how the new TPim system should operate based on his observations about the previous control order regime. Central to these was the need to ensure that:

- TPims are used only as a last resort and when prosecution, deportation or less intrusive Executive measures are not a feasible alternative;[217]
- no individual measure is imposed unless the Secretary of State is satisfied that it is necessary for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity;[218] and
- there is the highest possible degree of fairness in the closed material procedure, by giving sufficient information in all TPim cases to enable the subject to give effective instructions.[219]

197. The Law Council submits that the COAG Review Committee should consider the recommendations of the UK Reviewer in assessing the effectiveness and appropriateness of the Australian control order regime.

*Restriction of access to legal representation for preventative detention orders*

198. Preventative detention orders restrict detainees' rights to legal representation by allowing detainees access to legal representation only for limited purposes such as obtaining advice or giving instructions regarding the issue of the order or treatment while in detention.[220] Contact with a lawyer for any other purpose is not permitted. In addition, both the content and the meaning of communication between a lawyer and a detained person can be monitored.[221]

199. The Law Council considers such a restriction to be unacceptable, and is of the view that it should be repealed. At the very least, the courts should be given discretion to determine whether this type of monitoring is required.

Law Council Recommendations

200. The Law Council submits that the COAG Review Committee should recommend that the Government repeal the control order regime in Division 104 of the Criminal Code.

201. If the provisions are to remain, the Law Council considers that the Committee should recommend that the Government ensure that amendments are made to:

- make sure that a person who is the subject of a control order is provided with all the information and evidence that forms the basis of the application for such an order, or at the very least, that the court should be empowered to exercise discretion in this regard;

[217] D. Anderson QC, *Control Orders in 2011 – Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005*, March 2012, p.7. Available from http://terrorismlegislationreviewer.independent.gov.uk/publications/control-orders-2011?view=Binary
[218] Ibid.
[219] Ibid.

- subject the exercise of powers under Division 104 of the Criminal Code to full judicial review under the ADJR Act; and

- appoint an independent body such as a Public Interest Monitor with access to all material upon which an application for a control order is based.

202. The Law Council submits that the COAG Review Committee should recommend that the Government repeal the preventative detention order regime in Division 105 of the Criminal Code.

203. If the provisions are to remain, the Law Council considers that the COAG Review Committee should recommend that the Government ensure that amendments are made to:

- prescribe a maximum period for which a person can be held under successive continued preventative detention orders in Division 105;

- make sure that a person who is the subject of a preventative detention order is provided with all the information and evidence that forms the basis of the application for such an order, or at the very least, that the court should be empowered to exercise discretion in this regard;

- ensure that a person subject to a preventative detention order is entitled to attend an application hearing and present his or her case;

- repeal section 105.38 which provides that any contact between a detained person and his or her lawyer must be monitored. Alternatively, the courts should be given discretion to determine whether such monitoring is required;

- subject the exercise of powers under Division 105 of the Criminal Code to full judicial review under the ADJR Act; and

- appoint an independent body such as a Public Interest Monitor with access to all material upon which an application for a preventative detention order is based.

204. The Law Council notes that an additional safeguard for possible inclusion in the preventative detention order regime was recently outlined by the Monitor as part of his consultation on certain counter-terrorism laws.[222] The safeguard outlined by the Monitor in a series of questions relating to preventative detention orders would require evidence that the person subject to the order had a relevant prior criminal conviction and a record of unsuccessful rehabilitation before an order could be made.[223] The Law Council supports the inclusion of this type of safeguard if the preventative detention order regime is retained.

205. As the Law Council explained in response to the Monitor's question, the introduction of the requirement of a relevant criminal record and a history of unsuccessful rehabilitation would impose some limit on the broad discretion currently invested in officers of the Executive under the preventative detention regime.[224] It may also help focus the attention of the officers applying for the orders and the courts confirming such orders on the nature of the risk posed to the

[222] For further information on the Independent National Security Legislation Monitor 2012 Review see http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf; see also Bret Walker SC, *Independent National Security Legislation Monitor Annual Report*, 16 December 2011

[223] Op.cit., *INSLM Annual Report*, 16 December 2011, Question 45, see also pp. 41-42.

[224] Op.cit., Law Council of Australia submission to INSLM review of questioning and detention warrants, preventative detention orders and control orders, 10 September 2012, p. 45.

community, based on confirmed past conduct rather than suspicion of future wrongdoing.[225]

## Preventative Detention under State and Territory Laws

206. The preventative detention schemes in force in each State and Territory implement an agreement reached at the COAG meeting of 27 September 2005.[226] These schemes are intended to complement the preventative detention scheme introduced by the Commonwealth Government in the *Anti-Terrorism Act (No.2) 2005.*

207. The schemes in place across the country share many similarities. However there are also differences between the jurisdictions, particularly in terms of the safeguards that operate to limit the use of these highly intrusive powers.

Key Features

208. Preventative detention orders under the State and Territory provisions can be obtained by police officers following an application to an issuing authority, which can be a judicial officer or in some cases a senior police officer,[227] to prevent an imminent terrorist act or to preserve evidence of terrorist acts that have occurred.[228]

209. Initial or interim preventative detention orders can be obtained without notifying the person who is subject to the order, but must be confirmed at a subsequent hearing where the person can be represented and heard.[229]

210. Unlike the Commonwealth preventative detention order scheme which is limited to detention for 48 hours, the State and Territory schemes can operate so that a person can be detained without charge for up to 14 days.[230]

211. The State and Territory schemes also empower the relevant Supreme Court to make prohibited contact orders to prevent a detained person contacting specified persons[231] and establish a system of monitoring client -lawyer communications.[232]

212. The use of the preventative detention powers are generally subject to reporting requirements and oversight by the Ombudsman in the relevant State or Territory.[233]

Law Council Concerns

213. The Law Council opposes the concept of preventative detention. The concerns described above in relation to the Commonwealth preventative detention order scheme also apply to the regimes in force in the State and Territories and in many cases are heightened by the broader scope of the powers under these regimes, and by the significantly longer period for which a person can be detained.

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[225] Ibid.

/[226] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Act 2002* (NSW) Parts 2 and 2A; *Terrorism (Emergency Powers) Act 2003* (NT); *Public Safety Preservation Act 1986* (terrorist emergency powers) (QLD) (Part 2A); *Terrorism (Police Powers) Act 2005* (SA); *Police Powers (Public Safety) Act 2002* (TAS); *Terrorism (Community Protection) Act 2003* (VIC) (Part 3A); *Terrorism (Extraordinary Powers) Act 2005* (WA)

[227] For example, in Queensland, a senior police officer can constitute an "issuing authority" for the purpose of making initial preventative detention orders, see *Public Safety Preservation Act 1986* (Qld) s7

[228] See for example *Terrorism (Police Powers) Act 2002* (NSW) s26D

[229] Ibid., ss26H and 26L(1 ).

[230] Ibid., s26K

[231] Ibid., s26N.

[232] Ibid., s26Z1.

[233] Ibid.,ss26ZN, 26ZO

214. As with the Commonwealth provisions, the Law Council queries the continued necessity of the preventative detention order regimes, and notes that, during the 2011 review of the NSW provisions by the NSW Ombudsman, counter-terrorism police officers also raised doubts about the continued necessity and workability of these provisions:

> *"… the preventative detention powers may not be needed by police in order to respond to the threat of terrorism in NSW. As we have seen, the preventative detention powers have not been used, agreements with other agencies involved in preventative detention are yet to be finalised and there has been significant delay in finalising NSW Police Force SOPs and MoUs. To date, the NSW Police Force has not made out a strong case for the retention of the powers*.[234]

215. The Law Council notes that many of the regimes in place in the States and Territories have been subject to review. These include the review of the *Terrorism (Police Powers) Act 2002* (NSW) by the NSW Department of Attorney General and Justice in April 2012 and the Review of the *Terrorism (Extraordinary Powers) Act 2005* (WA), by the Legal and Legislative Services, Western Australia Police in January 2012. Some of the Law Council's Constituent Bodies have made submissions to these reviews.[235]

216. While the Law Council does not intend to comment in detail on each of the regimes in place in the States and Territories, it welcomes the opportunity presented by this Review to draw attention to some of the most concerning common features of the State and Territory regimes. The Law Council will identify some of the safeguards that have been incorporated in certain jurisdictions that should be included in each scheme if these provisions are to remain in force.

217. The most concerning features of the State and Territory regimes include:[236]

- The potential for a person to be detained for 14 days, or even longer
  - At the time these provisions were introduced, insufficient evidence was provided to demonstrate why this maximum period was necessary, particularly in light of the 48 hour maximum in force at the Commonwealth level. Concerns have also been raised by the Law Society of NSW that the NSW provisions have the potential to detain a person for even longer than 14 days. For example, if the relevant terrorist act does not take place within the anticipated 14 day period and the date of the suspected terrorist act is revised, section 26K(7) for the *Terrorism (Police Powers) Act 2002 (NSW)* provides an opportunity for a person to be subject to further orders.
- Access to evidence or other information of grounds on which orders sought

[234] NSW Ombudsman Review of Parts 2A and 3 of the *Terrorism (Police Powers) Act 2002*, August 2011 paragraph 3.3.3, pp 33-34

[235] Law Society of New South Wales, Submission to the Statutory Review of the *Terrorism (Police Powers) Act 2002*, NSW Department of Attorney General and Justice, April 2012 available at http://www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/593139.pdf

[236] Law Society of New South Wales, Submission to the Statutory Review of the Terrorism (Police Powers) Act 2002, NSW Department of Attorney General and Justice, April 2012 available at http://www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/593139.pdf, Queensland Bar Association and Queensland Law Society, Submission to the Premier and Minister for Trade Concerning *Terrorism Legislation Amendment Bill 2007* (Qld), Law Institutes of Victoria Submission, *UN Special Rapporteur Report on Australia's human rights compliance while countering terrorism* (03 May 2007).

- A number of the State and Territory regimes specifically exclude the operation of the rules of evidence from the proceedings undertaken in the Supreme Court to issue or confirm preventative detention orders. For example, section 26O of the *Terrorism (Police Powers) Act 2002* (NSW) permits the Supreme Court to take into account any evidence or information that the Court considers credible or trustworthy in the circumstances and, in that regard, the Court is not bound by principles or rules governing the admission of evidence. In addition, under the NSW Act there is also no requirement that the person who is subject to the application or order be given access to the application in its entirety or the information and evidence on which it is based. Section 26ZB provides for the detainee to receive a copy of the preventative detention order as soon as practicable after being taken into custody, which will contain a summary of the grounds on which the order is made, with the exception of information likely to prejudice national security.

- The Law Council supports the submissions of the Law Society of NSW that the rules of evidence should apply to preventative detention order proceedings, except where police can satisfy the Court that there are reasonable grounds for denying the detainee or their lawyer access to the information and evidence relied on for the application. The Law Council also shares the view that persons subject to a preventative detention application or order and their lawyers need sufficient detail of the application or order to oppose the application or apply for an order to be revoked.

- The monitoring of client-lawyer communications

  - Each of the State and Territory regimes contain provisions authorising the monitoring of communication between a detained person and his or her lawyer. These provisions constitute an unacceptable obstruction to lawyers performing their duty to their client. Maintaining communications is crucial to the client-lawyer relationship. It enables the lawyer to establish a relationship of confidence and trust with the client, without which full and frank disclosure will be less likely. As the Law Society of NSW has pointed out, although the communication cannot be used in evidence against the person, legal professional privilege is completely undermined by these provisions.[237] Similar concerns have previously been expressed by the Law Council in the context of other provisions that seek to monitor or restrict contact between a lawyer and client in the context of counter-terrorism investigations, such as those provisions that limit a person's ability to communicate confidentially with a lawyer of his or her choice where the person has been detained by ASIO for questioning under Part III Division 3 of the *ASIO Act 1979* (Cth).[238]

[237] Law Society of New South Wales, Submission to the Statutory Review of the *Terrorism (Police Powers) Act 2002*, NSW Department of Attorney General and Justice, April 2012.

[238] See for example, the Law Council's recent submission to the Independent Monitor on National Security Legislation (September 2012) where the Law Council recommends that all persons who are the subject of a Part III Division 3 warrant should have access to a lawyer of their choice, and that access to this lawyer should not be subject to limitation. The lawyer of the person's choice should be entitled to be present during the entire questioning process and people detained or questioned should be entitled to make representations through their lawyer to the prescribed authority. All communications between a lawyer and his or her client should be recognised as confidential and adequate facilities should be provided to ensure the confidentiality of communications between lawyer and client.

- In its submission to the 2012 review of the *Terrorism (Police Powers) Act 2002* (NSW), the Law Society of NSW queried the need for the provision that makes monitoring of lawyer- client communications compulsory. The Law Society noted that, under the NSW *Solicitors' Rules,* there already exists an exception to the rule of client legal privilege that requires a solicitor to divulge information obtained from a client if divulging that information would avoid the probable commission or concealment of a felony. The Law Society of NSW explained that, if law enforcement authorities have concerns that a particular lawyer is prepared to assist a detainee in hindering the investigation or committing an offence, the *Terrorism (Police Powers) Act 2002* (NSW) enables this to be dealt with by way of a prohibited contact order.[239]

- The Law Council shares the view of the Law Society of NSW that If these provisions are maintained, they must be amended to only permit monitoring to occur when the Court considers it necessary in accordance with a threshold test, for example, where the Court is satisfied that there is a high probability that a detainee will use communications with his or her lawyer to facilitate acts of terrorism.[240]

- The need to ensure judicial oversight of preventative detention orders

  - While some jurisdictions, such as NSW and the ACT, require preventative detention orders to be issued by a Supreme Court judge, other jurisdictions, such as Queensland and South Australia, allow an initial preventative detention order to be issued by a senior police officer.[241] The absence of judicial authorisation for the issuing of a preventative detention order is of serious concern.

  - As observed by the Queensland Law Society and the Queensland Bar Association in their joint submission to the Premier and Minister for Trade, the *Terrorism Legislation Amendment Act 2007* (Qld) establishes a system of preventative detention by government officials where justification for detention rests on "intelligence", rather than evidence which can be tested by the judicial process. It also removes the standard safeguards that form part of the criminal justice system such as the ability of an accused to have uninhibited communication with their lawyer; the ability to have access to all of the information put before the issuing authority to properly defend the application for preventative detention; and the ability to have a full and fair opportunity to present a defence in Court. [242]

218. Some jurisdictions, such as the ACT, contain particular safeguards that operate to limit the impact of the preventative detention order provisions on individual rights or to provide a level of independent oversight regarding their use. These include:

- More stringent requirements for applying for and issuing preventative detention orders

  - For example, in the ACT, in addition to demonstrating that it is reasonably necessary to detain the person to prevent a terrorist act, it

[239] *Terrorism (Police Powers) Act 2002* (NSW) 26N.
[240] Op.cit., Law Society of New South Wales, Submission to the Statutory Review of the *Terrorism (Police Powers) Act 2002*, NSW Department of Attorney General and Justice, April 2012.
[241] *Public Safety Preservation Act 1986* (Qld), s7; *Terrorism (Police Powers) Act 2005* (SA) s4.
[242] Queensland Bar Association and Queensland Law Society, Submission to the Premier and Minister for Trade Concerning *Terrorism Legislation Amendment Bill 2007* (Qld)

must also be shown that the order sought is "the least restrictive way of preventing the terrorist act".[243] Similarly, if the order is sought for the purpose of preserving evidence related to the commission of the terrorist act, it must be shown that detaining the person is the "only effective way of preserving the evidence" and that detaining the person for the period for which the person is to be detained under the order is reasonably necessary to preserve the evidence". [244] These requirements are not included in the regimes in force in other jurisdictions, such as NSW.

- Requirement to ensure detention conditions comply with human rights standards

  - Although all of the regimes contain provisions requiring "humane" conditions of detention for people detained under preventative detention orders,[245] not all States and Territories contain a specific requirement that detention facilities adhere to human rights standards. Section 43 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) requires the chief police officer executing the order to consult with the Human Rights Commissioner, the Ombudsman and the Public Advocate about detention arrangements and ensure that these arrangements are consistent with human rights, and to adhere to guidelines about the minimum conditions of detention and standards of treatment for detainees. This includes respecting the cultural and religious needs of detainees; ensuring that detainees are provided with appropriate health care services; and ensuring that detainees with disabilities are provided with appropriate support. The ACT provisions also include criminal offences if a person detains someone under a preventative detention order and engages in conduct in relation to the detained person that contravenes the arrangements under section 43.

  - Particular concerns have also been raised about the detention of people subject to preventative dentation orders in correctional centres or police cells. This issue was explored by the NSW Ombudsman's 2008 *Review of Part 2A and 3 of the Terrorism (Police Powers) Act 2002* where the Ombudsman expressed concern that detention in a correctional centre would involve detainees being held in similar circumstances to convicted offenders and subject to the highest security classification.

- Appointment of a Public Interest Monitor for applications for preventative detention orders

  - Some jurisdictions, such as the ACT and Queensland, provide a role for a Public Interest Monitor (PIM) to be present at the hearing of the application for a preventative detention order, to ask questions of anyone giving evidence to the court and to make any submissions to the Court. [246] The use of a PIM provides a level of independent scrutiny of the material and information relied upon by the police seeking the preventative detention order and can play an important role when the person subject to the order is not present before the Court determining the application.

- Prohibiting preventative detention orders for children

[243] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 16
[244] Ibid.
[245] *Terrorism (Police Powers) Act 2002* (NSW) s26ZC
[246] For example see *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss15, 16.

- All jurisdictions include provisions prohibiting the making of a preventative detention order in respect of a person under the age of 16., However, in some jurisdictions, such as the ACT, this prohibition extends to anyone under the age of 18.[247]

- The 2011 NSW Ombudsman's Review also raised concerns about departmental approaches that would appear to result in the detention of young people subject to preventative detention orders in adult correctional facilities by default, despite the requirement in the Act that detention in adult facilities only occur in 'exceptional circumstances'.[248]

219. While these safeguards, of themselves, are unlikely to be sufficient to mitigate against the interference with individual rights inherent in the preventative detention order provisions, they should be considered a minimum starting point for other jurisdictions.

Law Council Recommendations

220. As noted above, the Law Council opposes the use of preventative detention orders and urges the COAG Review Committee to carefully consider the continued necessity of each jurisdiction's preventative detention order regime. If these provisions can be shown to be necessary, the COAG Review Committee should recommend the removal of the most concerning features of the State and Territory regimes such as those described above; identify the safeguards that operate to limit the use of these powers; and ensure adequate oversight of their use. The COAG Review Committee should recommend that these safeguards be incorporated into each preventative detention regime.

# Commonwealth Special Police Powers

## Part 1AA Division 3A of the *Crimes Act*

221. Part 1AA Division 3A of the Crimes Act contains powers in relation to terrorist acts and terrorism offences. Sections 3C[249] and 3D[250] of the Act are relevant to the interpretation and application of Part 1 AA Division 3A.

222. This Division of the Crimes Act was introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth) with the intention of providing"a new regime of stop, question, search and seize powers that will be exercisable at airports and other Commonwealth places to prevent or respond to terrorism." [251]

223. This Division contains a range of powers that can be exercised by certain officers of the AFP and State and Territory Police, including the power to:

[247] Ibid., s11
[248] NSW Ombudsman's 2008 *Review of Part 2A and 3 of the Terrorism (Police Powers) Act 2002* Recommendations recs 4-6
[249] Section 3C is the interpretative provision for Part IAA of the *Crimes Act* which contains search, information gathering, arrest and related powers. It contains definitions of key terms, for example, it defines what constitutes an 'emergency situation" and which officers constitute executing officers for the purpose of executing a warrant. It also outlines which offences are covered by this Part of the Crimes Act.
[250] Section 3D of the Crimes Act concerns the application of Part IAA. It provides that Part 1AA is not intended to limit or exclude the operation of another law of the Commonwealth or of a Territory that provides search and arrest powers in respect of Commonwealth or Territory offences. It explains that the powers contained in Part 1AA are intended to be available *in addition to* other similar powers under other laws. It also provides that the application of Part 1AA in relation to State offences that have a federal aspect is not intended to limit or exclude the concurrent operation of any law of a State or of the Australian Capital Territory
[251] Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005.*

- require a person to provide their name;
- stop and search persons;
- seize terrorism related items;
- enter premises without a warrant; and
- apply to have an area declared to be a prescribed security zone.

224. In 2010, the Government further expanded such powers through the insertion of section 3UEA into the Crimes Act by the *National Security Legislation Amendment Act 2010* (Cth). This provision provides police with the power to enter and search premises, and to seize property without the occupier's consent in certain circumstances.

225. According to the then Attorney-General, the purpose of introducing the provision was to "enable police to render a premises safe and specifically to address some explosive device or material or another dangerous substance such as a dangerous chemical."[252]

226. The powers contained in this Division are subject to a sunset clause contained in section 3UK, which provides that the powers must not be exercised or duties performed after 2015 (10 years after the day on which the Division commenced).

227. At the time each of these measures were introduced, and in a number of forums since their introduction, the Law Council has expressed concern about the necessity of these increased police search and seizure powers.

Outline of Key Provisions

228. Under these provisions the Minister has the power to declare a 'prescribed security zone' if he or she considers that this will help prevent a terrorist act or help respond to a terrorist act. Once a prescribed security zone has been declared, Part 1AA Division 3A of the Crimes Act empowers police officers[253] to request a person to provide the following details:[254]

- the person's name;
- the person's residential address;
- the person's reason for being in that particular Commonwealth place;
- evidence of the person's identity.

If a person fails to comply with this request, the person may be guilty of an offence.[255]

[252] 7:30 Report, Australian Broadcasting Commission, 12 August 2009. Available from http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/TRanscripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien.

[253] Pursuant to s3UA of the *Crimes Act* 'police officer' means:
*(a) a member of the Australian Federal Police (within the meaning of the Australian Federal Police Act 1979); or*
*(b) a special member (within the meaning of that Act); or*
*(c) a member, however described, of a police force of a State or Territory.*

[254] *Crimes Act 1914* (Cth) s 3UC

[255] Ibid.

229. Under this Division, police officers are also empowered to stop and detain the person for the purpose of conducting a search; and conduct one of the following searches for a terrorism related item:[256]

- ordinary search or a frisk search of the person;
- a search of any thing that is, or that the officer suspects on reasonable grounds to be, under the person's immediate control;
- a search of any vehicle that is operated or occupied by the person; or
- a search of any thing that the person has, or that the officer suspects on reasonable grounds that the person has, brought into the Commonwealth place.

230. If, in the course of such a search, the police officer finds a terrorist related item or a serious offence related item, that item may be seized.[257]

231. Section 3UEA also enables a police officer to enter premises without a warrant where he or she reasonably suspects that:

- a thing is on the premises;
- it is necessary to search the premises for the thing and seize it to prevent the thing from being used in connection with a terrorism offence; and
- it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

232. If a police officer finds any other thing relevant to an indictable or summary offence, he or she must secure the premises and then obtain a search warrant.[258]

233. These powers apply when a person is in a Commonwealth place[259] and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act; or if the person is in a "prescribed security zone".[260]

234. An area can be prescribed as a security zone on the application of a police officer to the Minister.[261]

235. Under section 3UJ the Minister may declare, in writing, a Commonwealth place to be a prescribed security zone if he or she considers that such a declaration would assist in (a) preventing a terrorist act occurring or (b) responding to a terrorist act that has occurred.

236. The Minister must revoke the declaration where he or she is satisfied that there is no longer a terrorism threat that justifies the declaration being continued or that the

[256] Ibid., s 3UD. Subsection 3UD(2)-(4) sets out the conditions which apply to the conduct of a search.
[257] Ibid., s 3UE. See also section 3UF-3UG which regulates how seized thing are to be dealt with.
[258] Ibid., s. 3UEA(3)
[259] Ibid., s3C provides that *"Commonwealth place"* means a Commonwealth place within the meaning of the *Commonwealth Places (Application of Laws) Act 1970* .
[260] Ibid., s 3UB Pursuant to s3UA 'prescribed security zone' means a zone in respect of which a declaration under section 3UJ is in force.
[261] Ibid., s 3UI.

declaration is no longer required to respond to a terrorist act that has occurred.[262] Otherwise the declaration remains in force for 28 days.

237. If a declaration of a Commonwealth place as a prescribed security zone under this section is made or revoked, the Minister must arrange for a statement about the declaration to be made public, for example by a television or radio broadcast or publishing the details on the internet. [263]

Law Council Concerns

238. The Law Council queries whether these powers are a necessary and proportionate means of responding to the threat of terrorism in Australia. The Law Council is also concerned that they do not contain appropriate safeguards against abuse.

239. As these provisions have not been used, it is difficult for the Law Council to comment on whether they are effective tools to prevent, detect and respond to acts of terrorism, or whether they are being exercised in a way that is evidence-based, intelligence-led and proportionate. However, the Law Council is of the view that unless they can be shown to be:

- necessary in light of the range of other powers available to law enforcement agencies (which include, for example, powers to obtain emergency warrants to search premises and to stop and search vehicles for a thing connected with the commission of an indictable offence)[264], and
- proportionate, having regard to their intrusive impact on the fundamental rights of the individual,

then they should be repealed, or at least amended to limit their scope and to ensure that they are accompanied by appropriate safeguards and oversight mechanisms.

240. The Law Council also has a number of concerns relating to the procedure for declaring specified security zones and to the search and seizure powers in section 3UEA.

*Concerns relating to declared specified security zones*

241. As noted above, under this Division the Attorney-General has the power to prescribe a security zone where everyone in the zone is subject to stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. The Minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.

242. The Law Council is of the view that this broad power of the Minister to declare an area to be a 'specified security zone' and thus to invoke the special search and seizure powers has the potential to impact upon the liberty and security of individuals.

243. In particular, the Law Council is concerned that these powers do not constitute a proportionate response to the threat of terrorism, having regard to their intrusive

[262] Ibid., ss 3UJ(3)-(4).
[263] Ibid., s 3UJ(5). A declaration ceases to have effect at the end of 28 days after it is made, unless the declaration is revoked by the Minister before then.
[264] Ibid., ss3T, 3T

impact on human rights protected under Article 9 of the International Covenant on Civil and Political Rights. Under Article 9, no one shall be subjected to arbitrary arrest or detention. The Law Council is concerned that the power to randomly detain people and conduct random searches merely because an individual is present in a particular geographical location gives rise to the risk that these powers can be applied arbitrarily.[265]

244. The Law Council is also of the view that these provisions do not contain adequate safeguards. For example, there is no mechanism requiring the Attorney-General to consider whether to revoke or extend a declaration. This means that a declaration may remain in force for up to 28 days. [266] Allowing a declaration to remain in force for a significant period, even though the Minister has not re-considered whether a terrorist threat continues to exist or whether such a declaration continues to be necessary represents a disproportionate impact on liberty and security. [267]

245. The Law Council is also concerned that under these provisions, the Attorney-General is is not required to publish reasons for declaring a prescribed security zone and that there is no mechanism for independent review of the use of these powers.

*Concerns relating to the search and seizure powers in section 3UEA*

246. The Law Council is also concerned about the powers, provided by section 3UEA of the Crimes Act, to enter and search premises and seize property without a warrant and without the occupier's consent.

247. When these provisions were introduced in 2010, the Law Council submitted that these powers have a highly intrusive impact on the right to privacy and expressed concern that these powers were not accompanied by appropriate safeguards or appropriate oversight provisions.[268]

248. The Law Council explained that unlike the 'ordinary' search warrant system (which ensures that police search and seizure powers are subject to independent and external supervision and may only be exercised where prescribed statutory criteria are satisfied), the powers under section 3UEA allow police to enter and search premises without a warrant and under their own authority. Not only does this increase the risk that such powers will be misused, it also increases the risk that an individual's privacy rights will be breached.

249. The Law Council also queried whether these powers were necessary, particularly given the ability to obtain a warrant by telephone or fax in exigent circumstances to enter and search premises.[269]

[265] Article 9(1) of the *International Covenant on Civil and Political Rights* provides: ' Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

[266] Pursuant to section 3UJ(3) of the *Crimes Act 1914* (Cth) a declaration ceases to have effect at the end of 28 days after it is made, unless the declaration is revoked by the Minister before then. Pursuant to subsection 3UJ(4), the Minister must revoke a declaration, if he or she is satisfied that either (a) there is no longer a terrorism threat that justifies the declaration being continued; or (b) that the declaration is no longer required. However, there is no requirement for the Minster to consider the factors in subsection 3UJ(4) prior to the 28 day expiry of the declaration.

[267] Op cit., Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism,* para 30.

[268] Op.cit., Law Council Submission on National Security Legislation Discussion Paper, October 2009, p. 21.

[269] *Crimes Act 1914*, s. 3R

250. The Law Council submitted that if those measures were not effective then consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before introducing a warrantless entry and search power.

251. Notwithstanding these concerns, the Law Council acknowledged that, if the need for a narrowly drafted emergency entry power for a police officer could be demonstrated, it would not oppose this per se, provided appropriate safeguards were put in place.

Law Council Recommendations

252. The Law Council submits that the COAG Review Panel should recommend that Part 1AA Division 3A of the Crimes Act be repealed.

253. If this recommendation is not adopted, the Law Council recommends that Part 1AA Division 3A be amended to:

- require the Minister to publish reasons for declaring a prescribed security zone;
- require the Minister to regularly (such as daily or weekly) consider whether to revoke a declaration of a prescribed security zone made under section 3UJ;
- require a police officer who conducts a search under section 3UEA to go before a magistrate or judge after the search has been conducted to obtain an ex post facto search warrant;
    - If an ex post facto search warrant is not granted, it should be explicitly provided that any evidence identified by a police officer during the course of the search may be ruled inadmissible in future court proceedings; and
- require the police authorities exercising power under section 3UEA to report annually to the Commonwealth Parliament on the use of this power and on any instances in which an ex post facto search warrant was not granted.

## State and Territory Special Police Powers

254. The terms of reference for the Review also include examination of a range of emergency or 'special police powers' introduced at the State and Territory level pursuant to the 2005 COAG Agreement. These powers allow police officers to take a pre-emptive approach to the investigation of terrorist activity.[270] Although the special police powers available under the State and Territory laws are broadly similar, there are differences between the jurisdictions in terms of the process for authorising the use of these powers and in terms of the safeguards and restrictions placed on their use.

[270] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Major Events Security Act 2000* (ACT) (Division 3.2); *Terrorism (Police Powers) Act 2002* (NSW) (Parts 2 and 2A); *Terrorism (Emergency Powers) Act 2003* (NT); *Police Powers and Responsibilities Act 2000* (Special Events) (QLD) (Chapter 19, Part 2); *Public Safety Preservation Act 1986* (terrorist emergency powers) (QLD) (Part 2A); *Terrorism (Police Powers) Act 2005* (SA); *Police Powers (Public Safety) Act 2002* (TAS); *Terrorism (Community Protection) Act 2003* (VIC) (Part 3A); *Terrorism (Extraordinary Powers) Act 2005* (WA)

Outline of Key Provisions

*Nature of Special Police Powers*

255. The types of powers that can be exercised under the State and Territory special police powers provisions are broadly based on those available under Part 1AA Division 3A of the Crimes Act and are similar across jurisdictions. They include the power to:

- require a person to give his or her name and address;[271]
- stop and search a person, and anything in the possession of or under the control of the person, without a warrant. [272]
- stop, enter and search a vehicle, and anything in or on the vehicle without a warrant;[273] and
- enter and search premises without a warrant.[274]

256. Other powers that can be authorised under these provisions include the power to:

- give directions to government agencies;[275]
- cordon around a target area; [276]
- seize and detain things (including a vehicle); [277] and
- use such force as is reasonably necessary to exercise one of the powers described above.[278]

257. In Queensland, Part 2A of *Public Safety Preservation Act 1986*, inserted as part of the 2005 COAG agreement, also empowers certain police officers to control the movement of people who are in or are likely to be in an area declared to be a 'terrorist emergency' area. [279]

*Authorisation of the use of special police powers*

258. In NSW, the use of these special powers can be authorised by a senior police officer, such as the Commissioner of Police, with the approval of the relevant Minister.[280] The Minister must be satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near future, and that the exercise of those powers will substantially assist in preventing the terrorist act.[281]

[271] See for example *Terrorism (Police Powers) Act 2002* (NSW) s16. See also *Public Safety Preservation Act 1986* (Qld) s8O.
[272] See for example *Terrorism (Police Powers) Act 2002* (NSW) s17. Note, a police officer must not detain a person for any longer than is reasonably necessary for the purpose of conducting a search. See also *Public Safety Preservation Act 1986* (Qld) s8N.
[273] See for example *Terrorism (Police Powers) Act 2002* (NSW) s18. Note, a police officer must not detain a vehicle for any longer than is reasonably necessary for the purpose of conducting a search under this section
[274] Ibid., s14A
[275] See for example *Terrorism (Police Powers) Act 2002* (NSW) s19; *Public Safety Preservation Act 1986* (Qld) s8Q.
[276] See for example *Terrorism (Police Powers) Act 2002* (NSW) s19A
[277] Ibid., s20
[278] Ibid., s21
[279] *Public Safety Preservation Act 1986* (Qld) s8M
[280] For example see *Terrorism (Police Powers) Act 2002* (NSW) s8, certain exceptions apply in cases of emergency.
[281] Ibid., s5

259. In Western Australia (WA)[282] and South Australia (SA), [283] a warrant to exercise special powers can be issued by the Commissioner of Police, but only with the prior approval of a judge. When issuing such a warrant, the Commissioner of Police must be satisfied that there are reasonable grounds to believe that a terrorist act has been, is being, or is about to be committed, and that the exercise of the special powers will substantially assist in achieving one or more of these prescribed purposes, which include the prevention of a terrorist act, or carrying out investigations into the terrorist act. In urgent circumstances, prior approval is not necessary and the judge can approve the issue of a warrant up to 24 hours after it has been issued.

260. In Victoria, an interim authorisation for the exercise of special powers can be made by the Chief Commissioner of Police, with the written approval of the Premier. The Chief Commissioner must be satisfied, on reasonable grounds, that a terrorist act is occurring or will occur in the next 14 days and that the exercise of the powers will substantially assist in preventing the terrorist act or reduce the impact of the terrorist act, or of the threat of a terrorist act, on the health or safety of the public or on property. This interim authorisation must then be subject to an application for an order of the Supreme Court authorising the use of the special powers.[284] The terms of an authorisation given by the Supreme Court may be the same as, or different to, the terms of any interim authorisation given by the Chief Commissioner.

261. Under the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) the use of special powers must be authorised by the Supreme Court or the Magistrates Court following an application by the Chief Police Officer approved in writing by the Chief Minister. The court can make a preventative authorisation[285] if satisfied that a terrorist act is happening or will happen some time within the next 14 days; and that the authorisation will substantially assist in preventing the terrorist act or reducing its impact or both. The Court can also make an investigative authorisation[286] if satisfied that a terrorist act has happened within the last 28 days, is happening or will happen some time within the next 14 days; and that the authorisation would substantially assist in achieving one or more of the following purposes:

- apprehending a person responsible for the terrorist act;
- investigating the terrorist act (including preserving evidence of, or relating to, the terrorist act); and
- reducing the impact of the terrorist act.

262. The Queensland approach differs in adopting a procedure for declaring a 'terrorist emergency'[287] for a stated area.[288] An appropriately qualified police officer is appointed to be a 'terrorist emergency commander'[289] who can exercise, and authorise the exercise of certain powers in respect of people who are in or are likely to be in the stated area. When a terrorist emergency has been declared, the Minister or the Premier must be contacted by the Commissioner of Police. [290]

[282] *Terrorism (Extraordinary Powers) Act 2005* (WA) s7
[283] Ibid., s3
[284] *Terrorism (Community Protection) Act 2003* (Vic) s21D
[285] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ss64, 66
[286] Ibid., ss71,73
[287] *Public Safety Preservation Act 1986* (Qld) Part 2A Division 1
[288] Ibid., s8G
[289] Ibid., s8B, 8C
[290] Ibid., s8G

*Duration of Authorisations*

263. Authorisations to use special powers in circumstances where a terrorist act has not yet taken place generally last up to seven days, with possible extensions up to 14 days.[291] Authorisations can also be given where there are reasonable grounds for believing that a terrorist act has been committed, and the exercise of those powers will substantially assist in apprehending the persons responsible for committing the terrorist act. [292] These authorisations generally last up to 24 hours with a possible extension to 48 hours.[293] Under the Queensland provisions, a terrorist emergency declaration can remain in force for up to seven days, with extensions available following approval by the relevant Minister and the Premier for a further seven days.[294]

*Safeguards and other restrictions on use of special powers*

264. Generally, the police officers authorised to utilise the special powers described above can do so only for particular prescribed purposes. For example, section 7 of the *Terrorism (Police Powers) Act 2002* (NSW ) provides that a police officer can be authorised to use special powers for the purpose of:

- finding a particular person named or described in the authorisation, or
- finding a particular vehicle, or a vehicle of a particular kind, described in the authorisation, or
- preventing a terrorist act in a particular area described in the authorisation (or apprehending in any such area the persons responsible for committing a terrorist act), or
- for any combination of those purposes.

265. The jurisdictions also vary in terms of the information required to be contained in an authorisation to use the special powers. [295]

266. Some jurisdictions also contain specific safeguards or other requirements that operate to limit the use of these powers. For example:

- The *Terrorism (Extraordinary Temporary Powers) Act 2006 (*ACT) contains a requirement that any officers exercising the special powers are adequately trained about their obligations under human rights legislation applying in the ACT.[296]
- The *Terrorism (Extraordinary Powers) Act 2005* (SA) includes a provision that requires the special powers to be exercised in a manner that avoids: inflicting unnecessary physical harm, humiliation or embarrassment; offending genuinely held cultural values or religious beliefs; and causing unnecessary damage to property.[297]

[291] For example see *Terrorism (Police Powers) Act 2002* (NSW) s10. See also *Terrorism (Extraordinary Powers) Act 2005* (SA) s4
[292] For example see *Terrorism (Police Powers) Act 2002* (NSW) s6
[293] Ibid., s11. See also *Terrorism (Extraordinary Powers) Act 2005* (SA) s4.
[294] *Public Safety Preservation Act 1986* (Qld) s8H
[295] Cf *Terrorism (Extraordinary Temporary Powers) Act 2006 (*ACT) s68, 75 and *Terrorism (Police Powers) Act 2002* (NSW) s10
[296] *Terrorism (Extraordinary Temporary Powers) Act 2006 (*ACT) s93
[297] *Terrorism (Extraordinary Powers) Act 2005* (SA) s17

*Reporting and Review*

267. Most jurisdictions also include provisions that require the Commissioner of Police or another police officer to report on the use of the special powers to a relevant Minister, including details about the authorisation, such as its duration, the powers exercised under the authorisation and the result of the exercise of the special powers.[298]

268. In many jurisdictions, the special powers provisions are also subject to review after being in operation for a certain period. For example, the *Terrorism (Extraordinary Temporary Powers) Act 2006 (*ACT) requires that the relevant provisions be reviewed after being in operation for eight years.[299]

269. These reviews have taken place in many jurisdictions, such as the recent review of the *Terrorism (Extraordinary Powers) Act 2005* (WA) in January 2012[300] and the review of the *Terrorism (Police Powers) Act 2002* (NSW) in April 2012.[301] In some cases these reviews have resulted in recommendations for reforms.[302]

Law Council Concerns

270. The Law Council does not intend to comment in detail upon the relevant provisions in force in each jurisdiction. These provisions have been considered in detail in the course of the various reviews described above, some of which note the comments and concerns of the Law Council's Constituent Bodies.[303]

271. However, the Law Council welcomes the opportunity provided by this Review to consider the special power provisions as a package of reforms designed to strengthen Australia's response to 'home grown' terrorism, and to evaluate whether these provisions constitute a necessary and proportionate response to the terrorism threat.

272. The Law Council notes that to date the special police powers have not actually been used in any jurisdiction. This raises questions about their continued necessity, particularly in light of the range of alternative law enforcement powers to facilitate the investigation and prosecution of terrorist related offences. This is highlighted by the fact that on the one occasion that an authorisation has been made under these provisions – as part of *Operation Pendennis*[304] - the police searches and arrests

[298] *Terrorism (Police Powers) Act 2002* (NSW) s14B, see also *Public Safety Preservation Act 1986* (Qld) s8R
[299] *Terrorism (Extraordinary Temporary Powers) Act 2006 (*ACT) s100. See also *Public Safety Preservation Act 1986* (Qld) s8T
[300] Review of the *Terrorism (Extraordinary Powers) Act 2005* (WA), Legal and Legislative Services Western Australia Police (January 2012) available at http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3814653ad0272dccb44565b6482579ce00229469/$file/4653.pdf
[301] Statutory Review of *the Terrorism (Police Powers) Act 2002*, NSW Department of Attorney General and Justice, April 2012.
[302] For example, the 2009 review of the *Terrorism (Police Powers) Act 2002* (NSW) made 15 recommendations aimed at clarifying the operation of the Act. Of the 15 recommendations, 12 were implemented by the *Terrorism (Police Powers) Amendment Act 2010* and one by the *Terrorism (Police Powers) Regulation 2011*. However, many of the 15 recommendations flow from the New South Wales Ombudsman's report of 2008 and relate to preventative detention provisions.
[303] See for example, Law Society of New South Wales, Submission to the Statutory Review of the Terrorism (Police Powers) Act 2002, NSW Department of Attorney General and Justice, April 2012 available at http://www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/593139.pdf
[304] Operation Pendennis was one of the largest and longest Australian terrorism investigations to date. The task force comprised members of Victoria Police, the AFP, ASIO and New South Wales Police, who kept a group of men in Melbourne and Sydney who were preparing to conduct a terrorist attack against undisclosed targets in Australia under surveillance from 2004-late 2005. On 8 November 2005 representatives of these agencies launched a series of raids across Victoria and New South Wales. Initially, they arrested 10 men in

which took place occurred under other law enforcement powers - not the special powers described above.[305]

273. The Law Council also notes that many of the concerns outlined above in respect of the special powers contained in the Crimes Act also apply in respect of many of the State and Territory provisions. For example, like the Commonwealth powers, the powers under Division 3 Part 2 of the *Terrorism (Police Powers) Act 2002* (NSW) are not limited to a particular person or vehicle identified in the authorisation. They can be triggered by a person or vehicle merely being present in a 'target area', or being about to enter or leave a 'target area'. Police are not required to have a reasonable suspicion that the person or vehicle was or will be involved in a 'terrorist act'.

274. When the *Terrorism (Police Powers) Act 2002* (NSW) was reviewed in April 2012, the Law Society of NSW submitted that the application of the special powers, as they relate to persons or vehicles that are not the target of an authorisation, should be predicated on the police forming a reasonable suspicion that the powers must be exercised to prevent a terrorist attack or apprehend a person who has committed a terrorist attack.[306] This type of reform would assist in curtailing the potential for these special powers – which include the power to conduct personal searches and to seize items without a warrant - to be applied arbitrarily.

275. By comparing the different approaches adopted between jurisdictions, it is also possible to identify the types of safeguards and other restrictions on the use of these special powers that provide some protection against misuse and may operate to limit the potential for these special powers to unduly interfere with human rights.

276. In particular, the Law Council notes that a number of jurisdictions incorporate a level of judicial oversight as part of the process of authorising the use of the special powers. For example, under the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) the use of special powers must be authorised by the Supreme Court or the Magistrates Court following an application by the Chief Police Officer approved in writing by the Chief Minister. In Victoria, an interim authorisation for the exercise of special powers can be made by the Chief Commissioner of Police, but must then be subject to an application for an order of the Supreme Court authorising the use of the special powers.[307] This can be contrasted with the NSW provisions which allow an authorisation to be made without judicial approval, and specifically provide that an authorisation "may not be challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings".[308]

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Melbourne and nine in Sydney. Throughout 2006 they arrested and charged three additional men in Victoria with crimes associated with terrorist-related activities. A number of the men arrested pleaded guilty to the charges, some where found guilty following lengthy trials and others were acquitted. For further information about the outcome of these charges see the Law Council's Anti-Terrorism Reform Project, Attachment C, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=33955F71-1E4F-17FA-D28E-2DB9744044B2&siteName=lca

[305] The powers under the *Terrorism (Police Powers) Act 2002* (NSW) were authorised for the first time in raids carried out in Sydney in November 2005 as part of Operation Pendennis. The authorisation named 13 target persons under s7(1)(a) of the Act for the purpose of finding such persons. The authorisation was in effect from 7 November 2005 to 13 November 2005. No powers were exercised under the authorisation. See Review of the *Terrorism (Police Powers) Act 2002* NSW Attorney General's Department August 2006 available at http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/tppa_review_final_online_version.pdf.

[306] Op.cit., Law Society of New South Wales, Submission to the Statutory Review of the *Terrorism (Police Powers) Act 2002.*

[307] *Terrorism (Community Protection) Act 2003* (Vic) s21D

[308] *Terrorism (Police Powers) Act 2002* (NSW) s13

277. The ACT and Victorian regimes acknowledge the need to facilitate the rapid use of exceptional powers in urgent circumstances (for example by allowing the making of interim authorisations, or permitting authorisations to be confirmed by a court after they have commenced) while at the same time ensuring that the use of these exceptional powers are generally subject to independent oversight by a judicial officer. The Law Council suggests that these provisions could be used as a model for other jurisdictions, if these special police powers are found to be necessary and are retained.

278. Other safeguards, such as the requirement for supporting information in an application for use of the special powers, also vary between jurisdictions. Reporting requirements also vary. The Law Council suggests that, in light of the intrusive nature of the special police powers authorised by these provisions, consideration should be given to ensuring that the highest level of independent oversight and accountability is incorporated into each of the regimes. This could also involve consideration of additional or new oversight mechanisms, such as ensuring the Ombudsman in each jurisdiction has the power to monitor and report on the use of these powers.

Law Council Recommendations

279. The Law Council submits that the COAG Review Committee should consider the continued necessity of each jurisdiction's special powers provisions. If these provisions can be shown to be necessary, the COAG Review Committee should recommend that provisions incorporating judicial oversight of the use of these powers and other safeguards, such as those in force in the ACT and Victoria, be incorporated into each special powers regime.

280. The Law Council further notes that, in a number of reviews conducted into the separate special powers regimes, concerns have been raised about the use of the definition of 'terrorist act' from the Criminal Code in the State legislation.[309] The Law Council shares these concerns and refers to its comments and recommendations in respect of this definition outlined in detail above.

## Major Events Powers

281. The Law Council notes that there are provisions in a number of jurisdictions[310] that allow the Executive to declare an event to be a major or special event and then authorise the use of certain police powers for the period of that event.[311]

282. For example, under Chapter 19 of the *Police Powers and Responsibilities Act 2000* (Qld), a '"special event' can be declared by regulation where the Minister is satisfied that the declaration is necessary for preserving public order and the safety of individuals involved in the event and other individuals. The declaration may be made because of: the nature of the event; or the status in the international

[309] See for example Review of the *Terrorism (Police Powers) Act 2002,* NSW Attorney General's Department August 2006 available at http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/tppa_review_final_online_version.pdf.

[310] For example see *Major Events Security Act 2000* (ACT) (Division 3.2); *Police Powers and Responsibilities Act 2000* (Special Events) (QLD) (Chapter 19, Part 2). The *Police Powers (Public Safety) Act 2002* (Tas) Part 2 – authorises the use of special powers to ensure the safety of persons attending an event from a terrorist act.

[311] The *Major Events Security Act 2000* (ACT) has been used on at least four occasions including the Sydney Olympics soccer games hosted in Canberra in 2000, World Cup Rugby in 2003, the Olympic torch relay in 2008, and the visit by US President, Barack Obama in 2011. See http://citynews.com.au/2011/security-tightens-around-obama/ and http://www.afp.gov.au/~/media/afp/pdf/2/26-27-afp-take-part-in-journey-of-harmony.ashx

community of persons involved in the event; or the State's obligations for holding the event. The Minister must also be satisfied that there is a reasonable likelihood that the event may be disrupted if the special powers in Chapter 19, Division 5 are not exercised; or the exercise of the powers is necessary because of the need to protect persons involved in or at the event; or the exercise of the powers is required as a condition of holding the event in Queensland. [312]

283. Once a special event has been declared, a person seeking to enter the event site must permit a search to be made of his or her personal property or a frisk search to be made of his or her person; and must not take into or possess on the site a prohibited item.[313] The Commissioner of Police can also appoint certain authorised persons who may, along with certain police officers, exercise a range of powers in relation to the special event,[314] including the power to:

- refuse entry to the special event if the entrant refuses to state the reason for being in, or about to enter, the site;[315]
- refuse entry to the special event if the person fails to submit to an electronic screening procedure, such as a walk-through detector; an X-ray machine; or a hand held scanner;[316]
- inspect the entrant's belongings; ask the entrant to remove any outer garments; remove all articles from the entrant's clothing; inspect a vehicle or article;[317] and
- frisk search the entrant.[318]

284. A range of offences apply for failing to comply with the request of a police officer or authorised person under these provisions, and a person can also be removed from a special event for failing to comply with these requests.[319]

285. The Law Council does not intend to comment on these provisions in any detail, but notes that its concerns outlined above in respect of the Commonwealth powers under the Crimes Act and the State and Territory special powers in respect of terrorist activity also apply to these provisions. In particular, the Law Council is concerned by the absence of judicial oversight of the authorisation of the use of these powers, which can include personal searches of persons who are not suspected of, or engaged in, any wrongdoing whatsoever but are merely seeking to enter a special event or an area in which such an event is taking place.

286. The absence of independent oversight of these provisions and other safeguards gives rise to the risk that these powers can be misused or used arbitrarily. For example, under the Queensland provisions, there is no maximum duration of the period under which these powers can be exercised, and there is no requirement for the police officer or authorised person to be satisfied on reasonable grounds that the person may be threatening the security of the special event prior to the exercise of these powers.

[312] *Police Powers and Responsibilities Act 2000* (Qld) ss558,559
[313] Ibid., s561
[314] Ibid., s563
[315] Ibid., s566
[316] Ibid., s567
[317] Ibid., s568
[318] Ibid., s589
[319] Ibid., s570-575

287. The Law Council notes that there is little publicly available information about the use of these powers. However, analogous powers have attracted public and judicial attention in the past.[320] For example, a satirical stunt[321] performed during the 2007 Asia-Pacific Economic Cooperation (APEC) Leaders Summit meeting in Sydney by the group 'The Chaser' for the television series *The Chaser's War on Everything,* resulted in The Chaser cast and crew members being charged with entering a prohibited area under the *APEC Meeting (Police Powers) Act 2007* (NSW).[322]

288. The *APEC Meeting (Police Powers) Act 2007* (NSW), which has subsequently been repealed, empowered the Commissioner of Police to specify certain areas to be declared or restricted areas for the purposes of the Act,[323] and authorised the use of powers similar to those contained in the *Police Powers and Responsibilities Act 2000* (Qld).[324] The Act also included offences for entering a restricted area without special justification.

289. The Chaser cast and crew were granted bail[325] and, after numerous adjournments, all charges were withdrawn by the New South Wales Director of Public Prosecutions on 28 April 2008.[326] This experience suggests that further consideration may need to be given to the effectiveness of these types of special powers in the context of major events.

290. The Law Council also notes that similar major event powers were also introduced in WA in 2010 by the *Government Meeting (Special Powers) Act 2010* (WA).[327]

291. The Law Council submits that the COAG Review Committee should consider why these powers are needed in light of the range of other stop and search powers available to police officers. If such powers are considered necessary, the Law Council submits that the COAG Review Committee should recommend a range of safeguards be included in each jurisdiction with these powers, such as: independent oversight of the use of the powers; a maximum duration on the declaration of a special event; and more detailed criteria that are required to be satisfied before the use of such powers is authorised.

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[320] See for example *Evans v State of New South Wales* [2008] FCAFC130, which concerned the validity of clause 7(1)(b) of the *World Youth Day Regulations 2008* which gave police officers and authorised persons the power to direct people in World Youth Day declared areas to cease engaging in conduct that caused annoyance or inconvenience to participants in a World Youth Day event. The Court found this clause to be invalid.

[321] The most prominent prank was the breach of an APEC restricted zone in the heart of Sydney's central business district. The Chaser cast member Julian Morrow directed a fake Canadian motorcade, which was allowed through the restricted zone by police and not detected until The Chaser cast member Chas Licciardello alighted, dressed as Osama bin Laden.

[322] This was an offence under section 19 of the *APEC Meeting (Police Powers) Act 2007* (NSW) which attracted a maximum penalty of up to 6 months imprisonment, or two years imprisonment for aggravated offences.

[323] *APEC Meeting (Police Powers) Act 2007* (NSW) ss6-7

[324] Ibid., Part 3 and 4

[325] "Chaser team charged". *The Sydney Morning Herald*. (6 September 2007). http://www.smh.com.au/news/apec/chaser-team-charged/2007/09/06/1188783378804.html

[326] Police bungle sees Chaser charges binned". *News Limited*. (28 April 2008). http://www.news.com.au/entertainment/story/0,26278,23609111-10229,00.html.

[327] For further discussion of these provisions see Greg Barnes, "Civic freedom wiped off the CHOGM agenda" ABC Online The Drum, 29 March 2011, http://www.abc.net.au/unleashed/45704.html

# Conclusion

292. The Law Council considers that the Review constitutes an important opportunity to evaluate a range of Australia's most intrusive counter-terrorism provisions, with a view to ensuring that provisions are only retained if they can be shown to be a necessary and proportionate response to the threat of terrorism. The Review also provides an opportunity to ensure that any provisions retained contain appropriate safeguards to protect against misuse and to limit interference with individual rights.

293. Many of the provisions subject to the Review were introduced and passed quickly, often in response to significant terrorist events without careful consideration of how existing criminal law provisions could meet or be modified to address emerging needs. There was also little opportunity for robust scrutiny for their compliance with rule of law or human rights standards.

294. In many cases the new laws were modelled on similar provisions in force in the UK, despite the significant differences in terms of the threat of terrorism faced in that country and the other features of the UK legal framework that offer protection of human rights. Many of these laws also specifically exclude judicial oversight of the use of Executive power, perpetuating the notion that it is solely the domain of the Executive to determine what the interests of national security require.

295. Many of these laws have not been used, but their impact has been felt across a range of other areas of criminal law, for example, the introduction of control orders and association based offences in the context of serious and organised crime. In some cases, these laws, such as the terrorist act offence provisions, have also served as hooks for the use of intrusive or coercive law enforcement or intelligence gathering powers. For example, the broad scope of these offence provisions has vastly expanded the circumstances in which a person's conversations or movements can be intercepted or tracked.

296. Now, ten years on from the tragic events of 11 September 2001 in the US that triggered this rapid expansion of offence provisions and law enforcement powers, it is appropriate to ask whether Australia got its legislative response to terrorism right.

297. In particular, the Law Council queries whether it was necessary to depart so dramatically from the traditional principles of criminal law that successive Australian Governments considered to be sufficient to form the basis of responses to terrorist activity prior to the events of 11 September 2001. The Law Council suggests that these principles, based upon the rule of law, help define the appropriate parameters of criminal liability, limit the ability to detain or restrict a person's movements prior to charge and ensure independent oversight of the use of Executive power. The Law Council considers that these traditional principles should have formed the foundation of the Australian approach to terrorism over the last decade.

298. Adherence to these principles would ensure, for example, that instead of introducing a range of new offences based on purely preparatory conduct, the existing principles of ancillary liability could be utilised to ensure that certain conduct leading up to the commission of a terrorist act could be appropriately targeted by law enforcement officers. Similarly, the pre-existing stop and search powers available to police, could have formed an appropriate basis for ensuring that State and Territory authorities had the ability to react quickly to preserve evidence relating to a planned terrorist act, rather than adopting an approach that allows officers of the Executive to authorise the use of expansive search and seizure powers on the basis of a person's location in a certain prescribed area.

299. Adherence to traditional criminal law principles would have also brought the Australian approach closer in line with its international human rights obligations, which require law makers to consider whether each new offence or power is necessary to achieve the legitimate aim of protecting the community from terrorism, and proportionate in light of the restrictive impact it may have on a particular human right.

300. Considering each of the new laws in terms of their impact on human rights also highlights the need to ensure that appropriate safeguards are included in the provisions, if they have been shown to be necessary. This means, for example, that if some form of control orders are considered necessary, then, at least, a person subject to such an order should have unrestricted and confidential access to a lawyer, and be able to see and challenge the information upon which such an order was based.

301. Many of the concerns raised by the Law Council in this submission have been raised in other forums, including recently in the context of the 2012 Consultation by the Monitor and the 2012 Inquiry into National Security Legislation by the PJCIS.

302. The unique opportunity presented by the Review is to re-consider the need for a range of provisions that depart from and in some cases undermine traditional principles of criminal law, and provide officers of the Executive with a broad discretion to make decisions and exercise powers that have the potential to have a very significant impact on the rights of individuals. Unless the COAG Review Committee can be satisfied that they are necessary, the Law Council is of the view that the Committee should recommend that these laws be repealed. If any are to be retained, the Law Council urges the COAG Review Committee to recommend that changes be made to these laws that limit their potential to interfere with human rights and to ensure that they are subject to independent oversight.

303. The time is right for all Australian jurisdictions to adopt the type of careful, evidence based approach to law making in this area that was missing when many of these laws were first introduced. As former Law Council President, Mr Anthony Abbott, pointed out in 2002:

> *"It is necessary for the fundamental principles of the rule of law to tailor the nature of the legislative and executive response our democratic system makes to the threat of terrorism and other threats to our peace order and good government. This is because a response not moderated by rule of law considerations would result in a society in which, I believe, many of us would not wish to live.*
>
> *…*
>
> *A liberal democracy will overcome terrorism by playing to its strengths. The State must have powers to protect the public and the citizen needs assurances of their position against the use of State power. The rule of law provides these assurances, and its principles will defeat the terrorist."* [328]

304. Ten years later, the Law Council's President-Elect, Mr Joe Catanzariti, recently stated:

[328] "The World since September 11: Can democracy limited by the rule of law combat terrorism effectively?", address by Tony Abbott, President, Law Council of Australia, to the First Plenary Session of the Australian Academy of Forensic Sciences, 13 February 2002, page 22-23.

*"Over 50 pieces of counter-terrorism legislation have been passed since September 11, 2001 – many of which were rushed through Parliament and have never or very rarely been used. A number of these laws contain measures that run counter to established principles of criminal justice and the rule of law…"*[329]

305. The Law Council urges the COAG Review Committee to address these long standing concerns.

[329] See "Law Council calls for changes to anti-terror laws in wake of COAG review", Media Release, 10 August 2012 at http://www.lawcouncil.asn.au/media/news-article.cfm?article=0DECE32B-1999-B243-6E6F-15B33890B33F

## Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.