



Report of the Security Legislation Review Committee

June 2006

ISBN: 0 642 21188 4

© Commonwealth of Australia 2006

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Attorney General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at <http://www.ag.gov.au/cca>

CONTENTS

MEMBERS OF COMMITTEE	1
ACKNOWLEDGMENTS	2
EXECUTIVE SUMMARY	3
RECOMMENDATIONS	8
OTHER KEY FINDINGS	14
CHAPTER 1	
INTRODUCTION	17
Conduct of the review	23
Background briefings	23
Public hearings	24
CHAPTER 2	
THE LEGISLATION UNDER REVIEW	25
CHAPTER 3	
EXISTING OVERSIGHT AND ACCOUNTABILITY MECHANISMS	26
Judicial oversight	26
Commonwealth Ombudsman	28
Inspector-General of Intelligence and Security	29
Parliamentary Joint Committee on Security and Intelligence	30
Other laws and institutions	31
CHAPTER 4	
OVERVIEW OF GOVERNMENT POLICY	33

CHAPTER 5

SAFEGUARDING HUMAN RIGHTS IN THE FACE OF TERRORISM	39
The balance between human rights and national security	39
The nature of terrorism	42
The Australian approach to defining terrorism	44

CHAPTER 6

DIVISION 101 – TERRORISM	47
The meaning of ‘terrorist act’	49
Threat of action	50
The retention of paragraph (b) of the definition	53
The retention of subsection (3)	57
Sections 101.2, 101.4, 101.5 and 101.6	58

CHAPTER 7

DIVISION 102 – TERRORIST ORGANISATIONS	61
The definition of ‘terrorist organisation’	61
Regulatory specification, listing or proscription	68

CHAPTER 8

THE GROUNDS FOR PROSCRIPTION	69
Advocating of a terrorist act	69
Process of regulatory specification	73
Consequences of proscription	77
Administrative law consideration	78

CHAPTER 9

SHOULD THE EXISTING PROSCRIPTION PROCESS REMAIN?	85
Options for reforming the proscription process	86
A judicial or quasi-judicial process	89
The case for a judicial process	91
The case for an executive process	93
Advisory committee for the Attorney-General	99

CHAPTER 10

TERRORIST ORGANISATIONAL OFFENCES	101
Section 102.2 – Directing the activities of a terrorist organisation	102
Section 102.3 – Membership of a terrorist organisation	104
Legal Burden	106
Section 102.4 – Recruiting for a terrorist organisation	110
Section 102.5 – Training a terrorist organisation or receiving training from a terrorist organisation	110
Strict Liability	113
Section 102.6 – Getting funds to, from or for a terrorist organisation	118
Section 102.7 – Providing support to a terrorist organisation	121
Section 102.8 – Associating with terrorist organisations	123
General concerns	134
Discriminatory application	141

CHAPTER 11	
OTHER ISSUES ARISING FROM THE <i>SECURITY LEGISLATION AMENDMENT (TERRORISM) ACT 2002</i>	147
Extended geographical jurisdiction – category D	147
The ‘the’ to ‘a’ change	149
Penalties	151
Treason	152
CHAPTER 12	
<i>SUPPRESSION OF THE FINANCING OF TERRORISM ACT 2002</i>	157
Financing Terrorism (103.1)	158
Financing a terrorist (s103.2)	159
CHAPTER 13	
<i>BORDER SECURITY LEGISLATION AMENDMENT ACT 2002</i>	171
Concerns raised in Submissions	171
Customs recommendations	175
CHAPTER 14	
<i>CRIMINAL CODE AMENDMENT (SUPPRESSION OF TERRORIST BOMBINGS) ACT 2002</i>	181
CHAPTER 15	
<i>TELECOMMUNICATIONS INTERCEPTION LEGISLATION AMENDMENT ACT 2002</i>	182
CHAPTER 16	
<i>CRIMINAL CODE AMENDMENT TERRORISM ACT 2003</i>	189

CHAPTER 17

PROPOSED AMENDMENTS RAISED IN SUBMISSIONS	189
Hoax	189
Admissibility of evidence obtained overseas	191
Anonymity of ASIO officers called to give evidence	193
The Commonwealth DPP's right to appeal re: the exceptional circumstances test – ss 15AA of the <i>Crimes Act 1914</i>	198
Application of the <i>National Security Information (Criminal and Civil Proceedings) Act 2004</i>	199

CHAPTER 18

MECHANISMS OF REVIEW	201
Further Review	201
Independent Reviewer	202
Public Advocate	203

ABBREVIATIONS	208
----------------------	------------

ANNEXURES

ANNEXURE A – Table of Amendments	211
ANNEXURE B – List of written submissions received	237
ANNEXURE C – List of participants at public hearings	242
ANNEXURE D – Outline of Legislation	246
ANNEXURE E – List of proscribed terrorist organizations	254

MEMBERS OF THE COMMITTEE

Chair: The Hon. Simon Sheller, AO, QC

Members

Ms Gillian Braddock, SC, Law Council of Australia representative

Mr Ian Carnell, Inspector-General of Intelligence and Security

Ms Karen Curtis, Privacy Commissioner

Mr John Davies, APM, OAM, Attorney-General's nominee

Mr Graeme Innes, AM, Human Rights Commissioner

Professor John McMillan, Commonwealth Ombudsman

Mr Daniel O’Gorman, Law Council of Australia representative

ACKNOWLEDGMENTS

The Security Legislation Review Committee (SLRC) acknowledges the significant resources devoted to the SLRC by the Commonwealth Attorney-General's Department (AGD). The SLRC thanks the staff of the Department, which provided its secretariat services. The SLRC commends Ms Lisa Fox, a Legal Officer with the Department, for her substantial contribution to the work of the SLRC.

The SLRC wishes to thank all the organisations and individuals that made written and oral submissions.

For providing venues for public hearings and meetings, the SLRC thanks the Australian Federal Police (AFP), the Commonwealth Ombudsman, the Human Rights and Equal Opportunity Commission (HREOC), the Family Court of Western Australia and the Australian Government Solicitor.

EXECUTIVE SUMMARY

The Security Legislation Review Committee (SLRC) acknowledges that an appropriate balance must be struck between, on the one hand, the need to protect the community from terrorist activity, and on the other hand, the maintenance of fundamental human rights and freedoms. The SLRC is satisfied that, in addition to the general criminal law, separate security legislation is necessary. It is so satisfied on the basis that the current level of threat to Australia and Australian interests is of the type that has been publicly outlined from time to time by the Commonwealth Attorney-General. The SLRC has not itself received confidential briefings about the level of threat of terrorist activity currently faced by Australia. The report elaborates on this issue.

Since terrorist attacks in other parts of the world, notably in September 2001, security legislation has been enacted with the prime object of preventing or discouraging further terrorist attacks. To an extent, such legislation intruded upon well-established and well-recognised human rights. The SLRC, set up to consider the operation and effectiveness of such legislation enacted in 2002 and 2003 in Australia, has taken account of the effect of the legislation upon human rights. As a guiding principle, the SLRC has sought to determine whether the legislation was a reasonably proportionate means of achieving the intended object of protecting the security of people living in Australia and Australians living overseas, including protecting them from threats to their lives. These are difficult questions and the submissions made to the SLRC differed widely in their response.

The material available to the SLRC did not indicate that to date there has been excessive or improper use of the provisions that fall within the scope of this review. However, legislation must be well framed and have sufficient safeguards to stand the test of proportionality and fairness and to withstand administrative law challenge. This is particularly so where, as here, there is no sunset clause on the provisions under review, as is the case here. Australia has no formal Charter of Human Rights.

The SLRC considers that some parts of the amendments to Part 5.3 of the Criminal Code appear to have a disproportionate effect on human rights and could be subject to administrative law challenge. These provisions should be repealed or changed. Four areas are notable.

The first is the process for proscribing an organisation as a terrorist organisation. The terrorist organisation is an essential feature of derivative offences against persons connected in various ways with such organisations. Proscription is by an executive act of the Governor-General on the advice of the Attorney-General. The SLRC considers that no sufficient process is in place that would enable persons affected by such proscription to be informed in advance that the Attorney-General is considering whether to proscribe the organisation, and to answer the allegation that the organisation is a terrorist organisation. A consequence of proscription is that, on account of their connection with the organisation, persons become upon proscription liable to criminal prosecution. In that prosecution the defendant cannot deny that the proscribed organisation is a terrorist organisation or for that matter 'an organisation'. All members of the SLRC believe that a fairer and more transparent process should be devised for proscribing an organisation as a terrorist organisation.

Some members of the SLRC propose that the proscription process continue by way of regulation by the Governor-General on the advice of the Attorney-General. Other members of the SLRC propose that a judicial process for proscription be set in place. This would allow persons affected to be put on proper notice and to oppose the proscription of the organisation as a terrorist organisation.

Second, in 2004, section 102.8 which provided for an offence described as 'associating with terrorist organisations' was inserted into the Criminal Code. On its face, this offence transgresses a fundamental human right—freedom of association—and interferes with ordinary family, religious and legal communication. The SLRC considers that section 102.8 should be repealed.

The interference with human rights is disproportionate to anything that could be achieved by way of protection of the community if the section were enforced. The SLRC considers that the most important feature of the section—making it an offence to provide support to a terrorist organisation with the intention that the support assists the organisation to expand or to continue to exist—can be achieved by a new offence that does not rely on association between the person charged and anyone else.

Third, advocating the doing of a terrorist act is one of the grounds for proscription of an organisation as a terrorist organisation. The definition of ‘advocates’ (section 102.1(1A)) includes in paragraph (c) organisations that directly praise the doing of a terrorist act in circumstances where there is a risk that such praise might lead a person to engage in a terrorist act. The provision is, on its face, broad and potentially far-reaching. The SLRC recommends that paragraph (c) be deleted from the definition of ‘advocates’. If this is not accepted, then the paragraph should be more tightly defined and changed to require that the risk be a substantial risk.

Fourth, some subsections apply strict liability to elements of a criminal offence. Where criminal offences involve heavy penalties of imprisonment, neither the offences nor elements of them should be of strict liability.

Events in recent years have had a profound impact on Muslim and Arab Australians. The biggest impacts are a considerable increase in fear, a growing sense of alienation from the wider community and an increase in distrust of authority. The SLRC has serious concerns about the way in which the legislation is perceived by some members of Muslim and Arab communities.

The SLRC recommends that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim and Arab communities, to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them.

The SLRC also believes that the amendments it has recommended to the proscription, advocacy, association and strict liability elements of Part 5.3 of the Criminal Code would contribute to a reduction in fear and sense of alienation by at least some Muslim and Arab Australians. By doing so, there will be an enhancement, not a diminution, of anti-terrorism efforts. The dynamics for the development of so called 'home grown' terrorism must be reduced rather than provoked.

In the opinion of the SLRC, there are a number of further amendments that could be made to Part 5.3 to make the legislation clearer and more effective. With this in mind, the SLRC considers that the definition of 'terrorist act' should be amended by omitting all reference to 'threat of action'. Its place in the definition causes uncertainty and is unnecessary. Instead, if it is thought appropriate, a separate offence of 'threatening action' or 'threat to commit a terrorist act' should be inserted in the Criminal Code.

A particularly convoluted provision is section 102.5, which attempts to deal with training a terrorist organisation or receiving training from a terrorist organisation. It should be re-drafted as a matter of urgency and its scope more carefully defined.

In some places the legislation imposes a 'legal burden of proof' upon the defendant. It would be sensible, and reflect the likely approach of the courts based on precedent, to change this to an evidential burden.

The SLRC noted that to date there has been very limited practical experience with how the provisions of Part 5.3 operate. It is important that the ongoing operation of the provisions, including the views taken of particular provisions by the courts, be closely monitored and that Australian governments have an independent source of expert commentary on the legislation. Either an independent reviewer should be appointed, or a further review by an independent body such as the SLRC should be conducted in three years.

The SLRC further noted the importance of regular monitoring of privacy-sensitive access by the Australian Customs Service (Customs) to personal information. The Office of the Privacy Commissioner has conducted audits of Customs' Passenger Analysis Unit (PAU) and the SLRC believes this important activity should continue and be funded.

The specific recommendations of the SLRC are set out immediately below. In addition, several other findings are given. Many of these findings address specific propositions for change put to, but not accepted by, the SLRC.

RECOMMENDATIONS

The SLRC is satisfied of the need for separate criminal legislation to deal with terrorism as defined by the expression 'terrorist act' and does not recommend general repeal of the security legislation.

The Security Legislation Review Committee recommends:

Recommendation 1: Further review

The SLRC recommends that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years.

If an independent reviewer, as discussed in this report, has been appointed, the review to be commissioned by the Council of Australian Governments (COAG) in late 2010, could be expanded in its scope to include all of Part 5.3 of the Criminal Code. The SLRC also draws attention to other models of review and urges the government to consider the models discussed in the report.

For discussion, refer to Chapter 18.

Recommendation 2: Community education

The SLRC recommends that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim and Arab communities, and to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them.

For discussion, refer to Chapter 10.

Recommendation 3: Reform of the process of proscription

The SLRC recommends that the process of proscription be reformed to meet the requirements of administrative law.

The process should be made more transparent and should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

For discussion, refer to chapter 9.

Recommendation 4: Process of proscription

The SLRC recommends that either:

- i. the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General

In this case there should be built into that process a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. The committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice. The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public.

or

- ii. the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with

media advertisement, service of the application on affected persons and a hearing in open court.

For discussion, refer to chapter 9.

Recommendation 5: Publicity of proscription of a terrorist organisation

The SLRC recommends that once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution.

For discussion, refer to chapter 8.

Recommendation 6: Definition of terrorist act – ‘harm that is physical’

The SLRC recommends that the words ‘harm that is physical’ be deleted from paragraphs 2(a) and 3(b)(i) in the definition of ‘terrorist act’ so that the definition of harm in the Dictionary to the Criminal Code applies, and the paragraphs extend to cover serious harm to a person’s mental health.

For discussion, refer to chapter 6.

Recommendation 7: Definition of a terrorist act – ‘threat of action’

The SLRC recommends that the reference to ‘threat of action’ and other references to ‘threat’ be removed from the definition of ‘terrorist act’ in section 100.1(1).

For discussion, refer to chapter 6.

Recommendation 8: Offence of ‘threat of action’ or ‘threat to commit a terrorist act’

The SLRC recommends that an offence of ‘threat of action’ or ‘threat to commit a terrorist act’ be included in Division 101.

The description should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur.

For discussion, refer to chapter 6.

Recommendation 9: Definition of ‘advocates’

The SLRC recommends that paragraph (c) of section 102.1(1A) be omitted from the definition of ‘advocates’.

Section 102.1(1A) provides that an organisation advocates the doing of a terrorist act if ‘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 ... to engage in a terrorist act.’

If paragraph (c) is not omitted from the definition, the SLRC recommends that ‘risk’ should be amended to read ‘substantial risk’.

For discussion, refer to Chapter 8.

Recommendation 10: Definition of ‘terrorist organisation’

If the process of proscription is reformed as suggested in recommendation 3, the SLRC recommends that consideration be given to deleting paragraph (a) of the definition of ‘terrorist organisation’ so that the process of proscription would be the only method by which an organisation would become an unlawful terrorist organisation.

Paragraph (a) of the definition of ‘terrorist organisation’ provides that ‘an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act ...’ is a terrorist organisation.

For discussion, refer to chapter 7.

Recommendation 11: Section 102.3(2) – burden of proof

The SLRC recommends that the burden of proof on the defendant under section 102.3(2) be reduced from a legal burden to an evidential burden.

Section 102.3(2) requires the defendant to prove 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.

For discussion, refer to chapter 10.

Recommendation 12: Section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation

The SLRC recommends that section 102.5, ‘Training a terrorist organisation or receiving training from a terrorist organisation’, be redrafted as a matter of urgency.

The redraft should make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.

The SLRC recommends that the scope of the offence should be extended to cover participation in training.

The SLRC recommends that neither the offence nor any element of it should be of strict liability.

For discussion, refer to chapter 10.

Recommendation 13: Section 102.6 – getting funds to, from or for a terrorist organisation

The SLRC recommends that, at most, a defendant legal representative should bear an evidentiary burden, and that subsections (1) and (2) should not apply to the person’s receipt of funds from the organisation if the person received the funds solely for the purpose of the provision of:

- (a) legal representation in proceedings under Part 5.3, or
- (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.

For discussion, refer to chapter 10.

Recommendation 14: Section 102.7 – providing support to a terrorist organisation

The SLRC recommends that section 102.7, ‘Providing support to a terrorist organisation’, be amended to ensure that the word ‘support’ cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective.

One means of achieving this could be to insert defences of the type contained in section 80.3 of the Criminal Code in relation to treason and sedition.

For discussion, refer to chapter 10.

Recommendation 15: Section 102.8 – associating with terrorist organisations

The SLRC recommends that in its present form section 102.8 of the Criminal Code, ‘Associating with terrorist organisations’, be repealed.

The SLRC recommends that, if section 102.8 is retained, section 102.8(5) be repealed.

For discussion, refer to page chapter 10.

Recommendation 16: Section 103.1 – financing terrorism

The SLRC recommends that section 103.1, ‘Financing terrorism’, should be amended by inserting ‘intentionally’ after ‘the person’ in paragraph (a) and removing the note.

For discussion, refer to chapter 12.

Recommendation 17: Section 103.2 – financing a terrorist

The SLRC recommends that consideration be given to re-drafting paragraph (b) of section 103.2(1) to make it clear that it is required that the intended recipient of the funds is a terrorist.

For discussion, refer to chapter 12.

Recommendation 18: Section 80.1(1)(f) – conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force

The SLRC recommends that section 80.1(1)(f), ‘Conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force’, be amended to require, as an ingredient of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the Australian Defence Force.

For discussion, refer to chapter 11.

Recommendation 19: Customs’ recommendations on border security

The SLRC recommends that the government give consideration to implementation of Customs’ eight recommendations on border security.

For discussion, refer to chapter 13.

Recommendation 20: Hoax offence

The SLRC recommends that a hoax offence be added to Part 5.3 in the terms of Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism to apply to a credible and serious threat to commit a terrorist act, where the evidence does not support a finding that there was such intention as described in the definition of ‘terrorist act’.

For discussion, refer to chapter 17.

Other key SLRC findings

- The SLRC considers that amendments such as either the provision of a judicial process for proscription or greater safeguards for the existing process, and the repeal of section 102.8, would play an important role in reducing the concern and fear felt by the Muslim and Arab communities and members of other communities about the security legislation.

- The SLRC concluded that on balance the Passenger Analysis Unit (PAU) appeared to be operating effectively and protecting the personal information it collects appropriately. The system also appears to ensure the smooth transition of passengers through Customs. The SLRC concluded that the audits of the PAU are a valuable monitoring mechanism. The SLRC considers that the government should fund the undertaking of the audits on a regular basis, and at least every two years.
- The SLRC concluded that efforts should be made to obtain an ‘adequacy’ finding from the European Commission (EC) for the Australian Passenger Name Records (PNR) system. The SLRC recommends that consideration be given by government as to how best to achieve such an ‘adequacy’ finding.
- The SLRC concluded that the powers of Customs officers are appropriate and that appropriate safeguards and guidelines are in place.
- The SLRC recommends that the definition of a member of an organisation to include an informal member should remain.
- The SLRC does not recommend that paragraph (b) of the definition of ‘terrorist act’, which provides that ‘the action is done or the threat is made with the intention of advancing a political, religious or ideological cause’, be deleted from the definition.
- The SLRC does not recommend amendment of paragraph (a) of the definition of ‘terrorist organisation’ in section 102.1(1) and in particular does not recommend the omission of the word ‘fostering’ from paragraph (a).
- The SLRC does not recommend any change beyond those elsewhere recommended in this report to section 101.2, ‘Providing or receiving training connected with terrorist acts’; section 101.4, ‘Possessing things

connected with terrorist acts'; section 101.5, 'Collecting or making documents likely to facilitate terrorism'; and section 101.6, 'Other acts done in preparation for, or planning, terrorist acts'.

- The SLRC does not recommend any change from the 'the' to 'a' amendments made to sections 101.2(3), 101.4(3), 101.5(3), 101.6(2) and 101.3(2) of the Anti-Terrorism Act (No 1) 2005 and to subsections 102.1(1)(paragraph (a) of the definition of *terrorist organisation*) and (2) by the Anti-Terrorism Act (No 2) 2005, which were apparently driven by concern that preparatory acts could only be prosecuted under the offences as originally drafted if they pointed to some specific planned terrorist act.
- The SLRC does not recommend the application of any less extended geographical jurisdiction than that described in section 15.4 of the Criminal Code as extended geographical jurisdiction (category D). Under s 15.4, an offence applies whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not the result of the conduct constituting the alleged offence occurs in Australia.
- The SLRC does not recommend abolition of the law of treason contained in section 80.1 of the Criminal Code as a whole, or of paragraph (f) of section 80.1(1).
- The SLRC does not recommend amendment to Part 1C of the *Crimes Act 1914* to allow the admissibility of evidence obtained overseas in circumstances where AFP officers had done 'all that they could reasonably be expected to do to comply' with that Part.
- The SLRC does not recommend that there be legislative provisions providing for a statutory right protecting anonymity of ASIO officers in counter-terrorist prosecutions.

CHAPTER 1

INTRODUCTION

1.1 The Security Legislation Review Committee (SLRC) was established pursuant to section 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002*, as amended by the *Criminal Code Amendment (Terrorism) Act 2003*. Section 4 is headed 'Public and independent review of the operation of Security Acts relating to terrorism'. Section 4(1) requires the Attorney-General to cause a review of the operation, effectiveness and implications of amendments made by the:

- (a) *Security Legislation Amendment (Terrorism) Act* (the SLAT Act)
- (b) *Suppression of the Financing of Terrorism Act 2002* (the SFT Act)
- (c) *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (the STB Act)
- (d) *Border Security Legislation Amendment Act 2002* (the BSLA Act)
- (e) *Telecommunications Interception Legislation Amendment Act 2002* (the TILA Act), and
- (f) *Criminal Code Amendment (Terrorism) Act 2003* (CCAT Act).

1.2 These Acts are referred to in this report collectively as the 'security legislation'.

1.3 Since the six amending Acts were enacted, the several amendments they made to other legislation, such as the *Criminal Code Act 1995* (Criminal Code), were later further amended. At an early stage in its discussions, the SLRC considered whether the review was limited to the original text of the six

amending Acts or extended to cover amendments in other legislation made by the original legislation (see the *Acts Interpretation Act 1901* (Cth), s 10, and Pearce and Geddes, *Statutory interpretation in Australia*¹). Advice was sought from the Australian Government Solicitor and received in writing dated 5 January 2006 from Mr Henry Burmester, AO, QC, Chief General Counsel of the Australian Government Solicitor. Counsel's opinion was that, in the present case, section 10 reflected a broader legislative intention. The reference to 'amendments' in section 4(1) should be interpreted as the amendments in the form they are in from time to time. This interpretation was said to be reinforced by the evident purpose of the review provisions. There would be little point in the SLRC reviewing originally enacted but later amended or repealed provisions instead of the provisions currently in operation. Counsel advised that so long as the review examined the original amendments (in the sense of noting that they had been replaced or amended), it could not be criticised if it took the sensible decision to review the current form of those amendments (see table of amendments at Annexure A).

1.4 This approach was obviously a sensible one but, to an extent, exacerbated the problem for the Committee of reviewing the operation, effectiveness and implications of the amendments with only very limited knowledge of what use had been made of the legislation by law enforcement and security bodies, and how the provisions had been interpreted and applied by the courts.

¹ DC Pearce and RS Geddes, *Statutory interpretation in Australia*, 5th edn, Butterworths, Sydney, 2001, paragraph 6.19

1.5 The SLAT Act required that the SLRC undertake the review as soon as practicable after the third anniversary of the commencement of the amendments (section 4(2)) and provide for public submissions and public hearings as part of the review (section 4(5)).

1.6 The SLRC was also required, within six months of commencing the review, to give the Attorney-General and the Parliamentary Joint Committee on ASIO, ASIS and DSD, now the Parliamentary Joint Committee on Intelligence and Security (PJC), a written report of the review which included an assessment of matters in section 4(1) and alternative approaches or mechanisms as appropriate (section 4(6)). The SLRC commenced its review on 21 October 2005.

1.7 Section 4(7) requires the Attorney-General to cause a copy of the report to be tabled in each House of Parliament within fifteen sitting days of that House after its receipt by the Attorney-General. Section 4(8) enables the Attorney-General before tabling the report in Parliament to remove information from the copy of the report if satisfied on the advice of the Director-General of Security or the Commissioner of the Australian Federal Police (AFP) that its inclusion may endanger a person's safety, or prejudice an investigation or prosecution or compromise the operational activities or methodologies of the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), the Defence Signals Directorate (DSD) or the AFP. Section 4(9) requires the PJC to take account of the report of the review

given to the PJC, when the PJC conducts its review under paragraph 29(1)(ba) of the *Intelligence Services Act 2001*.

1.8 When the review began, the SLRC, in accordance with the requirements of section 4(4) of the SLAT Act, consisted of

- two persons appointed by the Attorney-General—the Hon. Simon Sheller, AO, QC, a retired judicial officer (Chair), and Mr John Davies, APM, OAM, a former ACT Chief Police Officer
- the Inspector-General of Intelligence and Security (IGIS), Mr Ian Carnell
- the Privacy Commissioner, Ms Karen Curtis
- the then Human Rights Commissioner, Dr Sev Ozdowski, OAM
- the Commonwealth Ombudsman, Professor John McMillan, and
- two persons holding legal practising certificates in Australian jurisdictions and appointed by the Attorney-General on the nomination of the Law Council of Australia—Ms Gillian Braddock, SC and Mr Dan O’Gorman. The Law Council of Australia is the peak national representative body of the Australian legal profession, representing approximately 50,000 Australian lawyers through its representative bar associations and law societies.

1.9 On 7 December 2005 Dr Ozdowski’s term as Human Rights Commissioner concluded. On 15 December 2005 Mr Graeme Innes, AM was appointed Human Rights Commissioner and became *ex officio* a member of the SLRC.

1.10 The composition of the SLRC is significant. In brief, the statutory responsibility of the IGIS is to provide independent assurance to the

Australian Government, the Parliament and the people that the several Australian intelligence and security agencies conduct their activities within the law, behave with propriety, comply with ministerial guidelines and have regard to human rights. The Privacy Commissioner is an independent statutory office holder responsible for promoting an Australian culture that respects privacy. The Human Rights Commissioner is responsible for human rights compliance under statutes directed to promoting human rights and eliminating discrimination—relevantly, racial and religious discrimination. The Commonwealth Ombudsman has the function of investigating and reporting on the administrative actions of almost all Commonwealth agencies. In part, this involves safeguarding the interests of members of the public in their dealings with government. These four members of the SLRC each brought their own backgrounds and experience in their respective offices to the deliberations of the SLRC. The Attorney-General's appointees had no particular statutory responsibilities.

1.11 The SLRC, as a whole, was required to conduct a public and independent review of the operation, effectiveness and implications of the nominated Acts.

1.12 Section 4(1) requires the SLRC to review how the specified legislation has worked, whether it has worked to achieve its intended purposes and what relevantly followed or can be implied from this. The SLRC's report will include an assessment of these matters and appropriate alternative approaches or mechanisms. The report has already alluded to the difficulty caused by the timing of the review so soon after significant amendments to the relevant

legislation. As well, the six month period allowed for the review covered both the Christmas/New Year and the Easter holidays.

1.13 Section 4 of the SLAT Act does not refer to what are arguably the most controversial parts of the security legislation found in Division 3 of Part 3 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) as currently amended, and in Divisions 104, 'Control orders' and 105, 'Preventative detention orders' of Part 5.3 of the Criminal Code. The insertion into the ASIO Act of Division 3, which deals with ASIO's special terrorism-related questioning and detention powers, was originally part of the SLAT Bill but proceeded separately through Parliament and was passed in 2003. It generated extensive debate. In part the debate was about issues such as detention for seven days, removal of the right to silence, some restrictions on access to legal representation, secrecy of interrogation and the extension of the system to non-suspects. The questioning and detention warrant provisions of the ASIO Act were reviewed by the PJC in 2005. The Division contains a sunset provision, which means the powers will cease to be in force from 23 July 2006 unless the sunset provision is removed or amended by legislation before that date. In addition to the sunset provision, the amending legislation contains a separate review mechanism by the PJC. The issues raised by Division 3 of the ASIO Act fall outside the committee's terms of reference but were examined by the PJC review.

1.14 Control orders and preventative detention orders are to be the subject of a review commissioned by the Council of Australian Governments (COAG) scheduled to commence in December 2010.

Conduct of the review

1.15 The Attorney-General announced the establishment of the SLRC on 12 October 2005². The SLRC convened its first meeting on 21 October 2005. The six month timeframe commenced from this date.

1.16 Written submissions were due by Friday 6 January 2006. However, the SLRC gave a general extension until Friday 13 January 2006 and accepted submissions until 4 April 2006.

1.17 Thirty-five submissions were received by the SLRC (see Annexure B for a list of submissions). After appearing at the public hearings, several organisations further assisted the SLRC by providing supplementary submissions. The submissions received were made available to the public on the SLRC's website www.ag.gov.au/slrc.

Background briefings

1.18 On 5 December 2005 the SLRC received background briefings from a number of Commonwealth government departments and agencies involved in implementing the legislation under review. Briefings were provided by the AFP, the Australian Customs Service (Customs), Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Commonwealth Director of

² Ruddock, P (Attorney-General) 2005, *Independent committee to review security legislation*, media release, Parliament House, Canberra, 12 October.

Public Prosecutions (Commonwealth DPP). These briefings gave an overview of the operations of each agency in relation to counter-terrorism and were useful in providing a factual background for the SLRC.

Public hearings

1.19 The details of public hearings were advertised on the SLRC's website and in national and major metropolitan newspapers. The public hearings were held in:

- Sydney – Tuesday 31 January 2006 and Wednesday 1 February 2006
- Canberra – Friday 3 February 2006
- Melbourne – Tuesday 7 February and Wednesday 8 February 2006
- Perth – Monday 20 February 2006, and
- Sydney – Tuesday 7 March 2006 and Wednesday 8 March 2006.

1.20 The participants at the public hearings are listed in Annexure C.

CHAPTER 2

THE LEGISLATION UNDER REVIEW

2.1 The SLAT Act amended the Criminal Code. It added Part 5.1 entitled 'Treason' and Part 5.3 entitled 'Terrorism' to Chapter 5, 'The security of the Commonwealth'. Part 5.1 was amended in 2005 to include 'Sedition'. Part 5.3 included Divisions 100, 'Preliminary'; 101, 'Terrorism'; and 102, 'Terrorist organisations'. The SFT Act added Division 103, 'Financing terrorism', to the Criminal Code. Many of these amendments and additions to the Criminal Code have since been amended. An outline of the legislation is to be found at Annexure D.

2.2 Section 80.1, 'Treason' in Part 5.1 is dealt with in this report but section 80.2, 'Sedition', is not. The Australian Law Reform Commission (ALRC) is undertaking an inquiry into what it describes as 'controversial federal sedition laws'³. Divisions 100, 101, 102 and 103 of Part 5.3 of Chapter 5 as they have been amended from time to time are central to this review. As already mentioned, this review is not directed to Division 104, 'Control orders', or Division 105, 'Preventative detention orders'. The review also extends to the STB Act, which added Divisions 72, 'International terrorist activities using explosive or lethal devices', to Chapter 4, 'The integrity and security of the international community and foreign governments' of the Criminal Code, the BSLA Act, the TILA Act and the CCAT Act.

³ Full details can be found at < <http://www.alrc.gov.au/inquiries/current/sedition/index.htm> >

CHAPTER 3

EXISTING OVERSIGHT AND ACCOUNTABILITY MECHANISMS

3.1 The legislation considered by the SLRC operates in the context of a broader framework of laws and mechanisms that enable external scrutiny and review of executive activity. It is important to bear these existing laws and mechanisms in mind in considering the need for any additional mechanisms for external oversight of the administration of security legislation. This chapter briefly describes the existing framework of laws and mechanisms.

Judicial oversight

3.2 Judicial review of executive action is secured in four ways in relation to federal government action.

3.3 Firstly, s 75(v) of the Constitution confers jurisdiction upon the High Court of Australia to grant the writ of mandamus or prohibition or an injunction against an officer of the Commonwealth. The writ of mandamus commands the performance of a public duty; the writ of prohibition restrains an excess of power; and an injunction can equally restrain unlawful executive action or require the restoration of a lawful state of affairs. In the exercise of this jurisdiction, the High Court can also grant other administrative law remedies, of which three are important: a declaration, which can be used to declare the law to be observed by a government agency; certiorari to quash an invalid decision; and habeas corpus to require the release of a person from unlawful detention.

3.4 The importance of this jurisdiction is that it provides a constitutional guarantee of judicial review of actions taken by Commonwealth agencies and officers. A relevant example of this jurisdiction being invoked is *Church of Scientology v Woodward*⁴, in which the High Court accepted that it had jurisdiction to decide whether ASIO was acting in breach of its statutory charter.

3.5 Secondly, the Federal Court has a like jurisdiction conferred by s 39B of the *Judiciary Act 1903* to issue the same remedies against an officer of the Commonwealth.

3.6 Thirdly, the Federal Court has jurisdiction conferred by the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to undertake judicial review of executive action taken under Commonwealth legislation. For example, action taken by the AFP and Customs is subject to review under the ADJR Act. Some areas of federal executive action are excluded from review under Schedule 1 of the ADJR Act. Relevantly, this exclusion extends to action taken under the ASIO Act, *Telecommunications (Interception) Act 1979* (TI Act) and the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Another relevant feature of the ADJR Act is that it provides that a person who is entitled to challenge a decision under the ADJR Act is also entitled to request, and be provided with, a written statement of the reasons for the decision (s 16).

⁴ (1982) 154 CLR 25

3.7 Fourthly, the Federal Magistrates Court also has jurisdiction to undertake judicial review of federal executive action under the ADJR Act.

Commonwealth Ombudsman

3.8 The Commonwealth Ombudsman is an independent statutory office, established by the *Ombudsman Act 1976*, with three functions that are relevant to the administration of counter-terrorism legislation.

3.9 Firstly, the Ombudsman can investigate a complaint from a member of the public about the administrative actions of an Australian government agency (though not ASIO, which comes within the jurisdiction of the IGIS). At the conclusion of an investigation, the Ombudsman can make a recommendation for remedial action which, if not accepted by an agency, can be made the subject of a report by the Ombudsman to the Prime Minister and then the Parliament. In undertaking an investigation, the Ombudsman has statutory powers to obtain access to documents, require evidence from witnesses, and enter premises.

3.10 The Ombudsman's role in investigating complaints against the AFP arises under a separate Act—the *Complaints (Australian Federal Police) Act 1981*. Special provision is made in some of the counter-terrorism legislation to safeguard the Ombudsman's complaint jurisdiction by providing that a person who is the subject of action taken under that Act is to be informed of their right to make a complaint against the AFP to the Commonwealth Ombudsman.

3.11 Secondly, the Ombudsman can undertake an investigation on his or her own motion. Often these investigations are undertaken into aspects of federal executive action that raise issues of systemic concern. It is customary for the reports of these 'own motion' investigations to be published by the Ombudsman.

3.12 Thirdly, the Ombudsman has a monitoring and inspection function of periodically inspecting the records of the AFP and the Australian Crime Commission (ACC) to ensure compliance with legislative requirements applying to selected activities undertaken by those agencies. Specifically, the Ombudsman examines the records maintained by those agencies under the TI Act, the *Surveillance Devices Act 2004* and the *Crimes Act 1914* (concerning controlled operations).

Inspector-General of Intelligence and Security (IGIS)

3.13 The IGIS is an independent statutory office established by the *Inspector-General of Intelligence and Security Act 1986*. The role of the IGIS is to oversight and review the activities of six federal intelligence and security agencies: ASIO, ASIS, DSD, Defence Imagery and Geospatial Organisation (DIGO), Defence Intelligence Organisation (DIO), and Office of National Assessments (ONA).

3.14 The IGIS can undertake an inquiry into the activities of one of those agencies either in response to a complaint from a member of the public, at the

request of a minister, or on the initiative of the IGIS. A substantial activity of the IGIS is to conduct own motion inspections of the records of the intelligence agencies and monitoring their activities. The IGIS also has a similar statutory function to that of the Commonwealth Ombudsman of conducting periodic inspections of the records of ASIO to ensure compliance with record keeping requirements relating to telephone interception and the use of surveillance devices.

3.15 In exercise of those functions of initiating inquiries and undertaking record inspection, the IGIS currently inspects on a monthly basis the records maintained by ASIO about its use of questioning and detention warrants and special power warrants (telecommunications interception, entry and search, computer access, listening devices, tracking devices, and inspection of postal and delivery service articles).

3.16 The complaint jurisdiction of the IGIS is safeguarded by a statutory requirement that a person who is the subject of a questioning or detention warrant is to be notified of their right to make a complaint to the Inspector-General.

Parliamentary Joint Committee on Security and Intelligence (PJC)

3.17 The PJC, formerly called the Parliamentary Committee on ASIO, ASIS and DSD, was established in 2002. The members are appointed under the *Intelligence Services Act 2001*, s 28. The function of the PJC is to review the administration and expenditure of ASIO, ASIS and DSD, and any matter

relating to those agencies referred to the PJC by a Minister or the Parliament. In recent years the PJC has prepared reports on organisations listed as prohibited terrorist organisations under the Criminal Code, and on ASIO's questioning and detention powers. The PJC has played a respected and bipartisan role in scrutinising selected aspects of the work of Australian intelligence agencies.

Other laws and institutions

3.18 A range of other Commonwealth laws also provide a measure of protection for members of the public so far as the administration of security legislation is concerned.

3.19 The *Privacy Act 1988* imposes an obligation upon Australian government agencies to maintain personal records in accordance with eleven privacy principles that relate to matters such as the acquisition, storage and disclosure of personal information. A complaint about a breach of the privacy principles can be investigated by the Privacy Commissioner, who has power to make a determination providing a remedy, including the payment of compensation.

3.20 The *Human Rights and Equal Opportunity Commission Act 1986* gives domestic recognition to the human rights standards contained in the International Covenant on Civil and Political Rights (ICCPR). A complaint that an Australian government agency is in breach of one of those standards can be the subject of an investigation by the Human Rights Commissioner and the

President of the Commission. The standards cover matters such as freedom of speech, freedom of assembly and freedom of conscience.

3.21 The *Freedom of Information Act 1982* provides members of the public with a right of access to documents held by Australian government agencies. This right of access is subject to exemptions specified in the Act to protect confidentiality in areas such as law enforcement and on grounds of national security.

CHAPTER 4

OVERVIEW OF GOVERNMENT POLICY

4.1 The initial impetus for security legislation in Australia came as the response of Australian governments to the 11 September 2001 terrorist attacks in New York and Washington.

4.2 On 26 September 2001 the Attorney-General, the Hon. Daryl Williams, AM, QC, announced the establishment of a committee to review the implications for Australia's security and counter-terrorism arrangements.

4.3 The committee was chaired by the Secretary of the Attorney-General's Department, Mr Robert Cornall, and included representatives from a number of government departments and agencies. On 2 October 2001 Cabinet announced its approval of the preparation of legislative reforms as a result of recommendations of this committee. The announced reforms included:

- amendment of the warranting regime under which ASIO exercises special powers
- creation of a new offence of terrorism and an offence related to the preparation for, or planning of, terrorist acts, and
- amendment of the *Proceeds of Crime Act 1987* to allow terrorist property to be frozen and seized.

4.4 At a special COAG meeting on 5 April 2002, the Prime Minister and state and territory leaders agreed "that a new national framework is needed to meet the new challenges of combating terrorism and multi-jurisdictional crime.

The attacks in the United States on 11 September last year indicated that previous assumptions about the nature of potential scale of terrorism are no longer valid.’⁵

4.5 Governments have seen the threat as continuing and at the COAG meeting in September 2005:

‘ ... considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia’s counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism 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.’⁶

4.6 An overview of current government policy on counter-terrorism gives context to this report. On 21 January 2006, the Federal Attorney-General, Mr Philip Ruddock, MP, gave a speech that he described as an ‘up-date on counter-terrorism’. The Attorney-General said that the bombings in London in July 2005 demonstrated that despite long experience of terror from the IRA and high levels of vigilance, the British authorities could still not detect the attack in time to prevent it. He went on to say that Australia’s response to the increased terror threat must not be narrowly focused on better security—vital though that is. We must also work to support and reinforce the other pillars on which our community life is based—tolerance, diversity and prosperity. In the course of discussing counter-terrorism, the Attorney-General referred to the program called ‘Working Together to Manage Emergencies’, which offers

⁵ Council of Australian Governments’ Communique 5 April 2002. Full text of the Communique can be found at <<http://www.coag.gov.au/meetings/050402/index.htm>>

⁶ Council of Australian Governments’ Special Meeting on Counter-Terrorism 27 September 2005. Full text of the Communique can be found at <<http://www.coag.gov.au/meetings/270905/index.htm>>

grants to local government and community organisations for emergency management projects. The Attorney-General stated that the community had responded strongly through more than 71,000 calls to the National Security Hotline since it was established in December 2002. About 37,000 of these calls had provided authorities with useful information that had increased understanding of the threats facing Australia. The AFP Commissioner, Mick Keelty, APM, had confirmed that information received through the hotline had been used in a number of counter-terrorism investigations.

4.7 On the subject of counter-terrorism laws, the Attorney-General said that as part of the government's efforts to strengthen Australia's counter-terrorism regime it had improved the legal framework. He described the London attacks in 2005 as a chilling reminder of what might occur should a terrorist attack occur in Australia. Fifty-two people were killed including a Melbourne man. The terrorists were indiscriminate in their killing. The fifty-two victims came from many different countries and religions. Terrorists made no allowance for race, religion or nationality.

4.8 The Attorney-General stated his determination that all Australians should be kept safe but that it was also vital that the important human rights and values, such as fairness and tolerance, that gave Australian society the claim to be one of the world's leading democracies, were not thrown away. Accordingly, the Australian security legislation was directed towards the twin goals of security and justice. It was a flawed assumption that society can only have either strong national security or civil liberty, not both. The Attorney-

General referred to the Universal Declaration of Human Rights and ICCPR which are binding on Australia.

4.9 Human rights are universal, equal and indivisible but many rights are subject to qualification. In some circumstances, nations derogate from some individual rights and freedoms in times of emergency. The Attorney-General stated that the government had not needed to do this in the course of implementing any of its counter-terrorism measures. The formulation of particular individual rights in the human rights conventions recognised that these rights were not absolute and must be balanced against considerations such as national security and the fundamental rights of others. The Attorney-General referred to Article 12 of the ICCPR, which balances the right of liberty of movement with restrictions necessary to protect national security, and Article 9, which provides for freedom from arbitrary detention but again with the important caveat that no one shall be deprived of liberty except on such grounds and in accordance with such procedures as are established by law.

4.10 The Attorney-General emphasised that the government was extremely conscious of maintaining the balance between strong national security and respecting civil liberties. Australia's national counter-terrorism policies must embody the democratic values that Australians seek to protect.

4.11 The Attorney-General went on to refer to reviews of legislation noting that other countries have learnt the hard way that it is difficult to play legislative catch-up after a terrorist attack occurs.

4.12 Later in his address, the Attorney-General said that it must be made clear that in formulating new anti-terrorism laws, the government was not targeting any particular religion or nationality. 'We are targeting terrorists—whatever their faith and whatever their race.'⁷ Reference was made to the statement of principles agreed at the Prime Minister's summit with Muslim and Arab community leaders in August 2005, which said: 'In confronting the challenge of terrorism ... [we] commit ourselves to work together with all Australians to produce positive outcomes which protect Australia against violence, terrorism and intolerance and promote our common goals of harmony and understanding.'⁸

4.13 The Attorney-General referred to the request by the heads of all Australian governments to the Ministerial Council on Immigration and Multicultural Affairs to work closely with Muslim leaders to develop a national action plan to build on these principles. The plan would engage the Muslim and Arab communities in a genuinely collaborative approach with governments, security and law enforcement agencies, media and community organisations.

4.14 The Attorney-General concluded by emphasising that the issues of counter-terrorism were under constant review at the highest levels of government in Australia and that recent issues had not been taken lightly.

⁷Ruddock, P (Attorney-General), *A Safe and Secure Australia: an update on Counter-terrorism*, speech at Manly Pacific Hotel Sydney 21 January 2006, . Full transcript of the speech can be found on the Attorney-General's website <<http://www.ag.gov.au/agd/www/MinisterRuddockhome.nsf>>

⁸Howard, J (Prime-Minister). *Meeting with Islamic Community Leaders, Statement of Principles*, media release 23 August 2005, Parliament House, Canberra. Full text of the media release can be found at <http://www.pm.gov.au/news/media_releases/media_Release1524.html>

Terrorism was arguably the greatest threat this nation had faced in many decades, and perhaps the most insidious and complex threat Australia had ever faced. He said that the government had made a conscious effort to consider the human rights and civil liberties implications for all Australians at every stage of the development of the legislative and other proposals.

4.15 The SLRC is conscious of the principles agreed by COAG as summarily described above. In this context the SLRC has to examine the operation, effectiveness and implications of the legislative changes introduced by government to give effect to these aims and principles.

CHAPTER 5

SAFEGUARDING HUMAN RIGHTS IN THE FACE OF TERRORISM

The balance between human rights and national security

5.1 The Human Rights and Equal Opportunity Commission (HREOC) asked the SLRC to accept that human rights law is not an optional extra during times of concern about international terrorism. Many other submissions took up the same theme. These submissions argued that respect for human rights is not antithetical to the protection of national security, necessitating a compromise or trade-off. HREOC further noted that international human rights law already strikes a balance between security interests and rights considered to be fundamental to the person. International human rights law allows for protective actions to be taken by States but demands that those actions remain within carefully crafted limits—most notably proportionality. It is acknowledged that concerns about the heightened risks of domestic terrorist attacks are plainly legitimate and require innovative measures on the part of all responsible States, including Australia. However, as the United Nations (UN) Secretary-General has stated, it is crucial that those measures are consistent with international human rights law to ensure that, in an attempt to safeguard our society, we do not give away the very rights that are essential to the maintenance of the rule of law, one of the fundamental principles of a functioning democracy.

5.2 The history of law and government around the world is replete with examples of official exercise of power without adequate regard to the effect on the civil rights of members of the public. Though those examples that occur in Australia are arguably individual and isolated, they are nevertheless real. It is not unfair to observe that, at times, submissions made by government agencies in favour of the current legislation did not adequately acknowledge that risk. Those submissions, while emphasising the importance of human rights, at times passed over the invasive effect of particular legislation on human rights, and said little about the particular steps that might be taken by their agencies to alleviate such effects. In the case of Commonwealth security agencies, there is at present the overriding and independent investigative role of the external oversight agencies described earlier in this report.

5.3 The submissions received, and the varying opinions expressed in them, demonstrate the difficulties encountered in attempting to strike an appropriate balance between competing interests. There is, on the one hand, the need to protect from terrorist attacks Australian people who are going about their lawful business. On the other hand, there is the need to uphold the human rights of all people, including those who for any reason are suspected of engaging in, or planning, or preparing to engage in, prohibited activity. Striking this balance is an essential challenge to preserving the cherished traditions of Australian society.

5.4 The rule of law is one of the fundamental principles that democratic people the world over are defending against those minded to engage in terrorist activity. In 1943 Chief Justice Latham remarked⁹ that it was easy for judges of constitutional courts to accord basic rights to popular majorities. The real test came when they were asked to accord the same rights to unpopular minorities and individuals. More recently the President of the Supreme Court of Israel has said: 'Regarding the State's struggle against the terror that rises up against it, we are convinced that at the end of the day, the struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security.'¹⁰ The President acknowledged that sometimes this meant that a democracy must fight with one hand tied behind its back, but pointed out that a democracy still has the upper hand from the strength of spirit engendered by the rule of law and individual liberties.

5.5 The tension between civil liberty and national security is considerable and perhaps more marked than ever if only for the reason that human rights are now better understood and recognised, not only nationally but internationally. Moreover, the concern has extended beyond such basic human rights as freedom from arbitrary arrest or detention to freedom of information, freedom of expression and freedom of thought.

5.6 On the occasion of Human Rights Day, 10 December 2001, seventeen independent experts of the United Nations Commission on Human Rights

⁹ *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 124

¹¹ *Bit Sourik Village Council v Government of Israel* (unreported) (HCJ 2056/04) 2 May 2004 cited by Kirby J in the Robert Schuman Lecture at ANU on 11 November 2004

reminded States of their obligation under international law to uphold human rights and fundamental freedoms in the aftermath of the tragic events of 11 September 2001. Examples of what were described as fundamental rights were the right to liberty and security of persons, the right to be free from arbitrary arrest, the presumption of innocence, the right to a fair trial, the right to freedom of opinion, expression and assembling, and the right to seek asylum. Many of those rights are directly or indirectly affected by the amending legislation that the SLRC is called upon to review.

The nature of terrorism

5.7 In the course of a paper given on 20 July 2005, Dr Sev Ozdowski, OAM, the then Australian Human Rights Commissioner, said:

‘Terrorist attacks against civilian targets constitute the gravest possible assault on human rights imaginable. Acts of terrorism are conceived and perpetrated by a few with the deliberate intent of causing indiscriminate death and serious injury to their victims – whoever they happen to be – [to support] some often undefined and unspecified cause.

It is important, however, to note that such arbitrary and unjustifiable acts not only violate the human rights of their victims, but also circumvent both the democratic principles and the values established by the various international human rights conventions – the very essence of the society against which they are perpetrated.’¹¹

5.8 In a later paper given on 2 December 2005, Dr Ozdowski said that contemporary acts of terrorism were premised on an entirely unsustainable concept: namely the total subjugation of non-believers to a specific ‘religio-

¹¹ Dr Sev Ozdowski OAM (Human Rights Commissioner and Acting Disability Discrimination Commissioner) ‘*Human Rights in Australia. Their Protection and Resolution through law*’ speech at the Chartered Institute of Arbitrators and Victorian Bar Seminar, Owen Dixon Chambers, Melbourne 20 July 2005. Full text of the speech can be found at www.hreoc.gov.au/speeches/human_rights/victorian_bar.html

political' ideology¹². Dr Ozdowski pointed out that the proposed curtailing of some personal freedoms, explicit in the government's response to the advent of global terror, was broadly something we accept as necessary. Further, many of the proposals to counteract global terror sought to be preventative in nature, to forestall an attack.

5.9 After an inquiry into the United Kingdom legislation against terrorism, Lord Lloyd of Berwick, in his report in 1996, defined terrorism as the use of serious violence for political ends, including any use of violence for the purpose of putting the public or any section of the public in fear¹³. Lord Lloyd said that this had called for new procedures conferring extended powers on the police, which in turn gave rise to the greatest concern on the part of those who campaign for human rights. The public perception was of a crime worse than ordinary crime, which gave rise to horror and revulsion and was recognised as an attack on society as a whole. Thus it is argued that the peculiar nature of the terrorist crime should in some way be reflected in the criminal law.

5.10 The submissions made and the SLRC's study of the legislation under review and its amendments raise particular, important concerns about the operation and effectiveness of several definitions and sections in Part 5.3. The SLRC proposes to deal first with these concerns.

¹² Dr Sev Ozdowski OAM (Human Rights Commissioner) '*Democracy, Human Rights and Social Issues*' speech to the Human Rights, Mental Health and Anti-Terror Laws in Australia Conference, Mitchell Theatre, Sydney Mechanics School of Arts on 2 December 2005. Full text of the speech can be found at http://hreoc.gov.au/speeches/human_rights/20051202_democracy_human_rights_and_social_issues.html

¹³ Inquiry into Legislation against Terrorism CM 3420, October 1996 (Vol's 1 & 2)

The Australian approach to defining terrorism

5.11 United Nations Security Council Resolution 1373 required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts. Resolution 1373 is formally binding on Australia under Chapter VII of the United Nations Charter. Part 5.3 of the Criminal Code was part of the legislation that, with the agreement of the States and Territories, together represented a comprehensive national approach to counter-terrorism, designed to ensure that there were criminal offences to deal with terrorism and membership of, or association with, terrorist organisations.

5.12 In Australia the counter-terrorism legislation addressed perceived 'gaps' in the existing legislative framework, and focused on criminalising terrorist acts and attacking terrorist organisations and networks. In written submissions to the SLRC, the Commonwealth DPP submitted that 'traditional' offences such as murder, kidnapping, aiding and abetting, attempt, incitement, grievous bodily harm, criminal damage, arson, conspiracy, treason and offence provisions dealing with unlawful associations were inadequate to deal with many offences specific to terrorist activities. Specific counter-terrorism legislation was and is needed particularly in relation to offences such as providing training to or receiving training from a terrorist organisation; directing the activities of a terrorist organisation; recruiting for a terrorist organisation; providing support to a terrorist organisation; and possessing things connected

with a terrorist act. The Commonwealth DPP submitted that the laws concerning conspiracy, attempt, incitement and aiding and abetting can be problematic to prosecute in the context of some of the factual scenarios encountered—many ancillary offences can only be proved if they attach to a specific primary offence. The nature of terrorism is such that the individuals involved in terrorist activities may not know the specific details of the terrorist act contemplated. Another important distinction from the traditional offences is that counter-terrorism offences are directed at establishing liability before the commission of a terrorist act. Traditional offences generally relate to acts that have already been completed.

5.13 In summary, to be effective and acceptable, new counter-terrorism legislation must meet a number of objectives:

- the measures must operate Australia-wide and have both a constitutional and operational effectiveness
- they must provide for preventative measures outside the operation of the usual criminal law offences
- the terrorist character of an act must be an element of any criminal law offence, and
- the penalties must reflect the seriousness of the terrorist offences.

5.14 The scheme of the legislation uses two critical definitions to meet the above objectives. Divisions 100 to 102 of Part 5.3 of the Code are based on two constructs: the definition of 'terrorist act' in section 100.1 and the definition of 'terrorist organisation' in section 102.1. Engaging in a terrorist act, or in an

activity connected in various ways with a terrorist act, is an essential feature of the offences described under the heading 'Terrorism' in the five sections of Division 101. Acts by persons related by various means to a terrorist organisation are the essential features of offences enumerated in Subdivision B of Division 102, headed 'Terrorist organisations'. In due course it will be necessary to return to consider in more detail the language used to describe these offences.

CHAPTER 6

DIVISION 101 – TERRORISM

6.1 In its submissions, HREOC points out that the criminal sanctions in Division 101, based on the concept of a terrorist act, and 102 Subdivision B, based on the existence of a terrorist organisation, interfere substantially with the right to freedom of expression under Article 19 of the ICCPR and the right to freedom of association under Article 22 of the ICCPR. Article 19, paragraph 2, states what will be included in the right to freedom of expression and, in paragraph 3, acknowledges that the exercise of the rights provided for in paragraph 2 carries with it special duties and responsibilities.

‘It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) for respect of the rights or reputations of others;
- (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.’

6.2 Similarly, Article 22, paragraph 1 describes what is included in the right to freedom of association. Paragraph 2 states that no restrictions may be placed on the exercise of this right ‘other than those which are prescribed by law and which are necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.’

6.3 Thus, it can be accepted that neither the right to freedom of expression nor the right to freedom of association is absolute. The rights may be limited

to the extent that the limitations are provided or prescribed by law and proportionate and necessary to achieve a legitimate end. Speaking of the two slightly different expressions 'provided by law' in Article 19(3) and 'prescribed by law' in Article 22(2), the United Nations Human Rights Committee (HRC) has said that the limiting measure must be sufficiently delineated in an accessible law. Laws should not be so vague as to permit too much discretion and unpredictability in their implementation. In the context of permissible restrictions on the right to freedom of movement, the HRC has stated that laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Therefore, HREOC says that a provision conferring an unfettered discretion on the executive may constitute an arbitrary interference with ICCPR rights. The restriction will not constitute a restriction provided or prescribed by law. In support of this proposition, various overseas human rights cases are cited.

6.4 So far as proportionality is concerned, HRC requires that a particular limiting measure must be the least restrictive means of achieving the relevant purpose. This is to ensure that the restriction does not jeopardise the right itself. Australia has no charter of human rights. For the most part, the protection of human rights depends on the Constitution, the common law or specific legislation, federal or state.

The meaning of ‘terrorist act’

6.5 ‘Terrorist act’ is defined in section 100.1(1) as meaning an action or threat of action that meets conditions described in paragraphs (a), (b) and (c). Under paragraph (a) the action must fall within subsection (2) of section 100.1 and **not** fall within subsection (3) of section 100.1. Paragraph (b) requires that the action is done or the threat is made ‘with the intention of advancing a political, religious or ideological cause’. Paragraph (c) requires that the action is done or the threat is made with the intention of:

- (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign countries, or of part of a State, Territory or foreign country; or
- (ii) intimidating the public or a section of the public.

6.6 Subsection (2) provides that ‘action’ falls within the subsection if it meets any one of several criteria set out in paragraphs (a) – (f): for example, under paragraph (a) if the action ‘causes serious harm that is physical harm to a person’ or paragraph (b) ‘causes serious damage to property’ or paragraph (c) ‘causes a person’s death’.

6.7 Subsection (3) provides that ‘action’ falls within that subsection if it:

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

6.8 The Attorney-General's Department submitted that paragraph 2(a) should be amended to include serious psychological harm. In the Dictionary to the Criminal Code, 'harm' is defined as meaning 'physical harm or harm to a person's mental health ...'. The SLRC agrees that paragraph 2(a) should extend to include serious psychological harm. It can be as great a concern as physical harm. In light of the Dictionary definition of 'harm' this is best achieved by deleting the words 'harm that is physical' from paragraph 2(a). Consistently with this, subsection 3(b)(i) should be amended by deleting the same words.

6.9 The SLRC recommends that the words 'harm that is physical' be deleted from paragraphs 2(a) and 3(b)(i) in the definition of 'terrorist act' so that the definition of harm in the Dictionary to the Criminal Code applies, and the paragraphs extend to cover serious harm to a person's mental health.

Threat of action

6.10 The inclusion of the phrase 'threat of action' in the definition of 'terrorist act' causes at least uncertainty. While it is true that in the criminal law the threat to inflict unlawful force on another can amount to an assault, the complexity of the definition of 'terrorist act' by reference to the nature of a particular action is made greater by the attempt to embrace 'threat of action'. It is unnecessary to do so. A threat usually means a communicated intention to inflict some kind of harm on the person or property of another, with the intention to intimidate the other person, to overcome their will, to unsettle their

mind, or to restrain their freedom of action. Communication may be oral, in writing or evinced by conduct. 'Threat of action' in the definition of 'terrorist act' should be understood as a threat communicated with the intentions, described in paragraphs (b) and (c), to engage in action which, if done, falls within subsection (2) and not within subsection (3) of section 100.1. It does not matter where or when the threat was made or to whom it was communicated. The nature of the offence and its ingredients can be as certainly defined as the common law offence of a threat to kill a person or to cause that person harm or injury, which itself can be an assault.¹⁴

6.11 The difficulty that arises from the inclusion of the offence 'threat of action' in the definition of 'terrorist act' is highlighted in the written submissions of the Western Australian (WA) Government which pointed out that if, for example, a terrorist made a bomb threat with the intention of advancing an ideological cause and intimidating the public, the threat would be a 'terrorist act' by definition. However, paragraph (a) requires that the action falls within subsection (2)—for example, that it 'causes serious harm that is physical harm to a person'. Subsection (2) speaks, like paragraph (a), of 'action', ie the bombing itself, falling within the subsection. None of the paragraphs (a) to (f) of section 100.1(2) sits comfortably with a prospective bombing. If the action is not 'done' even though the threat is made, subsection (2) could not apply. Another example is given. A terrorist act will have occurred whether as the making of a threat of action or as the doing of an action, which (the action not the threat) 'causes serious harm that is physical harm to a person'. The

¹⁴ S Bronitt and B McSherry, *Principles of criminal law*, 2nd edn, Lawbook Co, 2005, 537–38.

submission raises three questions. Does this mean that the threat will be a 'terrorist act' only if the 'action' takes place and harm eventuates? Does it mean that 'causes' could be read as equivalent to 'is of such a nature as is likely to cause'? Or is it really devoid of meaning? These difficulties can be avoided by making 'threat of action' a separate offence specified in Division 101, 'Terrorism'. Compare section 147.2 of the Criminal Code, discussed by Wood CJ at CL in *R v Mallah*¹⁵.

6.12 The SLRC considers that problems in the interpretation of the definition of 'terrorist act' should be avoided. They are likely to make prosecutions prolonged and more difficult, and increase the difficulties members of the public have in understanding the legislation. Presumably the intention of the legislation is to make a threat of a terrorist act an offence, provided the threat is made with the intentions described in paragraphs (b) and (c) and the threat of action itself or the threatened action, if done, satisfied at least one of the paragraphs in subsection (2), or, if not done, was of such a nature as to have been likely, if done, to satisfy one of the paragraphs in subsection (2). It would not be the legislative intention to make a threat an offence if the threat or threatened action fell within subsection (3) of section 100.1.

6.13 The reference to 'threat of action' and other references to 'threat' should be deleted from the definition of 'terrorist act'. The definition will then be limited to 'action' that meets the conditions described. An offence that can be described as 'threat of action' or 'threat to commit a terrorist act' should be

¹⁵ (unreported) Supreme Court of New South Wales, 21 April 2005 particularly at paragraphs 42 and 43

inserted into Division 101. The offence should be defined so as to make it plain:

- (a) That the threat itself or the threatened action, if done, was made or was done or, if not done, would have been done, with the intentions described in paragraph (b) and (c) of the definition of ‘terrorist act’ and
- (b) That the threat itself or the threatened action, if done, had, or, if not done, would have had, a result falling within subsection 100.1(2), and
- (c) Neither the threat nor the action threatened, whether the threatened action was done or not done, fell within subsection 100.1(3) of the Criminal Code.’

6.14 The SLRC recommends that the reference to ‘threat of action’ and other references to ‘threat’ be removed from the definition of ‘terrorist act’ in section 100.1(1).

6.15 The SLRC recommends that an offence of ‘threat of action’ or ‘threat to commit a terrorist act’ be included in Division 101.

6.16 The description should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur.

The retention of paragraph (b) of the definition of ‘terrorist act’

6.17 Gilbert & Tobin Centre of Public Law submitted that ‘after comparing the definition (of “terrorist act”) to other definitions in national legal systems such as the United States and Canada, it has been concluded that the

Australian definition is one of the best in the common law world in capturing the elusive qualities that make terrorism distinctive from other forms of violence' requiring no further amendment at this time¹⁶. The writers did not address themselves to the inclusion of the expression 'threat of action'.

6.18 Submissions were directed to the inclusion of paragraph (b) in the definition of 'terrorist act', that is to say the requirement that 'the action is done or the threat is made with the intention of advancing a political, religious or ideological cause'. Both the Commonwealth DPP and the Attorney-General's Department submitted that this requirement singled out criminal acts *motivated* by politics, religion or ideology, to the exclusion of the same acts with a different motive, such as greed, revenge or hate. It was said not to be in the public interest for a person to avoid criminal liability by showing that his or her acts were motivated by something other than politics, religion or ideology. The Commonwealth DPP asserts that where the act is one such as destroying a building or killing people, there seems little sense in specifically dealing with the case as a terrorist offence if there was an intention of advancing a political, religious or ideological cause but not if there was only a desire for revenge. Both, it was submitted, should be covered by the legislation. It would remain necessary, in order to prove the offence, that the defendant had the intention of coercing or influencing by intimidation a government or intimidating the public or a section of the public.

¹⁶ Gilbert and Tobin Centre of Public Law, *Submission 25*.

6.19 From a different perspective the Federation of Community Legal Centres (Vic) (FCLC (Vic)), which is the peak body for forty-nine community legal centres across Victoria, submitted that the definition of ‘terrorist act’ is overly broad, particularly in that it includes a mere threat, and goes beyond accepted notions of what constitutes an act of terrorism, criminalises politically, religiously and ideologically motivated acts, and is thereby prone to discriminatory application and application to suppress political dissent. The exceptions relating to protest, advocacy, dissent and industrial action were said to be qualified.

6.20 The submission of the WA Government did not support the submission of the Attorney-General’s Department that the definition of ‘terrorist act’ was overly complex in including political, religious and ideological intention as an ingredient of the offence. The WA Government submitted that, while that intention may be difficult to characterise, simply to dispense with the criteria would have the effect of considerably broadening the range of circumstances that would fall within the concept of a ‘terrorist act’. The result would be entirely at odds with what was a very deliberate decision by COAG to ensure that, having regard to the consequences of conduct amounting to a ‘terrorist act’, the concept would be a relatively narrow one—and one that was designed to deal specifically with ‘terrorism’ of the kind seen in New York and Bali.

6.21 To an enquiry from the SLRC, HREOC responded:

‘There appears to be little international consensus on whether ‘terrorism’ should be defined by its purpose as well as the nature of its

acts. For instance, the current draft definition of “terrorism” in the draft UN Draft Comprehensive Convention on International Terrorism does not require an intention to advance a political cause. The draft speaks of a purpose to intimidate a population or to compel a government or an international organisation to do or abstain from doing an act. This mirrors the position under the USA Patriot Act, but it is not the position under the UK *Terrorism Act 2000* (on which Australia’s legislation is based, being in almost identical terms), the New Zealand *Terrorism Suppression Act 2002*, the Canadian Criminal Code and the South African *Protection of Democracy Against Terrorist and Related Activities Act 2003*. Each of those laws requires the prosecution to establish a political intention.

Many academics argue that political (or ideological) intention is an “inherent aspect of terrorism”. For instance, Dr Ben Saul has argued that there is plainly a moral difference in prosecuting a person for “terrorism” rather than murder or hijacking. A distinctive feature of terrorism is the use of political violence ... If terrorism undermines the State and the political process, the definition should require proof of a political motive (religious, social, racial or ideological). Motive elements distinguish terrorism from private violence and ordinary crimes which also terrify (such as armed robbery, rape or mass murder).¹⁷

6.22 HREOC pointed out that neither the explanatory memorandum to the Act nor Second Reading Speech specifically referred to the rationale for defining ‘terrorist act’ in this way. It is, however, reasonable to infer from the very inclusion of paragraph (b) that Parliament intended that the definition of ‘terrorist act’ reflect contemporary use of that term in political and public discourse to stigmatise certain political acts, rather than actions motivated by non-political reasons such as greed or revenge. In HREOC’s view, the broad

¹⁷ Human Rights and Equal Opportunities Commission, *Submission 11(b)*.

element of intention to coerce or intimidate a government in paragraph (c) of the definition of ‘terrorist act’ does not capture that political intention sufficiently. Consequently, HREOC considers that it is appropriate to maintain paragraph (b). If paragraph (b) were deleted from the definition, HREOC would have real concerns that the resultant breadth of the definition would render Part 5.3 of the Criminal Code a disproportionate limitation on the rights guaranteed by the ICCPR, in particular Articles 19 and 22, which are discussed elsewhere in this report. This is especially so in view of the penalties attaching to terrorism offences under Part 5.3.

6.23 The SLRC accepts that paragraph (b) in section 100.1(1) appropriately emphasises a publicly understood quality of terrorism, and for that reason should remain as part of the definition of ‘terrorist act’. Accordingly, the SLRC does not recommend that paragraph (b) be deleted from the definition of ‘terrorist act’. Furthermore, the deletion of paragraph (b) would be contrary to what was intended and agreed by the various Australian governments about the definition of ‘terrorist act’. The SLRC agrees that paragraph (b) is the specific and narrowing provision in defining the scope of the ‘terrorist act’. It supplements other provisions in the Commonwealth and state/territory criminal law that deal with other forms of violent behaviour.

The retention of subsection (3) of the definition of ‘terrorist act’

6.24 The Attorney-General’s Department submitted that subsection (3) should be omitted from the definition of ‘terrorist act’ to achieve greater clarity. The subsection was said to be otiose having regard to the terms of subsection

(2). Sub-section (3) expresses what many critics of the legislation would regard as an essential protection of fundamental rights such as the right of free speech. Its omission in those circumstances is unthinkable. The SLRC is of the view that to ensure the protection described in subsection (3), the subsection should remain.

Sections 101.2, 101.4, 101.5 and 101.6

6.25 These sections specified offences of providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts or other acts done in preparation for, or planning for, terrorist acts. The FCLC (Vic) is concerned about the broad definition of 'terrorist act', which it says inordinately increases the range of conduct covered by the terrorism offences. The FCLC (Vic) argues that, as the definition of 'terrorist act' includes a threat of politically, religiously or ideologically motivated acts, there is not necessarily a nexus between the offences and acts of violence. Generally speaking, the legislation is silent on what kind of nexus there need be between the offending behaviour and a terrorist act. For example, the offence of doing an act in preparation for a terrorist act does not specify what kind of connection there must be between the preparatory act and the terrorist act. 'An act done in preparation' (see section 101.6) is a vague term and may encompass a wide array of behaviour, much of which would only be indirectly linked to the terrorist act in question. This gives rise to the possibility that even tenuously linked preparatory acts may be subject to prosecution. Furthermore, there may be no nexus between the offence and an actual act of politically,

religiously or ideologically motivated violence. The offence may include doing an act that is simply preparatory to making a threat of politically, religiously or ideologically motivated violence. It is submitted that there should be a close nexus between the offences and acts of terrorist violence. The SLRC has proposed an amendment to the definition of 'terrorist act' to exclude 'threat of action' which may lessen the particular concern of an act that is simply preparatory to making a threat.

6.26 The breadth of some of these offences listed in the heading is said to be increased by the vagueness of the terms used in the offences that relate to providing or receiving training, possessing things and collecting or making documents (sections 101.2, 101.4 and 101.5). The offending actions must be 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act'. It is said to be unclear what might constitute such a connection or the degree of connection required.

6.27 The title heading in section 101.5 of the offence of collecting or making documents suggests, so it is said, that in that case the collection or production of documents must be 'likely to facilitate terrorist acts'. This indication, however, is not contained in the actual statutory provision and so the degree of connection required ultimately, it is submitted, remains unclear. With respect to this particular offence it is also unclear what might constitute 'collection' of documents. The FCLC (Vic) is concerned about the expansive nature of these offences as this widens the class of people that may be liable to prosecution, and also has the effect of making this particular part of the

legislation a disproportionate response to the threat of terrorism in Australia. The ambiguous terms used to describe each offence simply heightens this problem. Also, it is claimed that the breadth of the offences impacts on ASIO's special powers, which relate to the gathering of intelligence in relation to terrorism offences.

6.28 The SLRC does not agree that these provisions are as broad or uncertain as claimed. The SLRC also notes that so far as sections 101.2, 101.3 and 101.4 are concerned, the prosecution has to show beyond reasonable doubt that the defendant either knew, or was reckless as to, the existence of the connection specified in the section. Sections 101.5 and 101.6 specify the offence of engaging in a terrorist act or acting in preparation for or planning a terrorist act. Subject to what is said later in this report about the 'the' to 'a' changes to the sections, the SLRC is satisfied that the offences are described with sufficient certainty. Having taken account of the FCLC (VIC) submissions and other submissions to like effect, the SLRC does not recommend any change to the legislation based upon them beyond those that are recommended elsewhere in this report.

CHAPTER 7

DIVISION 102 – TERRORIST ORGANISATIONS

7.1 After an inquiry into the United Kingdom legislation against terrorism, Lord Lloyd of Berwick, in his report in 1996, said that the ‘terrorist organisation’ is a ‘key concept ... in terms of *permanent* counter-terrorism legislation.’¹⁸ He suggested that proscription has a twofold purpose. ‘First it will furnish a conclusive presumption that an organisation which is for the time being proscribed is a terrorist organisation. This will facilitate the burden of proof in terrorist cases. Second proscription will be the starting point for the creation of a number of fundraising and other offences, especially fundraising for terrorism overseas.’¹⁹ Lord Lloyd said that the primary purpose of proscription was ‘to give legislative expression to public revulsion and reassurance that severe measures were being taken.’²⁰ Thus, proscription has been viewed as ‘essentially a cosmetic part’ of anti-terrorism laws.

The definition of ‘terrorist organisation’

7.2 Terrorist organisations are defined and regulated under Division 102 of the Criminal Code. Section 102.1, ‘Definitions’, in subsection (1), contains two descriptions of what ‘terrorist organisation’ means. The first is in paragraph (a). ‘Terrorist organisation’ means:

¹⁸ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, CM 3420 October 1996, Vol 1 p.29 and 30, Vol 2 p.57.

¹⁹ Ibid

²⁰ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, CM 3420 October 1996 Vol. 2, p. 57

- (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).

7.3 The second is found in paragraph (b) of the definition. 'Terrorist organisation' means:

- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

7.4 The meaning of 'fostering' and, even more, 'indirectly fostering', in paragraph (a) has caused concern. According to the Macquarie Dictionary, 'foster' means 'to promote the growth or development of; further, encourage'. The FCLC (Vic) and others submit that the definition is extremely expansive and may expose a very large number of organisations to being classed as terrorist organisations. A person may be prosecuted for recruiting to an organisation that, at some point, has simply indirectly fostered the doing of a terrorist act. The organisation may never itself have engaged in any act of terrorism. The legislative definition does not necessarily require that the 'fostering' concerned be intentional. The person involved may have been no more than reckless as to the fact that the organisation would fall under the definition of a 'terrorist organisation'. It is said not to be clear whose acts would be required to make an organisation fall within the definition.

7.5 The FCLC (Vic) draws attention to other issues of interpretation that could arise under paragraph (a). Who or what constitutes an 'organisation' for the purposes of paragraph (a): for example, when is a loose affiliation of people to be described as an organisation? In what circumstances are the

actions of an individual member of an organisation to be treated as 'preparing, planning, assisting in or fostering' activity by the organisation? What degree of intention is required, both of the members and of the organisation itself?

7.6 These issues of interpretation could be all the more challenging as a result of the inclusion of the qualifying phrase 'directly or indirectly' as an ingredient of the definition. Questions of degree arise under some of the other terminology in paragraph (a), and it is questionable whether 'directly or indirectly' adds to the definition or merely introduces further ambiguity.

7.7 The SLRC is aware that, at the time of writing, a number of people are being prosecuted for offences under the Criminal Code of which paragraph (a) forms a part. It is possible that the issues of interpretation to which the FCLC (Vic) has drawn attention will arise in those proceedings. With that in mind, the SLRC has decided not to make any recommendation for amendment of paragraph (a). However, it is an issue that may need consideration by government or the Parliament following court proceedings in which the scope of paragraph (a) and the difficulties of applying it are resolved or discussed.

7.8 Submissions have been put to the SLRC that paragraph (a) of the definition of 'terrorist organisation' should be deleted from the definition. The definition should be limited to paragraph (b), that is to say, an organisation that is specified by the regulations. This would give greater certainty to people dealing with an organisation. There are means for finding out if it is proscribed. If the organisation is not proscribed, it would not be a terrorist organisation for the purpose of the various offences in Subdivision B.

7.9 On the other hand, in a prosecution relying on establishing what is set out in paragraph (a), one potential source of unfairness is removed. The prosecution, in proving at the trial that the organisation is a terrorist organisation, must call evidence giving the defendant an opportunity to challenge the conclusion that there is an organisation and, if so, that the organisation is a terrorist organisation, and an opportunity to lead evidence to the contrary. If, on the other hand, the prosecution relies on paragraph (b) to prove that the organisation is a terrorist organisation, the character of the organisation as a terrorist organisation is proved by the tender of the regulation that specifies it as such. In *Evidence Act 1995* (Cth), Part 4.2, 'Judicial notice', section 143, 'Matters of law', subsection (1) provides:

Proof is not required about the provisions and coming into operation (in whole or in part) of:

- (a) an Act ...
- (b) a regulation, ... made, or purporting to be made under such an Act ...

7.10 Seemingly no challenge to the conclusion that the organisation is a terrorist organisation can be made at the trial.

7.11 The Commonwealth DPP's submission states:

'To prove knowledge of a circumstance, section 5.3 of the Code requires proof that a person is aware that the circumstance exists. In the DPP's view this pre-supposes that the circumstance actually exists and is not simply mistaken belief of the defendant. Accordingly, to prove knowledge on the part of the defendant it would be necessary not only to prove that the defendant was aware the organisation was engaged in preparing, planning, assisting in or fostering the doing of a

terrorist act but also that the organisation was *in fact* engaged in preparing, planning, assisting in or fostering the doing of a terrorist act. This results in the continued need for the prosecution to prove beyond reasonable doubt that the organisation in question was engaged in conduct falling within sub-paragraph (a) of the definition of a 'terrorist organisation' whether or not it is specified in the regulations. The effect of this is to negate any assistance that might otherwise have been provided by specifying an organisation in the regulations.'²¹

7.12 Thus, while proscription gives greater certainty to persons connected with the organisation, in practice the prosecution remains bound to prove beyond reasonable doubt that the organisation is a terrorist organisation.

7.13 The Commonwealth DPP also noted a potential difficulty with the current process of specifying terrorist organisations in the regulations, namely that, for an organisation to remain listed in the regulations, the Minister must continue to 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. If the Minister ceases to be so satisfied, the Minister must, by written notice published in the Gazette, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made. This raises the question of what 'terrorist act' the Minister is satisfied that an organisation is engaged in preparing, planning, assisting in or fostering the doing of at any given times. If no act can be pointed to at a particular time, the defendant may be entitled to challenge the

²¹ Commonwealth Director of Public Prosecutions *Submission 15*, p.10.

validity of the regulation being relied upon. Later in this report, the SLRC considers the ‘the’ to ‘a’ amendments²². These amendments were made to sections 102.1(1)(paragraph (a) of the definition of *terrorist organisation*) and (2).

7.14 The difficulties with paragraph (a) were highlighted in the submission to the SLRC from Australian Muslim Civil Rights Advocacy Network (AMCRAN). AMCRAN is a body dedicated to preventing the erosion of civil rights of all Australians and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals. It has produced a booklet, ‘*Terrorism laws: ASIO, the police and you*’, and has participated in parliamentary inquiries with respect to anti-terrorism laws in Australia. Among other things, AMCRAN conducts legal education sessions with members of the community about the effect and impact of the anti-terrorism laws.

7.15 Having referred to the alternative definition in paragraph (a), AMCRAN submitted:

‘While it is arguable that this bypasses the problem of broad executive discretion, in practice it is a dangerous provision. At the very least, the proscribed list of “terrorist organisations” as pronounced by the Attorney-General acts as notice to members of the public that certain organisations are “terrorist organisations” and therefore should be avoided. However, recent times have seen charges being laid ... against terrorist suspects ... as members of a “terrorist organisation”

²² see Chapter 11 p. 149.

that was not previously proscribed. This means that it is much easier for many innocent people to be caught up in the legislation. It also increases the onus on individuals to ensure that their friends and acquaintances have nothing to hide. It is easily conceivable that a person could visit a mosque or Islamic studies class without knowing very much about the teacher or other attendees, and unwittingly be caught up in a situation of being charged with being a member, or with associating with a member, of an organisation.

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.²³

7.16 While the SLRC does not necessarily agree with the consequences asserted, it accepts that this quotation reveals real fears held by at least some members of the Muslim and Arab communities about the operation of this legislation. The SLRC has earlier noted that it is premature to make any recommendation to reform paragraph (a) before the conclusion of current proceedings, in which issues of interpretation might arise. The SLRC later makes recommendations for reforming the process of proscription to which paragraph (b) applies. If those recommendations are accepted, it may be that

²³ AMRCAN *Submission 17(a)*.

paragraph (a) is not required. At this time, however, the SLRC recommends that paragraph (a) of the definition remain.

Regulatory specification, listing or proscription

7.17 The Senate Legal and Constitutional Legislation Committee (SLCLC), when considering the Bills for the five 2002 Acts, said (3.155) that the Attorney-General's proposed proscription power in the Security Bill was clearly one of the most significant issues of concern during the SLCLC's inquiry, and aroused the most vehement opposition²⁴. Among other things, the SLCLC pointed out that decisions on proscription were effectively unreviewable because of the limited scope of the available relief review under the ADJR Act, and the traditional reluctance of the courts to examine issues relating to national security.

7.18 To this time, nineteen organisations have been proscribed as terrorist organisations²⁵. Several have been re-listed after the expiry of the two year period (section 102.1(3)(c) of the Criminal Code). No applications have been made to the Attorney-General for de-listing (section 102(17)).

²⁴ Senate Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills, Chapter 3.155. The full report can be found at:

<http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/terrorism/report/report.pdf>

²⁵ See list at Annexure E.

CHAPTER 8

THE GROUNDS FOR PROSCRIPTION

Advocating of a terrorist act

8.1 The process for proscription of an organisation as a terrorist organisation under section 102.1(2) presents several problems. The first is the meaning of the expression 'advocates the doing of a terrorist act.' Pursuant to section 102.1(2), before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition, the Minister, that is to say the Attorney-General, must be satisfied on reasonable grounds that the organisation:

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

8.2 'Paragraph (b) enlarges the grounds upon which a regulatory specification, proscription or listing of an organisation as a terrorist organisation (see the definition of 'listed terrorist organisation' in section 100.1) may be made. If an organisation is not a proscribed terrorist organisation, in criminal proceedings for an offence under Division 102 subdivision B, the prosecution cannot establish that the relevant organisation is a terrorist organisation in reliance upon section 102.1(2)(b). The definition of 'terrorist organisation' in section 102.1(1) does not refer to an organisation which advocates the doing of a terrorist act.'

8.3 'Advocates' is defined in section 102.1(1A) where it is said that in Division 102 an organisation *advocates* the doing of a terrorist act if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) 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 (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

8.4 'Urges' is found as part of the description of sedition in section 80.2 of the Criminal Code (for example, 'urges another person to overthrow'). 'Advocates', 'counsels', 'praises' are not.

8.5 In the context of paragraph (c), 'a risk' means no more than 'a chance' that such praise might have the effect of leading a person to engage in a terrorist act. It is hard to imagine that anything less than 'a substantial risk' was intended, or that a Court would construe 'risk' to mean anything other than a 'substantial risk'. Regardless of this, the SLRC recommends that at least paragraph (c) should be amended by the insertion of 'substantial' before 'risk'.

8.6 Paragraph (c) of the definition of 'advocates' reflects a recommendation made by the SLCLC in its report into the *Anti-Terrorism Act (No 2) 2005* (Cth)

, which enacted the provision²⁶. HREOC submitted that the definition is extremely broad, first for not referring to a 'substantial risk' as recommended by the Senate Legal and Constitutional Committee, and second by not clearly setting out the circumstances in which advocacy will be attributed to an organisation. Hence, a person who is a member of an organisation will be held accountable for the actions or views expressed by other members of that organisation. The point is made that, under the definition, a person who is a member of a group (which could be any company or club) could be liable for a derivative offence (such as membership) 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. While not convinced that courts will take such an expansive view of when an 'organisation' could be said to have praised the doing of a terrorist, the SLRC agrees that there is nonetheless considerable uncertainty, and potentially a broad reach, in what conduct could bring an organisation within the scope of paragraph (c).

8.7 The SLCLC in its report referred to a suggestion by AMCRAN that possible criteria for proscription could include, for example, that the statements advocating terrorism are made by the acknowledged leader of the organisation; that the statements advocating terrorism are made on official material distributed or speeches given by the leader or organisation; and the statements are made on multiple occasions. On the other hand, the Attorney-General's Department submitted to the SLRC that such matters would be

²⁶ A full copy of the report and submissions received can be found at http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/index.htm

considered in any case before an organisation could be listed, and that single statements by individual members would be unlikely to be attributed to the organisation as a whole.

8.8 In their submission, Gilbert & Tobin Centre of Public Law said that section 102.1(1A)(c), in defining ‘advocates’, indicates an intention to cover indirect incitement of terrorism or statements that, in a very generalized or abstract way, somehow support, justify or condone terrorism. The effect of proscribing an organisation on this basis has serious consequences under the accompanying criminal provisions. Individuals, be they either a member (section 102.3) or an associate (section 102.8), could be prosecuted merely because someone in their organisation praised terrorism—even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the person praising terrorism did not intend to cause terrorism. This is described as:

‘... an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of their associates beyond their control. While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism. It is well accepted that speech which directly incites a specific crime may be prosecuted as incitement. It is quite another matter to prosecute a third person for the statements of another, even more so when such statements need not be directly and specifically connected to any actual offence.’²⁷

²⁷ Gilbert & Tobin Centre for Public Law *Submission 25*, p.5.

8.9 Gilbert & Tobin Centre of Public Law recommend, at the very least, that section 102.1(1A) of the Criminal Code should be amended by the deletion of subsection (c).

8.10 The SLRC accepts that paragraph (c) could lead to a proscription of an organisation which was in no way involved in terrorism because a person identified as connected with the organisation praises a terrorist act, although that person had no intention to provoke a terrorist act. The consequence could be a heavy penalty imposed on a member innocent of any connection with terrorism. Such legislation, understandably, causes great concern, not only to members of the Muslim and Arab communities. For the reasons set out in the submissions from HREOC, AMCRAN, Gilbert & Tobin Centre of Public Law and others, **the SLRC recommends that paragraph (c) of section 102.1(1A) be omitted from the definition of ‘advocates’.**

8.11 If paragraph (c) is not omitted from the definition, the SLRC recommends that ‘risk’ should be amended to read ‘substantial risk’

Process of regulatory specification

8.12 The practice of the Attorney-General’s proscribing organisations has been criticised ‘as highly subjective and political²⁸. While the Attorney-General’s decision is subject to judicial review, the factual correctness of the decision itself (as to whether the organisation is or is not a terrorist organisation), is not reviewable. Only the legality of the Attorney-General’s decision is reviewable. AMCRAN submits:

²⁸ The Politics of Proscription, Research Note No 63, 21 June 2004, Parliamentary Library.

'The main problem with this broad executive discretion is that it is subject to political manipulation and application. Dr Jenny Hocking condemns it for breaching the "notion of equality before the law in its creation of groups for which the usual judicial process does not apply and it breaches absolutely the separation of powers in even allowing for such a use of executive power".²⁹ The Law Council of Australia agrees that the provision is "a serious departure from the principle of proportionality, unnecessary in a democratic society, and subject to arbitrary application".³⁰ This "unacceptably wide ... discretion conferred on public officials" has been labelled by Simon Bronitt, Director of the National Europe Centre, as offensive.'³¹³²

8.13 In his oral submissions on 1 February 2006, Dr Waleed Kadous, who was one of the persons responsible for preparing AMCRAN's written submissions and who appeared at a public hearing of the SLRC, pointed out that the actions of a leader or some senior person in an organisation expressing support for terrorist activities could produce the situation that members who have done nothing wrong, but be members, are guilty of an offence³³. This form of collective punishment is, he submitted, totally undesirable. For that reason, the removal of the terrorist organisation offences and holding people accountable merely for their own actions would be a desirable simplification of the legislation.

²⁹ Dr J Hocking, Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control in Australian Journal of Politics and History Vol 49, No 3, 2003, p370

³⁰ Law Council of Australia, quoted by Senate Committee Report, para 3104.

³¹ S Bronitt, Australia's Legal Response to Terrorism, Neither Novel Nor Extraordinary? in Human Rights 2003, The Year in Review, 4 December 2003.

³² *Submission 17(a)*

³³ Transcript of Public Hearings 1 February 2006 available on the Committee website www.ag.gov.au/slrc

8.14 It appears to the SLRC from the reports of the PJC that the current process of proscription of a terrorist organisation is as follows:

- ASIO prepares an unclassified statement of reasons setting out the case for listing (or re-listing) an organisation.
- The Chief General Counsel of the Australian Government Solicitor provides written advice on whether the statement of reasons is sufficient for the Attorney-General to be satisfied on reasonable grounds that the organisation is an organisation directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the terrorist act has occurred or will occur, or advocates the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).
- The Attorney-General's Department consults with the Department of Foreign Affairs and Trade (DFAT) to identify any issues of relevance of which DFAT is aware.
- The Attorney-General considers the statement of reasons, the advice of the Chief General Counsel, DFAT's comments and a covering letter from the Director-General of Security.
- Section 102.1(2) requires the Attorney-General to be satisfied that the organisation has the specified characteristics of a terrorist organisation (see above).
- In the case of organisations that are to be listed for the first time the SLRC is informed that the Inter-governmental Agreement (IGA) on Counter-Terrorism Laws signed by the Prime Minister, Premiers and Chief Ministers on 25 June 2004 requires the Prime Minister to consult

Premiers and Chief Ministers. The IGA provides that the Australian government will not proceed with the listing of a terrorist organisation if a majority of the States and Territories object to the listing within a nominated time frame and provide reasons for their objections. The Australian government must provide States and Territories with the text of proposed regulations listing terrorist organisations, a written brief on the terrorist-related activities of the organisation that it proposes to list and also offer an oral briefing by the Director-General of Security. In the case of organisations that are being relisted because of the two year expiry period, the Attorney-General advises the Attorneys-General of the States and Territories of the decision.

- The Leader of the Opposition is advised and offered a briefing.
- The Governor-General in Executive Council makes the regulation. Executive Council usually comprises the Governor-General and at least two Ministers or parliamentary secretaries.
- The regulation is made and lodged with the Federal Register of Legislative Instruments (publicly available on the internet).
- A press release is issued and the Attorney-General's Department's National Security website is updated.
- The PJC decides whether to review the regulation pursuant to section 102.1A(2). Review is not mandatory but has been undertaken in every instance to date.
- If the PJC decides to review the regulation, the inquiry is publicly advertised (in newspapers and on the PJC's website) and submissions invited.

- The PJC hearings are held, some in private.
- The PJC tests the validity of the listing or re-listing, both on procedures and merits.
- The PJC reports its comments and recommendations to each House of Parliament before the end of the applicable disallowance period, as required by section 102.1A(2).

8.15 The legislation gives no indication of the criteria to be applied, beyond what is said in paragraphs (a) and (b) of subsection (2). The legislation does not require that notice be given to an organisation, or persons affected by the regulation proposed, before the regulation is made, nor is there any opportunity for that organisation or such person to be heard in answer to the case for making the regulation before the regulation is made. While notification in the case of some overseas organisations may be impracticable, that is no reason for not notifying an Australian organisation and its members or Australian members of an overseas organisation, if known, before the regulation is made. There is every reason why an Australian organisation and its members should be given an opportunity to oppose the proscription of the organisation.

Consequences of proscription

8.16 The offences in Division 102 Subdivision B of Part 5.3 of the Criminal Code are tied to the concept of a terrorist organisation. Some of those offences apply only to proscribed terrorist organisations (sections 102.5 and 102.8); some offences apply to terrorist organisations as defined in paragraph

(a) as well as (b). Examples of offences which apply to all terrorist organisations are 102.2 and 102.3.

Administrative law considerations

8.17 The consequence of proscription is that a person who is connected with an organisation may, at the moment of proscription, become liable to indictment on one of the related offences. In the language of Liberty, which is the Victorian Council for Civil Liberties Inc, offences may be triggered by the executive decision. In particular, the person may become liable to prosecution if that person directs the activities of the organisation, is a member of the organisation, recruits others to join or participate in the activities of the organisation, trains or receives training from the organisation, gets funds to, from or for the organisation, supports the organisation or associates with, for example, members of the organisation. If charged with any of those offences, that person, it appears, cannot specifically raise as a defence that the organisation was wrongly proscribed, and is not a terrorist organisation or, perhaps, not an organisation at all. There may be a limited opportunity in administrative law for a collateral challenge to the validity of the regulation.

8.18 In any proceedings, the prosecution must prove beyond reasonable doubt that the person knew the organisation was a terrorist organisation or was 'reckless' as to whether the organisation [was] a terrorist organisation. This is true except apparently in the cases of training or associating. Sections 102.5 and 102.8 do not apply 'unless the person is reckless'.

8.19 HREOC submitted that the broad discretion given to the Attorney-General to proscribe and subsequently de-list an organisation does not satisfy the international human rights law requirement that any interference with ICCPR rights (in this case, the right to association and freedom of expression) be prescribed by law and proportionate to the legitimate aims sought to be achieved by the legislation.

8.20 HREOC and others were particularly concerned about the lack of any fixed criteria, published or otherwise, for the exercise of the Attorney-General's discretion in specifying an organisation as a terrorist organisation, and that the interested parties (including community groups) are provided with a limited opportunity to make representations to the Attorney-General or the Parliament as to appropriateness of the proposed proscription. HREOC noted that it is not mandatory for the PJC to review and report to Parliament in relation to regulations proscribing organisations as terrorist organisations. The SLRC has been informed that the PJC has reviewed every proscription made to date. Merits review on the Attorney-General's decision is unavailable under the legislation. The process under the ADJR Act is not one that allows an investigation of the facts or of the reasonableness and proportionality of the decision.

8.21 As was pointed out by HREOC in its most recent report and by others, the PJC recommended that ASIO and the Attorney-General specifically

address each of the following six criteria of reasons accompanying listing regulations³⁴:

- engagement in terrorism
- ideology and links to other terrorist groups or networks
- links to Australia
- threat to Australian interests
- proscription by the United Nations or other like-minded countries, and
- engagement in peace or mediation processes.

8.22 HREOC submitted that these criteria identified by the PJC could form the basis of criteria to which the Attorney-General would have regard in proscribing an organisation and considering a de-listing application. Circumscribing the Attorney-General's discretion in the way suggested would provide legal certainty to organisations and persons to whom the derivative offences may apply, as required by international human rights law. Making it clear on what basis organisations are selected for proscription would also assist in assuring that proscription does not operate in a discriminatory manner, contrary to Article 26 of the ICCPR. Enhancing the transparency of the proscription process would increase public confidence that the process was operating to protect Australians and Australia's national interests, and not targeting one sector of the Australian community.

³⁴ *Review of the listing of four terrorist organisations*, May 2005, the full text of which is available at: <http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsc/report.htm>

8.23 The SLRC regards all these considerations as important. On the one hand, such considerations emphasise the vulnerability of the existing process to possible challenge on administrative law grounds. On the other hand, such considerations indicate how much increased transparency could achieve by allaying the concerns, particularly of the Muslim and Arab communities, that the legislation discriminates against sections of society. Fixed criteria should also be in place if a judicial or independent body is set up to process applications for proscription.

8.24 In its submissions, the Law Council of Australia raised its particular concern about the power of the Attorney-General to make a declaration that an organisation is a proscribed organisation without affected persons being afforded any opportunity to be heard. It was said that the threshold test for determining the applicability of procedural fairness in Australia was laid down by the High Court in *Kioa v West*³⁵. In his judgment, Mason J said:

‘It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and be given an opportunity of replying to it. The reference to “right or interest” in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as proprietary rights and interests. ...

The law has now developed to a point where it may be accepted there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights,

³⁵ (1985) 159 CLR 550

interests and legitimate expectation, subject only to the clear manifestation of a contrary statutory intention ...³⁶

8.25 The SLRC notes similar sentiments expressed in *FAI Insurances Limited v Winneke*.³⁷ In *Annetts v McCann*³⁸ the majority of the Court said:

‘.....the critical question in the present case is not whether “the rules of natural justice require an extension of the rights expressly conferred upon the [appellants] by s.24 of the Act” as was said in one of the judgments in the Full Court of the Supreme Court of Western Australia in this case. It is whether the terms of the Coroners Act 1920 (WA) (‘the Act’) display a legislative intention to exclude the rules of natural justice and in particular the common law right of the appellants to be heard in opposition to any potential finding which would prejudice their interests.’

8.26 In *State of South Australia v Slipper*³⁹ Finn J, in a judgment with which Branson and Finkelstein JJ agreed, summarised the principles to be applied in relation to the legislative exclusion of procedural fairness, and in particular concluded that, while the rules may be excluded because the power in question is of its nature one to be exercised in circumstances of urgency or emergency, urgency cannot generally be allowed to exclude the right to natural justice, although it may in the circumstances reduce its content.⁴⁰

8.27 *Kioa* and *Slipper* are discussed in the judgment of Madgwick J in *Leghaei v Director General of Security*. At [111] Madgwick J agreed with Finn J’s comment in *Slipper* that:

³⁶ at 584

³⁷ (1982) 151 CLR 342

³⁸ (1991) 170 CLR 596 at 598-9

³⁹ (2004) 136 FCR 259

⁴⁰ at 279-80

‘... against the background of a clearly recognised need to “strike a balance” between private and societal interests, one would have expected the legislature to have spoken with unmistakable clarity if it was to deny rights of procedural fairness that could otherwise have been made available ...’⁴¹

8.28 The Law Council also referred to this passage in *Aronson & Dyer*:

‘Where the potential consequences of a decision are grave, allowing affected persons a more extensive opportunity to be heard offers the dual benefit of reducing the risk of errors (contrary to the interests of the persons who are heard) and promoting acceptance of such decision by the persons concerned and the public in general.’⁴²

8.29 These references suggest that the Attorney-General is currently under an obligation to observe natural justice when determining whether to list an organisation under paragraph (b) of the definition of terrorist organisation. The duty to accord natural justice is owed both to the organisation and to its members. The question in any given case will be whether the rules of natural justice have been observed in the process of proscription. There is, of course, a practical question as to whether organisations, such as those currently listed under paragraph (b), may choose to utilise a procedure of this kind to seek a hearing by the Governor-General or the Attorney-General. But if it were intended to proscribe an organisation set up in Australia or operating in Australia with Australian members, and if both the organisation and the members were left with no opportunity to resist the application for proscription,

⁴¹ (unreported) Federal Court of Australia, 10 November 2005

⁴² Aronson, M and Dyer, B ‘*Judicial Review of Administrative Action*’, 2nd ed LBC Information Services 1996 Sydney at p397

an erroneous belief that the organisation was a terrorist organisation could lead to a substantial injustice to those members.

8.30 It is not for this committee to rule upon whether the process for proscription generally or in a particular case fails to comply with a fundamental rule of the common law doctrine of natural justice. But the operation and effectiveness of the legislation is clouded by this possibility.

CHAPTER 9

SHOULD THE EXISTING PROSCRIPTION PROCESS REMAIN?

9.1 There are a number of reforms on which all members of the SLRC are agreed. It is agreed that the process of proscription must be reformed in the following respects:

1. Criteria for proscription need to be determined and stated. The criteria proposed by ASIO and supported by HREOC and the PJC are a useful starting point.
2. In all but exceptional circumstances, a proposal to proscribe an organisation should be made public and an opportunity given for interested persons to make comment. If practicable the organisation and its members, or persons affected, or interested persons, should be notified and have the opportunity to be heard before an organisation is proscribed. It is probable that this obligation is implicit in the statutory scheme under the common law doctrine of natural justice. It would be better if it were spelled out in the legislation.
3. Once an organisation has been proscribed, steps should be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution. There needs to be better explanation of how and why the organisation has been proscribed in an attempt to ensure that those affected by proscription are aware of the risk of continued connection with the organisation, and to foster community understanding and acceptance. A person who has taken all reasonable steps to

dissociate themselves from a proscribed organisation will not be guilty of an offence. The important safeguards in the criminal justice process also provide protection for any person against whom proceedings have been commenced.

9.2 The SLRC believe there is a need for better transparency and additional measures to foster community confidence.

Options for reforming the proscription process

9.3 The SLRC has considered various suggestions about what body or person would be most suitable to make the decision to proscribe an organisation as a terrorist organisation. The options that were prominently raised came down to a choice between a court, an independent tribunal, or the Attorney-General, or the Attorney-General with an independent adviser. There is a further question as to whether the process should be by way of a determination to proscribe or merits review of an executive act. Some members favour the view that the process for proscription of an organisation as a terrorist organisation be a judicial process brought by application to the court, with service on affected parties and an open hearing so far as that is practicable. Other members of the SLRC favour retaining the Attorney-General's role with some additional safeguards.

Attorney-General's Department Submission

9.4 The Attorney-General's Department submitted that the listing of organisations is a process that does not just involve the executive; it also involves the Parliament, as it is Parliament that has the power to disallow a

regulation that proscribes an organisation as a terrorist organisation. Further, the Attorney-General's Department submitted it is appropriate that the executive and the Parliament play a role in determining the nature of the organisation, taking into account the expert advice of those with an extensive knowledge of the security environment. The value of taking into account the expertise of members of the executive who have contact with senior members of the governments and agencies of other countries, so that this issue can be addressed from a global perspective, should not be understated.

9.5 The Attorney-General's Department says that both the Commonwealth government and the governments of the States and Territories have concluded that the executive and not the judiciary is best placed to make the necessary decision about the nature of the organisations that should be proscribed, and that it is desirable that this power not be left to the courts. The government considers that it is essential that the executive take responsibility for making such decisions and that it should not abdicate this responsibility to the courts.

9.6 Turning to the question of a merits review, the Attorney-General's Department noted that a decision by the Attorney-General that he is satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or that it advocates the doing of a terrorist act, is a decision that is reviewable under the ADJR Act. That review, though not a merits review, enables a court to determine whether, for example, the decision was made in bad faith or at the direction or

behest of another person, or is so unreasonable that no reasonable person could have so exercised the power (see section 5 of the ADJR Act). Referring to submissions, such as those of HREOC and the Law Institute of Victoria (LIV), that the decision to list an organisation should be subject to a full and judicial merits review, it is said that this would mean that a court would be able to determine not only whether the Attorney-General's decision was made in accordance with the law, but whether there was sufficient substantive evidence for him to have reached the decision that he did. The Attorney-General's Department submitted that judicial review under the ADJR Act strikes the appropriate balance between an unfettered discretion and a merits review.

9.7 The Attorney-General's Department submitted that the contentions that the Attorney-General's discretion is unlimited are without merit. The Attorney-General must be satisfied of the matters set out in section 102.1(2) before the Governor-General is empowered to make the necessary regulations proscribing the organisation as a terrorist organisation. The Attorney-General's Department submitted that specified further criteria, such as the organisation's engagement in terrorism, its links to Australia, the threat of Australia's interests, and proscription by the United Nations or other like-minded countries, are unnecessary. What is relevant to the exercise of the Attorney-General's discretion needs to be assessed on a case by case basis. Further, in relation to the suggested criteria that the activities of the organisation must have direct relevance to Australia before it may be listed, the Attorney-General's Department submitted that this is inconsistent with the

international nature of terrorism. Terrorism is not something that is relevant to a particular region or country; it is a global problem that requires a global response. Being able to proscribe an organisation as a terrorist organisation, even if the organisation has no direct relevance to Australia, is part of that global response.

A judicial or quasi-judicial process

9.8 In *Australian Communist Party v The Commonwealth*⁴³ Dixon J, as he then was, said:

‘History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.’

9.9 The context was the purported grant of power to the Governor-General to make a declaration with consequences consisting in the dissolution of bodies as unlawful associations, the forfeiting of their property, the restriction upon the actions of the officers and others, and the disqualification of individuals for certain offences and employments.

9.10 The SLCLC, in reporting on the 2002 Bills, referred to the suggestion by Professor Williams that it would be preferable that the courts determine whether an organisation should be proscribed. Professor Williams believes that no form of subsequent judicial review would ever be effective in this context. Professor Williams said:

⁴³ (1951) 83 CLR 1 at 187

‘Any form of independent involvement must be at the decision-making stage because, once an Attorney makes a decision on national security or other grounds, the court simply is not well equipped to review such a decision, even if you gave it the power to do so on the merits. That means that, if you want a power to proscribe organisations, ideally it would work in such a way that the decision would be made only by an independent and open tribunal – or perhaps in camera, in very limited circumstances. It will be a tribunal that might be required to exercise the decision at extremely short notice, and courts have often proved able to do that.’⁴⁴

9.11 HREOC submitted that a way of putting aside deeply felt concerns about the proscription process would be the adoption of a judicial process for determining whether an organisation should be proscribed, the determination to be made against defined criteria.

9.12 HREOC has pointed to sections 30A and 30AA of the *Crimes Act 1914* (Cth), as an example of a suitable process for the proscription of terrorist organisations. Those sections provide for the declaration of an association as an unlawful association on the ground that it advocates or encourages the overthrow of the Constitution. The Attorney-General applies, by way of summons to the Federal Court, for an order calling upon a body of persons to show cause why an association should not be declared to be an unlawful organisation (section 30AA).

9.13 More recently, the amendments made by the addition to Part 5.3 of Division 104, ‘Control orders’, enable a court—‘the issuing court’—on the

⁴⁴ Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 43.

request of a senior AFP member, to make what is described as an ‘interim control order’. Provision is also made for the making of an urgent interim control order. The interim control order is to be served personally on the person in relation to whom it is made and, in Queensland, the Queensland Public Interest Monitor is to be given a copy of the order. A procedure is in place for confirming the interim control order before the issuing court. The ‘issuing court’ is defined in section 100.1 as the Federal Court or the Family Court or the Federal Magistrates’ Court. This procedure ensures transparency and gives any person affected an opportunity to be heard.

9.14 Another available option for determining whether a terrorist organisation should be proscribed would be the appointment of an independent body of persons, other than serving judges, with experience in security legislation, investigation and policing. Such a body, on receiving an application from the Attorney-General—after notice, if possible, to persons affected, or advertisement, and after hearing from any interested persons who wish to be heard—would determine whether an organisation should be declared a terrorist organisation. Alternatively, a body so constituted could provide advice to the Attorney-General before the Attorney-General decides whether he has reached the state of satisfaction referred to in paragraph (b).

The case for a judicial process

9.15 The issue that an organisation and person associated with it may, by an executive act, be made liable to prosecution and conviction for criminal offences, with at best only a limited opportunity to challenge either the legality

or the merits of the regulation, excited considerable debate in the hearings of the SLRC. As is evident from the preceding discussion, there are key concerns about the discretionary nature of the Attorney-General's decision, leading to a lack of certainty about the process of proscription, the absence of an opportunity to be heard before the making of a regulation, the lack of transparency of the process and the lack of confidence in the fairness of the process in the eyes of at least some members of the community.

9.16 Those members who favour a judicial process reiterate that unless the process for proscribing an organisation as a terrorist organisation is made more transparent in the way described, with an opportunity to the parties affected to be heard, the process remains vulnerable to challenge, as do proscriptions of organisations made under it.

9.17 Those members of the SLRC who favour a judicial process for proscription consider that the process should begin with an application by the Attorney-General to the Federal Court for an order to that effect, together with evidence supporting the making of that order. The application should be advertised in the press. The application should be served to the extent practicable upon the organisation and members of the organisation, and other persons considered by the court to be affected by the making of such an order. Any person, in the view of the court interested in opposing the application, should be given an opportunity to be heard. Questions about procedure, the admissibility of evidence, and the management of classified material can be dealt with by the court. The members of the SLRC who prefer

such a procedure are persuaded by its overriding fairness and transparency. It is ultimately for a judge to determine how such an application can be fairly heard, and whether or not the grounds are established by the Attorney-General on the evidence for proscribing an organisation. There can be no question of the Attorney-General relying on material which is not available to the court. The basis upon which proscription is sought can be fully and fairly challenged by those with a contrary interest. In this report more will be said about the use of a Public Interest Monitor appointed to be an advocate. (See chapter 18.)

9.18 In the opinion of at least some members of the SLRC, the most important argument favouring the adoption of a court process for determining whether an organisation should be proscribed, or declared to be a terrorist organisation, is not only the procedural fairness of that process but also its transparency. Transparency must help to reduce the fear of discrimination and error.

9.19 Yet another choice is to invest an independent body so constituted, or a review body such as the AAT, with power to review, on the merits, the Attorney-General's specification by regulation of an organisation as a terrorist organisation, after it has occurred and with power to disallow or set aside the regulation. This has the disadvantages mentioned by Professor Williams and referred to above.

The case for an executive process

9.20 Some members of the SLRC consider that with various safeguards already in place or suggested, the Attorney-General should remain, as provided in section 102.1(2), the person, upon whose satisfaction on reasonable grounds the organisation is a terrorist organisation, to advise the Governor-General to make a regulation specifying the organisation. The reasoning of those members of the SLRC focuses on three elements: the nature of the function, the procedure for discharging the function, and the safeguards surrounding that function.

Nature of the function

9.21 First, the function of proscribing a terrorist organisation is by nature executive and not judicial in character. There are many different models for the exercise of the judicial function, but there are generally characteristic features: an existing dispute between two or more parties that is resolved by an independent judicial officer, who receives submissions and evidence from the parties, and applies pre-existing legal standards in making a ruling that is binding on the parties on all legal and factual issues in dispute. The executive function is more varied, and can extend to formulating policy, making decisions by applying legislative rules to particular cases, issuing orders, and making proclamations and declarations.

9.22 The function of declaring an organisation to be a proscribed terrorist organisation fits more easily into the executive rather than the judicial mould. There will not necessarily be a party to oppose the proposed declaration

(unless there is a Public Interest Monitor as discussed below): as a practical matter many organisations that are labeled as terrorist would not choose to become a party to an adversarial proceeding conducted by an independent judicial officer in a public forum. It is probable too that the declaration will be made after a process of formal and informal consultation with a range of people in and outside government, possibly in other countries beside Australia. The officer making the declaration may need some understanding of security issues and international and domestic pressures that support the suppression of terrorism.

9.23 Another aspect of executive power is that it is tied to the system of political accountability. Thus, if the Attorney-General bears the responsibility for declaring an organisation to be a proscribed terrorist organisation, he or she can be questioned about that decision both at the time and afterwards. There will be continuing accountability and public and political oversight of the decision to proscribe an organisation.

9.24 The decision to proscribe an organisation is also one that requires continuing review. This occurs in three ways under the Criminal Code: a declaration ceases to have effect after two years and must be remade if it is to have continued force (section 102.1(3)); a declaration is to be revoked if the Attorney-General ceases to be satisfied that an organisation fits the criterion for proscription (section 102.1(4)); and a proscribed organisation can formally apply to have the declaration of proscription revoked by de-listing (section 102.1(17)). It would be awkward, perhaps impractical, to confer some at least

of that responsibility on a court that initially made a declaration to proscribe an organisation. There is no similar difficulty in requiring the Attorney-General or other executive officer to perform the function on a continuing basis.

Procedure for discharging the function

9.25 The evidence to support a declaration of a proscribed organisation is likely to be of an assorted character and to come from many sources. It may variously come from public statements, defence and security analysts, confidential informants, law enforcement agencies, and foreign intelligence organisations. While courts are accustomed to dealing with classified material and to holding hearings in camera, this is not the normal manner of discharging a judicial function.

9.26 It could be problematic for a court, both symbolically and in practice, to proceed partially in secret in each case, and to base a decision on evidence that in some key aspects cannot be tested in the normal manner. Some, at least, of the evidence will not conform to the rules of evidence that are customarily applied by courts in civil and criminal proceedings. It is questionable too whether sources of information, particularly foreign intelligence agencies, would be prepared to submit evidence for independent consideration by a court, without any guarantee as to how their information would be used or protected.

9.27 Those are real issues that may have to be addressed on each occasion that a proposal is made to proscribe an organisation. A court discharging

such a function may choose to spend some time initially resolving the rules of procedure, deciding what evidence is to be accepted, and how parties with an interest in the proceedings can be heard. There is the possibility that one or other party will wish to dispute an interim ruling by the court. This process of resolving the procedure to be followed in an individual case could cause delay and impair the efficiency of the process.

Safeguards

9.28 The attraction of a judicial process for the function of declaring an organisation to be a proscribed terrorist organisation is the safeguards this brings to the process. A judicial officer will be independent of the parties to any dispute and bring an unbiased and objective mind to the task. The procedure for making a declaration will be rigorous, and focus on the strength of the evidence to support an application. There will be an opportunity for interested persons to be heard before a declaration is made that renders it a criminal act, from the moment the declaration becomes effective, to be connected to an organisation that is henceforth to be classified as a terrorist organisation. There is also public respect for the independence and integrity of the judicial process.

9.29 Those considerations are important, but can also be met in an executive process with careful design. There are already many safeguards in the existing executive process, as outlined in Chapter 9 of this report. Some of those safeguards are written into the statute, others are currently followed as a matter of executive practice. Independently of the decision made by the

Attorney-General, the Director-General of ASIO (a statutory office holder) prepares a submission that is guided by criteria that are on the public record; the Chief General Counsel confirms that there is adequate evidence to support any decision of the Attorney-General; and the regulation proscribing an organisation can be disallowed by a joint parliamentary committee that includes members of different political parties.

9.30 Other existing safeguards in the framework of law and government are also relevant. The IGIS and the Commonwealth Ombudsman can, either on complaint or of their own motion, conduct investigations into the administrative conduct of executive agencies, for example, in preparing advice to the Attorney-General for an organisation to be proscribed. The opportunity for judicial review of the decision to proscribe an organisation means that the legality of the process and its compliance with legal standards of the process can be scrutinised by a court. Other safeguards, such as the *Freedom of Information Act 1982*, also provide a limited opportunity to ensure transparency in the process. The different officers and agencies with a deliberative or oversight role in the process can be asked to appear before a parliamentary committee and to answer questions. Through the parliamentary process, the Attorney-General can also be required to explain or justify a decision to proscribe an organisation.

9.31 Further safeguards could be added to this process. One option, outlined below, is for the appointment of an independent committee to provide

advice to the Attorney-General. All members of the SLRC favour better notification before and after a decision on proscription is made.

Advisory committee for the Attorney-General

9.32 If the proscription process remains with the Attorney-General, the SLRC recommends that a committee should be established by statute to provide advice to the Attorney-General on the case that has been submitted for an organisation to be proscribed. The membership of the committee should comprise people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration, and legal practice. The role of the committee should be publicised, and it should be open to the committee to consult publicly and to receive submissions from members of the public.

9.33 The SLRC recommends that the process of proscription be reformed to meet the requirements of administrative law. The process should be made more transparent and should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

9.34 **The SLRC recommends that either:**

- i. the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General**

In this case there should be built into that process a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. The committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice. The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public.

or

- ii. the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected persons and a hearing in open court.**

9.35 The SLRC recommends that once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution.

CHAPTER 10

TERRORIST ORGANISATIONAL OFFENCES

10.1 Subdivision B of Division 102 is headed 'Offences'. The offences are listed in seven paragraphs headed as follows:

- directing the activities of a terrorist organisation (102.2)
- membership of a terrorist organisation (102.3)
- recruiting for a terrorist organisation(102.4)
- training a terrorist organisation or receiving training from a terrorist organisation (102.5)
- getting funds to, from or for a terrorist organisation (102.6)
- providing support for a terrorist organisation (102.7), and
- associating with terrorist organisations (102.8).

10.2 Each of these derivative offences is an offence, not by the terrorist organisation, but by a person in some way connected or associated with the organisation, and depends upon a particular organisation being a terrorist organisation specified by regulation or, with the exception of section 102.5 (2) and section 102.8, the organisation, although not so specified, being directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.

Section 102.2 – Directing the activities of a terrorist organisation

10.3 Section 102.2 provides, in sections (1) and (2), two offences. The first is intentionally directing the activities of a terrorist organisation, when the person knows the organisation is a terrorist organisation, for which the penalty is imprisonment for twenty-five years. The second is when the person is reckless as to whether the organisation is a terrorist organisation, in which case the penalty is imprisonment for fifteen years. The distinction between knowledge and recklessness is clearly drawn.

10.4 Division 5 of the Criminal Code is headed 'Fault elements'. According to section 5.1(1), a fault element for a particular physical fault element may be intention, knowledge, recklessness or negligence. Section 5.2 provides that a person has intention with respect to conduct if he or she means to engage in that conduct (subsection 1); with respect to a circumstance if he or she believes that it exists or will exist (subsection 2); and with respect to a result if he or she means to bring it about, or is aware that it will occur in the ordinary course events (subsection 3). Section 5.3 states that a person has knowledge of a circumstance or result if he or she is made aware that it exists or will exist in the ordinary course of events.

10.5 Section 5.4 of the Criminal Code describes what is meant by recklessness. Under subsection (1), a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. Under subsection (2) of section 5.4, a

person is reckless with respect to a result if he or she is aware of the substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. Thus, as is made plain by sub-section 4, recklessness may be an alternative to knowledge (subsection 1) or may be an alternative intention (reckless indifference) (subsection (2)). Subsection (4) provides that if recklessness is a fault element of a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

10.6 Section 5.6(2) of the Criminal Code provides that if the law creating the offence does not specify a fault element of a physical element that consists of a circumstance or result, recklessness is the fault element for that physical element. A note to that section provides that, under section 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

10.7 The FCLC (Vic) does not accept that prosecuting people for their reckless involvement is necessary to prevent acts of terrorism in Australia, particularly when it may be involvement with organisations that may not have been involved in a terrorist act.

10.8 Despite these concerns, the SLRC accepts that, consistently with traditional criminal law, it is appropriate to have an offence based not on knowledge of an element of the offence but on recklessness as to the existence of that element. Moreover, the requirement for recklessness in the

Commonwealth Criminal Code is at a high level. As has been noted by the Australian Law Reform Commission, its meaning is “one that differs from its use in common parlance, where it is roughly interchangeable with ‘negligent’, or perhaps ‘seriously negligent’. As a term of art in Australian criminal law, recklessness is much closer to intentionality, requiring that the person consciously consider the substantial risks involved, and nevertheless to proceed with the conduct⁴⁵.”

Section 102.3 – Membership of a terrorist organisation

10.9 Section 102.3(1) makes membership of a terrorist organisation an offence carrying a penalty of ten years imprisonment. The prosecution must prove beyond reasonable doubt that the person knew that the organisation was a terrorist organisation. Member of an organisation is defined in section 102.1 as including:

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

10.10 Subsection (2) of section 102.3 provides that subsection (1) does not apply if 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. Below the subsection is a

⁴⁵ ALRC Sedition Inquiry. Issues Paper 30, Chapter 3.26. Full text of the Issues Paper can be found at <http://www.austlii.edu.au/au/other/alrc/publications/issues/30/>

note: 'A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).'

10.11 AMCRAN, in its submission, says that the expressions 'informal member' and taking 'steps to become a member' of the organisation are unreasonably vague. 'It is arguable that any person tangentially connected with the organisation could be taken as a member or informal member of that organisation. Further, punishment of up to ten years imprisonment for simply being an informal member of an organisation is clearly disproportionate with the act.'⁴⁶

10.12 This is further compounded, it is argued, by the evidential burden placed on the defendant by section 102.3(2) of proving '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.' AMCRAN says that it becomes very difficult for a person to know whether or not he is committing an offence under these laws. Further, it increases the likelihood of the laws being used selectively.

10.13 However, the SLRC accepts that terrorist organisations would be unlikely to have formal membership requirements or membership lists. The phrase 'informal member' was designed to apply in such a situation. The SLRC recommends that this definition of 'member of an organisation' remain.

⁴⁶ *Submission 17(a)*

Legal burden

10.14 Section 13.4 of the Criminal Code provides that the note in subsection 102.3(2) imposes a legal burden of proof on the defendant in relation to proving that the person charged 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. Section 13.1(3) of the Criminal Code provides that in the Code ‘legal burden, in relation to a matter, means the burden of proving the existence of a matter’—that is to say carrying the ultimate onus. In order to exonerate him or herself, this means that the person charged has to prove on the balance of probabilities that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after he or she knew that the organisation was a terrorist organisation. This is to be contrasted with an evidential burden of proof, described in section 13.3(6) of the Criminal Code to mean, in relation to a matter, ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.’

10.15 In its submissions, HREOC drew attention to the decision in the House of Lords in *Sheldrake v Director of Public Prosecutions, Attorney-General’s Reference (No 4 of 2002)*⁴⁷. This report is of two cases heard together: one, an appeal from a conviction, and the other, a reference by the Attorney-General. In both, reverse burdens—so called because the burden of proof was placed on the defendant and not, as ordinarily in criminal proceedings, on the prosecutor—were challenged as incompatible with the

⁴⁷ [2005] 1 AC 264

presumption of innocence guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953),⁴⁸ . This was the first question. The second was whether the provision could and should be read down in accordance with the *Human Rights Act 1988* so as to impose an evidential and not a legal burden on the defendant. Lord Bingham of Cornhill⁴⁹ said that an evidential burden is not a burden of proof. 'It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exonerating does not avail the defendant.'

10.16 Section 11(1) of the *Terrorism Act 2000* (UK) provided that a person committed an offence if he or she belonged or professed to belong to a proscribed organisation. Subsection 11(2) made it a defence for a person charged under subsection (1) to prove that the organisation was not proscribed on the last (or only) occasion on which he became a member, or began to profess to be a member, and that he had not taken part in the activities of the organisation at any time while it was proscribed. Subsection (2) was held to impose a legal burden of proof on the defendant.

10.17 Lord Bingham referred to the 'legal or persuasive burden on a defendant in criminal proceedings to prove the matters respectively specified in those subsections if he is to be exonerated from liability on the grounds there provided. That means that he must, to be exonerated, establish those

⁴⁸ see p289

⁴⁹ p289

matters on the balance of probabilities. If he fails to discharge that burden he will be convicted'.⁵⁰ This was contrasted with the evidential burden.

10.18 His Lordship referred to the governing principle of English criminal law (which, as part of the common law, is also a governing principle in Australia, though much eroded by legislation⁵¹) memorably affirmed by Viscount Sankey LC in *Woolmington v Director of Public Prosecutions*⁵², that the onus lies upon the prosecution in a criminal trial to prove all the elements of the offence with which the accused is charged. As Lord Bingham said 'this principle has been regarded as supremely important, but not as absolute.'⁵³ Such may be the case on any statutory exception, exemption, proviso, excuse or qualification. Lord Bingham observed: 'Security concerns do not absolve member States from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.'⁵⁴

10.19 In the result, in the Attorney-General's reference, the House of Lords held by a majority that there was a real risk that a person who was innocent of 'any blameworthy or properly criminal conduct'⁵⁵, but who was unable to establish a defence under section 11(2) that the organisations, in that case, were not proscribed when he became a member, or began to profess to be a

⁵⁰ at p289

⁵¹ S Bronitt and B McSherry, *Principles of criminal law*, 2nd edn, Lawbook Co, 2005pp 114-5

⁵² [1935] AC 462 at 481

⁵³ at 290

⁵⁴ At p297

⁵⁵ [2005] 1 AC at 313

member, and that he had not taken part in the activities of the organisation at any time while it was proscribed, might fall within subsection 11(1) and be convicted of the offence. This would result in a clear breach of the presumption of innocence and an unfair conviction. Bearing in mind the difficulties a defendant would have in proving the matters contained in section 11(2), and the serious consequences for the defendant in failing to do so, the imposition of a legal burden upon the defendant was not a proportionate and justifiable legislative response to the threat of terrorism.

10.20 For present purposes, the decision of the House of Lords is sufficient to raise a doubt about the proportionality of overriding the presumption of innocence by imposing upon a person, charged with the offence of membership of a terrorist organisation, carrying a maximum penalty of ten years imprisonment, the legal burden of proving, if he or she is to be exonerated, on the balance of probabilities, that he or she took all reasonable steps to cease to be a member as soon as practicable after he or she knew that the organisation was a terrorist organisation. The difficulty the defendant might have in proving this might result in the conviction of an innocent person and the incarceration of that person unjustly. In the United Kingdom the burden is read down to be an evidential burden. An evidential burden applied in place of a legal burden in section 102.3(2) would be appropriate.

10.21 The SLRC recommends that the burden of proof on the defendant under section 102.3(2) be reduced from a legal burden to an evidential burden.

Section 102.4 – Recruiting for a terrorist organisation

10.22 Section 102.4, 'Recruiting for a terrorist organisation', reverts to the pattern found in section 102.2 of two offences: the first being that the person who recruits for an organisation, knows the organisation is a terrorist organisation; and the second, that a person who recruits for an organisation is reckless as to whether the organisation is a terrorist organisation. The difference in penalty between the two is twenty-five years imprisonment and fifteen years imprisonment.

10.23 On the question of recklessness, the SLRC refers to the discussion and comments on section 102.2.

Section 102.5 – Training a terrorist organisation or receiving training from a terrorist organisation

10.24 Section 102.5 presents several problems. According to subsection (1) a person commits an offence if:

- (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and
- (b) the organisation is a terrorist organisation; and
- (c) the person is reckless as to whether the organisation is a terrorist organisation.

(This amended form of the subsection should be compared with that considered by Bell J in *R v Izhar Ul-Haque*⁵⁶.) The penalty is imprisonment

⁵⁶ (unreported) Supreme Court of New South Wales, 8 February 2006

for twenty-five years. Subsection (1) describes, on its face, a reckless and not a knowledge offence with whatever consequence that may have (see section 5.4(1) of the Criminal Code). Submissions were made to the SLRC about the uncertainties it causes. Ms Banks, making submissions to the SLRC on behalf of the Public Interest Advocacy Centre (PIAC), said

‘... we’ve done training with Muslim community organisations in Sydney and we do it quite regularly around things like human rights training and do I check the list of who is there? Probably not as much as I should. You know, it really does become much more difficult when you effectively are catching a cultural group and many of the organisations are linked to the Muslim community but, I think we have already observed, not necessarily in Australia.’⁵⁷

That it creates not only the legislative framework but says, you know, we have to be much more cautious but it also sets up a message to the community about being much more – and I use the term ‘paranoid’ – about relationships and connections within the work that you do and that is really, I think, a very significant undermining of a community that has for a long time been relatively trusting and open to minorities and this is part of the broader context as well of what is happening culturally in Australia ...

Certainly all the feedback that I am aware of, and I don’t do all the training, is that there is a lack of understanding. People are really uncertain about what it means to them, but people are concerned that it has created divisions in the community.’⁵⁸

10.25 Subsection (2) of section 102.5 provides that a person commits an offence if:

⁵⁷ Transcript of Public Hearings Sydney 8 March 2006 p.65

⁵⁸ Transcript of Public Hearings Sydney 8 March 2006 p.66

- (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and
- (b) the organisation is a terrorist organisation that is covered by paragraph (b) of the definition of terrorist organisation in subsection 102.1(1).

10.26 Again the penalty is imprisonment for twenty-five years. The subsection itself does not mention that the person charged must have knowledge that the organisation was a terrorist organisation (see section 5.1 of the Criminal Code). As already mentioned, section 5.6 of the Criminal Code deals with offences that do not specify fault elements. The section provides:

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

10.27 Subsection 5.6 does not assist in explaining why knowledge is not an essential element of the offence and why the pattern of the section differs from that of, say, sections 102.2 and 102.4.

Strict liability

10.28 Subsection (3) provides that, subject to subsection (4), strict liability applies to paragraph 2(b). It is difficult to understand what this means or is intended to achieve. Tender of the regulation would prove that the organisation is a terrorist organisation covered by paragraph (b). See section 143(1)(b) of the Evidence Act referred to above. What work then has subsection (3) to do? Subsection (4) provides:

‘Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).

Note: A defendant bears an evidential burden in relation to the matter is subsection (4) (see subsection 13.3(3)).’

10.29 Division 6 to the Code is headed, ‘Cases where fault elements are not required’. Section 6.1, ‘Strict liability’, provides:

If a law that creates an offence provides that the offence is an offence of strict liability:

- (a) there are no fault elements for any of the physical elements of the offence; and
- (b) the defence of mistake of fact under section 9.2 is available.

10.30 Bronitt & McSherry state that the courts have recognised a tripartite classification of statutory offences. Among those, an offence may ‘be a strict liability offence where no fault element need be proved, but evidence of honest and reasonable mistake of fact is open to the accused.’⁵⁹ The offence described in section 102.5(2) is not an offence where no fault element need

⁵⁹ S Bronitt and B McSherry, *Principles of criminal law*, 2nd edn, Lawbook Co, 2005pp 187

be proved. Both intention and recklessness must be proved, in the latter case subject to the note in subsection (4).

10.31 A submission by the LIV stated that ‘the imposition of strict liability for offences, which carry heavy penalties (ie fifteen years imprisonment) for offences committed without intent or recklessly and the reversal of the onus of proof contained in the terrorism offences do not accord fairness and justice to those accused of such offences.’⁶⁰ The Attorney-General’s Department noted that strict liability only applies to the specific elements of the offences and that the prosecution must prove the relevant fault elements in all other cases. It was submitted that the core culpability that justifies the penalty is not affected by the application of strict liability in the manner proposed.

10.32 However, even if strict liability applies only to make it unnecessary for the prosecution to prove that the organisation is a terrorist organisation as a result of proscription, the defendant is denied by the process of proscription any opportunity to resist the factual conclusion that it is a terrorist organisation, at any time, either by resisting a process of proscription, which results in the executive act of proscription, or at the trial for the offence. Section 143(1)(b) of the Evidence Act 1995 means that the regulation proves itself. This in itself emphasises how important it is that proscription should only occur after a due and open process, with an opportunity to those likely to be affected by proscription to deny that the organisation is a terrorist organisation.

⁶⁰ *Submission 23(a)*

10.33 The Attorney-General's Department written submissions discussed strict liability and recklessness in sections 102.5 and 102.8. As to the first, it was said that the offence in section 102.5 (training etc) was repealed by the *Anti-Terrorism Act 2004* and a new offence was inserted. The amendment removed the requirement for the prosecution to prove that the person *knew* that the organisation was a terrorist organisation (the form of the section applicable in the prosecution of *Ishar Ul-Haque*) and, it was said, inserted a new offence (in subsection 102.5(2)) where strict liability applied to paragraph (2)(b). The offence described in section 102.5(1) was not affected by this change.

10.34 This meant that strict liability applied to the element of the offence that the organisation was a proscribed or listed organisation. However, subsection 102.5(4) provided that the offence in subsection (2) did not apply unless the person was reckless as to the fact that the organisation was a proscribed or listed organisation (and the defendant bore an evidential burden to establish this). This meant that if the defendant could, on the evidence, raise an issue fit for consideration by the tribunal of fact that the defendant was not reckless as to the fact that the organisation was a terrorist organisation covered by paragraph (b) of the definition, the prosecution was left to prove beyond reasonable doubt that the defendant was reckless as to whether the organisation was a terrorist organisation covered by paragraph (b).

10.35 Similarly, a different subsection—subsection 102.8(3)—provides that strict liability applies to paragraph 102.8(1)(b) and (2)(g): that is, that the organisation is a proscribed or listed organisation. Subsection 102.8(5) also provides that the offence in section 102.8 does not apply unless the person is reckless as to the fact that the organisation is a listed or proscribed organisation. As the Commonwealth DPP pointed out, this section is further complicated by requiring the prosecution to prove that the defendant knew that the organisation was a terrorist organisation (subsection 102.8(1)(a)(ii) and (2)(c)).

10.36 The Attorney-General's Department submitted that the default elements 'need[ed] to be clarified, first by applying strict liability to the question of whether the organisation is a proscribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation'⁶¹. The SLRC does not regard it as according with justice and proportionate to apply strict liability to offences under either section 102.5 or 102.8. It reiterates that, if strict liability applies to an offence, no fault element need be proved (section 6.1). The SLRC considers that offences that carry penalties of imprisonment—in the case of section 102.5 for twenty-five years and in the case of section 102.8 three years—should not be treated as such offences.

⁶¹ *Submission 14(a)*, p.21.

10.37 To add to the confusion, the Attorney-General's Department refers to section 102.5(4), underneath which is a note: 'A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3))'.

10.38 Between them, subsections (3) and (4) are so confused that the operation of section 102.5 and its effectiveness must be in doubt. Yet the potential penalties are imprisonment for twenty-five years. If it is intended, which seems doubtful, that the offences be reckless offences alone, no more is required than subsection (1). If it is intended to be a knowledge offence, then that should be stated in a subsection. There seems no reason why section 102.5 should not in that circumstance follow the pattern set by section 102.2 and section 102.4. The SLRC recommends that the section be re-drafted as a matter of urgency and without making the offence or any element of it of strict liability.

10.39 There remains the separate concern, referred to above, that section 102.5 catches quite innocent training or teaching of persons who may, unknown to the teacher, be members of a terrorist organisation. This problem can, to some extent, be overcome by introducing the reasonable qualification measured by the language found in section 101.2, 'Providing or receiving training connected with terrorist acts'. Alternatively, if the policy objective in relation to terrorist organisation training is seen as different from that relating to personal conduct, the requirement could be expressed in terms that the training was such as 'could reasonably prepare the person to engage in, or

assist with, a terrorist act or terrorist acts'. The SLRC recommends such an amendment.

10.40 The Commonwealth DPP submitted that the training offences should be extended to include not only providing training to, or intentionally receiving training from, an organisation but also participating in training provided to, or received from, an organisation. The SLRC is not necessarily persuaded that such an amendment is necessary. Nevertheless, there being apparently some doubt about the matter it recommends such an addition. The SLRC recommends that the section be so amended.

10.41 In summary the SLRC recommends that section 102.5, 'Training a terrorist organisation or receiving training from a terrorist organisation', be redrafted as a matter of urgency.

10.42 The redraft should make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.

10.43 The SLRC recommends that the scope of the offence should be extended to cover participation in training.

Section 102.6 – Getting funds to, from or for a terrorist organisation

10.44 Section 102.6, 'Getting funds to, from or for a terrorist organisation', divides into two offences: the first, in subsection (1), based on knowledge that

the organisation is a terrorist organisation, with a penalty of twenty-five years imprisonment; and the second, in subsection (2), based on recklessness as to whether the organisation is a terrorist organisation, with a penalty of fifteen years imprisonment. Subsection (3) provides:

Subsections (1) and (2) do not apply to the person's receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of:

- (a) legal representation for a person in proceedings relating to this Division (ie division 102); or
- (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.

Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4).

10.45 This means that if a legal adviser receives funds solely for the purpose of the provision of legal representation, the legal adviser bears the burden, if he is charged and to be exonerated, of establishing on the balance of probabilities that the purpose of the provision of legal representation was for a person in proceedings relating to Division 102, namely an offence connected with a terrorist organisation, or for the purpose of assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory. This should be compared with section 102.8(4)(d).

10.46 Communications passing between a client and his or her legal adviser, and made for the purpose of obtaining or giving legal advice, are in general privileged from disclosure. The privilege is that of the client and may be

waived by the client (see generally Part 3.10 Division 1 of the *Evidence Act 1995*). Unless the client consents to the legal adviser adducing evidence about the nature of the legal representation (section 122(1) of the Evidence Act), it may be difficult, if not impossible, for the legal adviser to demonstrate that he or she falls within the exception in subsection (3). The consequence may be imprisonment for up to twenty-five or up to fifteen years.

10.47 That apart, no exception is made in respect of legal representation for the organisation that provides the funds for the purpose of seeking de-listing, which may of course fail, or review of the Attorney-General's proscription, which also may fail. If the intention is to deny an organisation the right to use its own funds in defending itself in proceedings concerned with proscription or with any criminal offence, the SLRC regards it as unreasonable, unless provision is made for application to the court to have access to the organisation's funds for that purpose (see Attorney-General's Reference (No 4 of 2002) referred to above).

10.48 **The SLRC recommends that, at most, a defendant legal representative should bear an evidentiary burden, and that subsections (1) and (2) should not apply to the person's receipt of funds from the organisation if the person received the funds solely for the purpose of the provision of:**

- (a) legal representation in proceedings under Part 5.3, or**
- (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.**

Section 102.7 – Providing support to a terrorist organisation

10.49 This section is divided into two subsections: one, a knowledge offence, and the second, a reckless offence. The nub of each offence, found in paragraphs (a) and (b), is that the person intentionally provides to an organisation support or resources that would help a terrorist organisation to engage in an activity described in (a) of the definition of ‘terrorist organisation’ in Division 102. The penalty for the knowledge offence is twenty-five years imprisonment and the penalty for the reckless offence is fifteen years imprisonment. The section has some importance when coming to look at section 102.8.

10.50 HREOC submitted that the ambiguity and breadth of the term ‘support’ may render subsection (1) disproportionate to the legitimate aims sought to be achieved by the legislature. Thus, the subsection may impermissibly restrict the right to freedom of expression. Under that subsection a person commits an offence if the person intentionally provides to an organisation, known to that person to be a terrorist organisation, support or resources that would help the organisation engage in an activity described in paragraph (a) in the definition of terrorist organisation. ‘Support’ is not defined in the Criminal Code, and could be regarded as support that directly or indirectly helps a terrorist organisation engage in a terrorist act. Thus, it could extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective.

10.51 The European Court of Human Rights has held that a comparable provision to Article 19(3) of the ICCPR (Article 10(2) of the European Convention on Human Rights (ECHR)) only permits laws restricting expression that incites to violence and public disorder. It is stated that Article 10(2) provides ‘little scope ... for restrictions on political speech or matters of public interest.’⁶² This is in recognition of the fundamental importance of freedom of expression to a democratic society.

10.52 HREOC submitted that section 102.7 may therefore disproportionately restrict the right to freedom of expression. This is because it arguably extends to expression other than expression that ‘incites to violence or public disorder’. It may also impermissibly infringe the right to freedom of association. HREOC therefore submitted that the term ‘support’ used in section 102.7 should be defined in such a way as to ensure that it does not deprive that section of its proportionality.

10.53 HREOC’s submissions reveal the vulnerability of this section unless the meaning of ‘support’ is read down in the way suggested. The SLRC accepts that the combination of vulnerability and uncertainty requires that the section be amended to limit its application in a way which would reduce any infringement upon the right to freedom of expression.

10.54 The SLRC recommends that section 102.7, ‘Providing support to a terrorist organisation’, be amended to ensure that the word ‘support’

⁶² *Unabhängige Initiative Informationsvielfalt v Austria* 28525/95 [2002] ECHR (*Application no. 28525/95*) JUDGMENT STRASBOURG 26 February 2002 **Final** 26/05/2002 at 36 citing *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV

cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective.

10.55 One means of achieving this could be to insert defences of the type contained in section 80.3 in relation to treason and sedition, noting that the ALRC is currently examining section 80.3 as part of its review of the sedition provisions and that there may be scope to refine the provision.

Section 102.8 – Associating with terrorist organisations

10.56 Section 102.8 was inserted into the Criminal Code in 2004. Section 102.1(1) provides that in Division 102 ‘associate’ should be defined in this way: ‘A person associates with another person if the person meets or communicates with the other person.’. The word so defined would embrace a casual meeting, in the street or elsewhere or a casual communication with some other person. Neither person need ever have met or communicated before. Such an association, provided it happens on two or more occasions, can give rise to an offence under section 102.8(1) and (2), subject to the conditions set out therein. The conditions in subsection (1) are:

- (a) That on two or more occasions:
 - (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
 - (ii) the person knows that the organisation is a terrorist organisation; and
 - (iii) the association provides support to the organisation; and
 - (iv) the person intends that the support assists the organisation to expand or to continue to exist; and

(v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and

(b) The organisation is a terrorist organisation because of paragraph (b) of the definition of terrorist organisation in Division 102 (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

10.57 The same problem attaches to the use of the word 'support' in this section as in section 102.7. It is difficult to understand in what circumstance meeting or communicating with another person would provide support of itself to a terrorist organisation, that is to say, support based only on the association. Subsections (1)(a)(iv) and (2)(e) tend to confirm that it is support of the type there described which is at the heart of the offence. Presumably, paragraph (a) should be construed to mean that the association provides such support on at least two of the occasions; that on each of those occasions the person concerned intends that the support assist the organisation to expand or to continue to exist; and that on each of those occasions the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation. The penalty that flows, if the conditions in subsection (1) are satisfied, is imprisonment for three years. Subsection (2) provides for an offence if the person has previously been convicted of an offence against subsection (1) and the other six conditions found in paragraphs (i) to (v) and (b) in subsection (1), and now found in paragraphs (b) to (g) in subsection (2), apply. Again, the penalty is imprisonment for three years.

10.58 Subsection (3) provides that strict liability applies to paragraphs (1)(b) and (2)(g), that is to say, the paragraphs that stipulate that the organisation is a terrorist organisation because it is proscribed. For reasons already given, it is hard to see what subsection (3) is intended to achieve. The SLRC has already discussed the application of strict liability to offences of this nature and recommends the omission of subsection (3).

10.59 Subsection (4) includes four paragraphs (a) to (d). Paragraph (d) contains six sub-paragraphs. In paragraphs (a) to (d), conditions are set out. If they apply, section 102.8 does not apply. The first of the conditions in subsection (4) is '(a) the association is with a close family member and relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern; ...'. 'Close family member' is defined in section 102.1(1) in this way:

Close family member of a person means:

- (a) the person's spouse, de facto spouse or same sex partner; or
- (b) a parent, step-parent or grand-parent of the person; or
- (c) a child, step-child or grand-child of the person; or
- (d) a brother, sister, step-brother or step-sister of the person; or
- (e) a guardian or carer of the person.

10.60 The existence of subsection (4) suggests that an association with any one of those persons, even as a matter of family or domestic concern, might have been caught by subsections (1) or (2).

10.61 Subsection (4)(b) provides that the section does not apply if:

- (b) the association is in a place being used for public religious worship and takes place in the course of practising a religion.

10.62 Subsection (4)(c) provides that the section does not apply if ‘the association is only for the purpose of providing aid of a humanitarian nature’. Subsection (4)(d) provides that the section does not apply if ‘the association is only for the purpose of providing legal advice or legal representation in connection with’ and there then follow the six sub-paragraphs (i) to (vi). These include, by way of illustration,

- (i) criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or
- (ii) proceedings relating to whether the organisation in question is a terrorist organisation.

10.63 Sub-paragraph (i) is expressed in terms wider than section 102.6(3). A note to subsection (4) is to the effect that the defendant bears an evidential burden in relation to the matters in subsection (4). This burden of proof is in stark contrast to a legal burden to apply in section 102.6(3), and adds support to the view that, in 102.6(3), the burden should be amended to an evidential burden as in 102.8(4).

10.64 Subsection (5) provides:

‘This section does not apply unless the person is reckless as to the circumstances mentioned in paragraph (1)(b) and (2)(g) (as the case requires).

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).’

10.65 The SLRC cannot understand how subsection (5) operates. As already demonstrated subsection (1)(a) requires (ii) that the person knows that the organisation is a terrorist organisation, and (v) knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation. The same is the case in subsection (2) (see paragraphs (c) and (f)). Unless subsection (5) is read to contradict the provision that the person had knowledge that the organisation is a terrorist organisation, which would be absurd, it has no operation. The SLRC would recommend, at the very least, that subsection (5) of section 102.8 be repealed. It does no more than create confusion.

10.66 Section 102.8 denies a fundamental human right, namely freedom of association, and, subject to section 102.8(6), the constitutionally guaranteed freedom of political communication implied from the text and structure of the Constitution (*Lange v Australian Broadcasting Corporation*⁶³). The SLRC regards this method of defining an offence as inappropriate, principally because it is quite unclear to the reader what the ambit of the offence may be. That ambit is described by reference to an unstated constitutional limitation. Put another way, the defendant is told that if the defendant, carrying the evidential burden, can demonstrate that the offence purports to extend outside the unstated constitutional limitation, then to that extent the subsection does not apply. In short the measure of the offence can only be determined by

⁶³ (1997) 189 CLR 520

challenging its constitutionality. In the opinion of the SLRC, putting other considerations aside, the limits of the offence should be clearly and directly specified in the section.

10.67 In its submissions to the SLCLC's inquiry into the *Anti-Terrorism Bill (No 2) (2004)*, which introduced the proposed section 102.8, HREOC expressed its concern that the new offence lacked precision and was wide-ranging in terms of the types of activities or persons who might be subject to it. The stated intention of the amendment was that the offence apply in relation to the provision of support to a terrorist organisation as an entity, rather than with respect to the activities of the organisation. The offence was designed to address what was said to be the fundamental unacceptability of the organisation itself by making associating with the organisation, in a manner which assisted its continued existence or expansion, illegal. The offence potentially infringed the rights prescribed in Article 19 (Freedom of expression) and Article 22 (Freedom of association) of the ICCPR. Such infringements are only permissible if the proposed amendments conform to the principle of proportionality and are the least intrusive means to achieve the stated aim.

10.68 It is an essential feature of both offences in section 102.8 that the association provides support to the organisation and the person intends that the support assist the organisation to expand or to continue to exist. Such an offence, with a much lower penalty than that prescribed by section 102.7, could be inserted without the need to rely on the concept of 'associate'.

Section 102.7, in a new subsection, could make it an offence to provide support or resources to a terrorist organisation that would help the organisation engage in an activity described in paragraph (a) of the definition of 'terrorist organisation' with knowledge that the organisation was a terrorist organisation or reckless as to whether it was. Alternatively, a lesser offence could be substituted in section 102.8, being the offence of providing support to a terrorist organisation with the intention that the support assists the organisation to expand or to continue to exist. There seems no need whatever to make it an ingredient of such an offence that the person charged was, when providing the support, associating with some other person.

10.69 The offence so described would achieve the object of section 102.8 without adding conditions that cause great concern to Muslim people and fly in the face of a fundamental human right. Association, whatever its overtones, is a minor ingredient of the offence. A critical part is that a person provides support to the organisation. That person can be charged individually for doing so.

10.70 The explanatory memorandum for the 2004 Bill stated that the provisions drew on concepts from the offence of consorting⁶⁴ and the use of non-association orders as part of the sentencing in New South Wales⁶⁵. The explanatory memorandum stated that 'just as consorting offences can be used to break up criminal gangs, the proposed offence can be used to break up terrorist groups'. AMCRAN submitted that there are a myriad of problems in

⁶⁴ *Crimes Act 1900* (NSW) section 546A

⁶⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) No 92

relation to consorting offences under State legislation and no evidence at all that these consorting laws have had any impact in breaking up criminal gangs.

Section 546A of the Crimes Act (NSW) provides:

‘Any person who habitually consorts with persons who have been convicted of indictable offences, if he or she knows that the persons have been convicted of indictable offences, shall be liable on conviction before a local court to imprisonment for six months, or to a fine of four penalty units.’

10.71 Steel,⁶⁶ in a comprehensive analysis of the offence, finds it is laden with problems. First, what the Division creates is more a general police power than a substantive offence because the elements are impossible to define, and second, the scope of the offence is so broad that it ‘applies indiscriminately to large sections of the public without any clear justification.’

10.72 It has been argued that it is inconsistent with the principle of justice and fair punishment that a person who has served and completed the punishment for a crime imposed by a court should then be subject to further punishment. AMCRAN submitted that the new offences go even further in that the person does not even have to be convicted for the offence to apply. Mere association with a member of an organisation proscribed by the government as a terrorist organisation is sufficient.

⁶⁶ A Steel, ‘Consorting in New South Wales: substantive offences or police power?’, *University of New South Wales Law Journal*, 26(3), 2003, p. 567

10.73 The Law Reform Commission of Western Australia, in recommending repeal of an offence similar to section 546A in Western Australia, stated that it is:

‘ ... inconsistent with the principles of the criminal law to make it an offence to associate with particular people. Offences should prescribe conduct, thought deserving of punishment. Merely associating with people whether they are known to be in a particular category or are reputed to be in a particular category, should not be criminal.’⁶⁷

Similar comments are to be found elsewhere.⁶⁸

10.74 The Attorney-General’s Department in its supplementary submission sought to explain why there was a separate association offence:

‘The association offence (section 102.8) extends the application of the offence provisions to a person whose associations with another person, who is a member or who promotes or directs the activities of a terrorist organisation, assists the organisation to expand or to continue to exist. There are a number of exceptions to the association offence prescribed at subsection 102.8(4).

The offences at section 102.7 of providing support to a terrorist organisation target the intentional provision of support or resources to a terrorist organisation that would help the organisation prepare, plan, assist in or foster the doing of a terrorist act. The prosecution must prove an intention associated with the planning or financing of a terrorist act. That is, if evidence cannot be adduced demonstrating a link to such a terrorist act, then the offence cannot be made out.

Section 102.7 differs from section 102.8 as it requires there to be a causal link to a ‘terrorist act’. The association offence, by contrast,

⁶⁷ Law Reform Commission of Western Australia, Report on Police Act Offences, Project No 85, 1992 41–42

⁶⁸ 2002 Victorian Scrutiny of Acts and Regulations Committee

does not require a direct causal link to the commission of a terrorist act. It targets conduct that is more remote to the nexus of terrorist activity, where it cannot necessarily be proved that a person has a requisite intention associated with a specific terrorist act but where the association builds up its overall capacities and the capacity to do harm. It is intended to disrupt the mechanisms that terrorist organisations use to exploit their associates with a terrorist organisation to continue to exist or expand. The offence is predicated on the need to address the deplorability of the organisation itself by making associating with the organisation in a manner which assists the continued existence or the expansion of the organisation illegal. For example, the preliminary stages of recruiting a person into a terrorist organisation, or the lending of public support to a terrorist organisation in an effort to lend credibility to that organisation. Although more remote, such conduct can play an important part in the life cycle and growth of terrorist organisations. In recognition of the fact that the relevant conduct is more remote, lower penalties apply to the association offence.

The absence of an anterior requirement to establish an intention associated with planning or financing a terrorist act precludes characterisation of section 102.8 as an appropriate offence within the definitional ambit of a supporting or resourcing offence. In light of their contrasting aims, it seems appropriate to retain distinct association and support offences.⁶⁹

10.75 HREOC noted in its submissions that the majority of the SLCLC, in its report, concluded in relation to section 102.8 that the evidence did not persuade it of the need for the offence in the first place, given the already wide ambit of terrorism offences under the current law and the breadth of the definition of 'terrorist organisation' contained in the Criminal Code. The

⁶⁹ Attorney-General's Department, *Submission 14(c)* p.3

breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions, has led the SLRC to conclude that considerable difficulties surround its practical application. Some of these difficulties include the offences' potential capture of a wide-range of legitimate activities, such as some social and religious festivals and gatherings and the provision of legal advice and legal representation. Further, the section is likely to result in significant prosecutorial complications.

10.76 The SLRC agrees with the arguments expressed in HREOC's submissions and other submissions in support of the conclusion that section 102.8 should be repealed.

10.77 The SLRC recommends that in its present form section 102.8 of the Criminal Code, 'Associating with terrorist organisations', be repealed.

10.78 The SLRC recommends that, if section 102.8 is retained, section 102.8(5) be repealed.

10.79 This leaves open its replacement by a lesser support offence which does not depend upon association.

General concerns

10.80 Some of the submissions to the SLRC advanced arguments in favour of a recommendation that some at least of the legislation under consideration,

and as amended from time to time, should be repealed. In its submission to the SLRC dated January 2006, the Australian Privacy Foundation (APF) stated that the government had consistently failed to provide any reasoned justification for claiming that existing laws were not adequate to deal with particular threats. The SLRC should insist, it was said, on case studies of investigations and prosecutions where the new powers have actually made a significant difference. The FCLC (Vic) said that the Act did not serve to deter or prevent politically, religiously or ideologically motivated violence, and was an unjustified and disproportionate legislative response given the levels of terrorist threat in Australia. The FCLC argues that the legislation should be repealed. See also the submissions of the Law Council of Australia and Mr Patrick Emerton⁷⁰, who make similar submissions.

10.81 Lord Carlile of Berriew, QC, is the Independent reviewer appointed by the Secretary of State under the *Prevention of Terrorism Act 2005* (UK) annually to review the operation of that Act and prepare a report to parliament pursuant to the *Terrorism Act 2000*. Lord Carlile, in his report dated 6 October 2005, speaking of proposals by the United Kingdom Government for changes to the laws against terrorism, remarked: 'I have heard the view expressed by some with profound knowledge of the criminal justice system that there is no need for terrorism specific legislation. That view has been far less in evidence since 7 July 2005, and I disagree with it.'⁷¹ Referring to young men prepared

⁷⁰ Mr Patrick Emerton, *Submission 16*

⁷¹ Proposals by her Majesty's Government for changes to the Laws against Terrorism- report by the Independent Reviewer Lord Carlile of Berriew Q.C. October 2005 page 4 paragraph 10. His Lordship's Report is available electronically at <<http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/carlile-review-121005?view=Binary>>

to rationalise their own criminal acts in terms of death and glory, and the ways in which Islamist extremists are able to manipulate the question of identity and make it synonymous with religion, or rather, a religion they portray as everywhere under infidel assault, calls for a response by the introduction of laws that justly balance the important and even fundamental civil liberties of the suspected terrorist and the innocent public. He says, 'laws which have the effect of wounding identity further are unlikely to do more than exacerbate the situation. Laws with the effect of bringing together in a fair way the proper and constitutional will of the majority of the public have some prospect of persuading the disaffected that terrorism is an unacceptable option, and of preventing it when it would otherwise occur. There are non-legislative measures too that can be taken to improve work against terrorism.'⁷²

10.82 In the course of dealing with the draft Terrorism Bill 2005 in the United Kingdom, Lord Carlile discussed clauses dealing with encouragement of terrorism, dissemination of terrorist publications, preparation of terrorist acts, training for terrorism, and making and possession of devices or materials. Dealing with a clause of the Bill, intended to extend the existing power to proscribe organisations that promote or encourage terrorism, which proposed the potential inclusion of organisations whose activities or statements glorify, exalt or celebrate terrorism, Lord Carlile said:

'Proscription is regarded by some as something of a toothless tiger. However, after careful inquiry including discussions about the merits or otherwise of proscriptions during the worst of the troubles in Northern

⁷² Proposals by her Majesty's Government for changes to the Laws against Terrorism- report by the Independent Reviewer Lord Carlile of Berriew Q.C. 12 October 2005 page 4 paragraph 10. His Lordship's Report is available electronically at <<http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/carlile-review-121005?view=Binary>> at paragraph 17, page 6.

Ireland, I share the opposing view that it can play a role in reducing the opportunity for disaffected young people to become radicalised towards terrorism. That being so, extending the list to include the organisations envisaged in the clause is a proportional limitation on the freedom of association and related to the public good. However, it is important that restraint is shown in the exercise of the power.⁷³

10.83 It is noted that, in the UK, proscription is subject to the system of appeal established through the Proscribed Organisations Appeal Commission (POAC). However, the function of that body is to do no more than review the proscription within the same limits that would apply on review under the ADJR Act.

10.84 Dealing a little later with clauses providing for the extension of the period of detention by judicial authority, Lord Carlile said:

'In serious non-terrorist crime it was occasionally possible for the police to wait for the crime to be committed and catch the criminals red handed. This occurred with a major bullion robbery at Heathrow Airport for which the culprits were sentenced in September 2005. That approach is very rarely possible with terrorist crime, because of the potentially dreadful consequences of a terrorist act being brought to fruition. There have been occasions when, because of the nature of the threat, arrests have had to take place at an early stage to avoid the possibility of a nervous terrorist acting earlier than might otherwise have been intended.'⁷⁴

10.85 Part of the argument for the repeal of terrorist legislation was that the existing criminal law, without the Security Acts relating to terrorism, was

⁷³ Proposals by her Majesty's Government for changes to the Laws against Terrorism- report by the Independent Reviewer Lord Carlile of Berriew Q.C Q.C. 12 October 2005 at paragraph 52, page 15.

⁷⁴ Proposals by her Majesty's Government for changes to the Laws against Terrorism- report by the Independent Reviewer Lord Carlile of Berriew Q.C. 12 October 2005 at paragraph 57, page 16.

capable of dealing with issues raised by what was described as politically and religiously motivated violence. This argument proceeded in part upon what is said to be ASIO's assessment of the national terrorism threat level at 'medium', a level that has remained constant since 11 September 2001. Medium threat level means a terrorist attack could occur. Above medium are two levels: 'high' which means a 'terrorist attack is likely' and 'extreme' which means a 'terrorist attack is imminent or has occurred'. Below 'medium' on a four level scale is 'low'—'terrorist attack is not expected'. According to the Australian Government Information Sheet:

'The system was not introduced as a reaction to any particular threat, rather a sensible arrangement to inform national preparation and planning and to provide greater flexibility for responses.

Raising the national-counter terrorism alert level guides national preparation to prevent, detect and respond to a terrorist act. If the Australian Government was advised by its security and intelligence agencies that the increased public vigilance and mechanisms implemented from raising the alert level was required to prevent a terrorist threat then it would do so. However, every situation is different and not all situations require this level of response.⁷⁵

10.86 In contrast to the submissions for repeal of the legislation are the submissions from state governments, police and security organisations, Directors of Public Prosecutions, and federal government bodies. These bodies and organisations, responsible for the safety of the public in Australia

⁷⁵ Attorney-General's Department, Information Sheet entitled "National Counter-Terrorism Alert Level" available electronically at: <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/F2ED4B7E7B4C028ACA256FBF00816AE9?OpenDocument>

and of Australian institutions, largely support the legislation and, in some instances, submit that the legislation should be amended to reduce its complexity or extend its coverage.

10.87 In his submission to the SLRC on 8 March 2006, the Director-General of ASIO referred to terrorist acts in Australia in the 1970s and 1980s and said:

‘...While these attacks occurred in Australia, they were perceived to be directed against foreign interests, not specifically against Australians even though there were some Australian victims. At that time our assessment was and remained that whilst terrorist attacks in Australia were possible, such attacks were generally unlikely. However, the September 2001 attacks in the United States demonstrated all too clearly that it was possible for capable and committed terrorists to operate undetected and to mount a successful attack. ASIO subsequently revised its assessment of the threat and the level of alert was raised to medium which means, by definition, a terrorist attack in Australia is feasible and could well occur and that threat level has remained at that level since September 2001. ...

From ASIO’s perspective, the legislative changes since 2002 have been effective in strengthening the counter-terrorism framework to allow ASIO and other agencies better to respond to the threat of terrorism.’⁷⁶

10.88 On reference to it of the 2002 Bills, the SLCLC in chapter 3 considered the need for the SLAT Bill. The Senate Committee’s conclusion was expressed as follows:

‘3.34 While acknowledging that existing criminal laws would cover the results of many terrorist acts, the committee also notes that

⁷⁶ Transcript of public hearings in Sydney, 8 March 2006, p.3 and p.5.

Australia has signed various international treaties that seek to address terrorism, including the Convention for the Suppression of Financing of Terrorism and the Convention for the Suppression of Terrorist Bombings that are the subject of two of the bills under consideration. United Nations Security Council resolution 1373 adopted on 28 September 2001 indicates a world wide determination to develop measures to address terrorism and demonstrate a commitment to prevent acts of terrorism and punish those who commit them. The committee has also heard evidence of certain gaps in Australia's current legislative framework. Consequently the committee considers that new legislation to achieve a comprehensive approach to dealing with terrorism is justified.⁷⁷

10.89 Between what might be described as the extremes on this issue are the submissions of HREOC. In the course of his oral submissions, the President of HREOC, the Honourable John von Doussa, QC, said:

'I think the submissions that we made perhaps differ in an important respect from many of the others. My impression of the Law Council submission and of some of the others is that they focus on what is the assessment of the risk today. Does the risk today justify the legislation? The view that I put forward is that that is not the right question to ask.

We are facing an international terrorist regime of unknown proportions and dimensions. Whatever the risk today is, we don't know what the risk is going to be. The government will be severely criticised, and rightly so, if it does not have in place measures that will deal with the most serious risks that might arise at short notice.

⁷⁷ Senate Legal and Constitutional Committee Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills, full details of which can be found at <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/terrorism/index.htm>

It seems to me that what the government has to do is put in place laws that will deal with the most serious situation straight away. We can't wait for them to arise and then go back to Parliament to get laws to deal with the risks. So you have to wait until the powers are exercised and then assess the risk at the time of the executive exercise of power. Was that particular exercise of power, pursuant to the risk, justified by the risk at the time that it was exercised?' ⁷⁸

10.90 In his speech given on 21 January 2006, the Commonwealth Attorney-General noted that other countries had learnt the hard way that it is difficult to 'play legislative catch-up' after a terrorist attack occurs.

10.91 Despite significant questioning by the SLRC of a number of organisations that presented submissions as to concrete evidence that the general criminal law would accommodate, particularly on a national basis, all types of terrorist activity contained in the legislation under review—importantly the prevention of such activity—this has not been demonstrated. The SLRC also notes that one of the reasons the States and Territories agreed to hand to the Commonwealth the power to enact this anti-terrorism legislation was the desire that there be a national approach to such legislation.⁷⁹

Discriminatory application

10.92 It is of considerable importance that anti-terrorism legislation does not contravene other human rights legislation such as the *Racial Discrimination*

⁷⁸ Transcript of Public Hearings Sydney 31 January 2006 p.33-34.

⁷⁹ See submissions 20 and 13.

Act 1975 (Cth) and similar state or territory legislation by directly or indirectly discriminating against minority groups.

10.93 AMCRAN submitted that there are two consistent patterns that cause 'concern and in some cases consternation in the Muslim community'. The first is that the laws are seen as discretionary in their application and the choice of those to whom they apply. This leads to the perception that the discretionary application is a façade for discriminatory application and that the laws are applied in a discriminatory manner, and in particular, used against the Muslim and Arab communities. Thus, AMCRAN submitted that concrete steps should be taken to reduce the discretionary nature of the legislation, which would be likely to improve the perception of its justice and fairness.

10.94 The second problem seen by AMCRAN is that there is a lack of clarity about many aspects of the legislation. This lack of clarity leads to a great deal of confusion and makes it very difficult for AMCRAN as a community education group to explain to the community what the laws are. This leads to a form of self limiting behaviour where people err far too much on the side of caution and cease to participate fully in public life. For example, AMCRAN has met with people whose parents have erroneously instructed them not to participate in peaceful protests because they will be charged under the new anti-terrorism laws.

10.95 Dr Kadous submitted that, put simply, an important but comparatively small section of the Australian community feels threatened by legislation

which on some constructions could make individuals, who see themselves as innocent of any crime, and particularly of terrorist crime, face imprisonment as the result of associations in places of worship or through family or friendships. If such fears are groundless, then that has not been sufficiently explained for these members of the Australian community.

10.96 The impact of security legislation on minority groups has been the subject of research overseas⁸⁰. HREOC has also noted a profound impact on Muslim and Arab Australians of events in recent years and found that the biggest impacts are a substantial increase in fear, a growing sense of alienation from the wider community and an increase in distrust of authority.

10.97 The SLRC also has serious concerns about the way in which the legislation is perceived by some members of Muslim and Arab communities. This is indicated in some of the submissions. Misunderstandings and fearfulness will have a continuing and significant impact and tend to undermine the aims of the security legislation. The negative effects upon minority communities, and in particular the escalating radicalisation of young members of such communities, have the potential to cause long term damage to the Australian community. It is vital to remember that lessening the prospects of 'homegrown' terrorism is an essential part of an anti-terrorism strategy.

⁸⁰ 'The impact of anti terrorism powers on the British Muslim population', Liberty, June 2004; Hillyard, 'Suspect community: people's experience of the prevention of terrorism acts in Britain', 1993; Council for Racial Equality Submission to the Joint Committee on Human Rights, Review of Counter-terrorism Powers, 2003-4 HL 18th Report, Appendix 1.S

10.98 Evidence from the Department of Immigration and Multicultural Affairs (DIMA) and the PIAC support the conclusion that Australian government consultation with ethnic groups, particularly the Muslim and Arab communities, tends to be compartmentalised and could be more effective in reaching those citizens who least understand and are most fearful of the operation of the legislation.

10.99 For reasons previously set out, the SLRC accepts the need for separate criminal legislation to deal with what is commonly understood as terrorism centred on, and defined by, the expression ‘terrorist act’ in section 100.1(1) of the Criminal Code. Further, it accepts the appropriateness of defining and isolating an organisation which is a terrorist organisation. The SLRC does not recommend a repeal of the terrorist legislation. However, the SLRC does strongly recommend amendments—such as reform of the process for proscription; removal of one element of the definition of ‘advocates’ from the grounds of proscription and the repeal of the association offence in section 102.8—that could play a very useful part in lessening the fear, alienation and distrust of authority felt by Muslim and Arab members of the community about the security legislation. Further, the SLRC believes that greater effort has to be made by all Australian governments to move among the Muslim and Arab communities, explain the legislation, and learn about the concerns of those members of the community so that something practical and immediate can be done about it. The National Action Plan, which the SLRC was advised is being developed under the auspices of the Ministerial Council on Immigration and Multicultural Affairs, must pay adequate attention to this,

and facilitate particular strategies and activities properly and adequately to address this essential need. The SLRC considers that the media has an important role to play in responsibly reporting court proceedings in, and the investigation of, terrorist as well as all other cases.

10.100 The SLRC notes the good work undertaken by DIMA in engaging with communities through consultation and informed debate. A representative from DIMA at the public hearing in Sydney on Tuesday 7 March advised:

‘The government continues to work to reinforce Australia's social cohesion, to broaden community engagement and, for example, as I've just mentioned, the Living in Harmony program and other initiatives. Since 2004 Living in Harmony has undertaken major projects, working with the Family Court of Australia and various police services to strengthen two-way communication and build relationships between law enforcement agencies and emerging communities from the Middle East and Africa.

On 23 August 2005 the Prime Minister held a summit meeting with leaders of the Muslim community. At that time the government committed to continuing dialogue with the Muslim communities, and several projects have emerged from those consultations and a longer term advisory body formed, the Muslim Community Reference Group. Membership of this body and its sub-groups is drawn from a cross-section of the Muslim community nationally, representing a range of organisations, ethnic communities, professions and fields. Seven sub-groups have been established under the auspices of the Muslim Community Reference Group to target specific areas of concern including youth, women, schooling, education and training of clerical and lay leaders, employment outcomes and workplace issues, plus management and family in the community.

A major achievement to date was the staging of a national Muslim youth summit in December 2005. That summit engaged a range of young Muslim Australians to identify and discuss issues of concern, and determined practical solutions to address the concerns that they face. It's anticipated that state and territory based youth summits will take place over the next six months to reinforce the common bonds between young Muslims and non-Muslims in Australia and identify ways in which they can work together to make Australia a better place for all young people.

A national action plan was initiated in late 2005 by the Council of Australian Governors to address intolerance and extremism. It will put in place a coordinated strategic response from all Australian governments to reinforce social cohesion and oppose intolerance and extremism. The plan will be supported by initiatives at federal, state and territory government levels. The national action plan consists of five strategic elements: (1) encouraging tolerance and social cohesion through employment, public education and community activities; (2) engaging with communities including through consultations and ongoing dialogue; (3) building leadership capacity and communication skills in Australian communities; (4) supporting leaders and teachers; and (5) improving the understanding of extremism.⁸¹

10.101 However, the SLRC recommends that additional funds be committed so that Muslim and Arab communities are better informed about and better understand the activities that are, and are not, prohibited by the security legislation under review.

10.102 **The SLRC recommends that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim**

⁸¹Transcript of public hearings Sydney 7 March 2006 p.97

and Arab communities, and to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them.

CHAPTER 11

OTHER ISSUES ARISING FROM THE *SECURITY LEGISLATION AMENDMENT (TERRORISM) ACT 2002*

Extended geographical jurisdiction – category D

11.1 Each of the sections describing offences in Division 101 provide that section 15.4, 'Extended geographical jurisdiction – category D', applies to an offence against the section. Section 102.9 applies category D to an offence against Division 102. Section 15.4 of the Criminal Code, 'Extended geographical jurisdiction – category D', is in these terms:

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

11.2 Section 100.1(4) of the Code provides that in Division 100:

- (a) A reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
- (b) A reference to the public includes a reference to the public of a country other than Australia.

11.3 The subsections referred to in the note to section 15.4 deal respectively with 'Complicity and common purpose', 'Innocent agency', and the provision that a reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including the Code) includes a reference to an offence against section 11.1(Attempt), 11.4 (Incitement) or 11.5 (Conspiracy) of the Code that relates to such an offence.

11.4 The FCLC (Vic) made the point that the category D extension means that it did not matter whether the offences took place in Australia or whether the consequences of the offences occurred in Australia. Thus is expanded the class of people that may be liable to prosecution. The FCLC (Vic) was deeply concerned that people may be prosecuted for having involvement with an organisation in an overseas jurisdiction where the organisation is not classed as a terrorist organisation. An organisation might fall within the extremely broad definition of a terrorist organisation but might not be so defined overseas. For example, a person who provided funds to that organisation while overseas might later be prosecuted under Australian law even if, when the person provided the funds, the person did not know that the organisation would be classed as a terrorist organisation under Australian law. The person might not have known about the activities of the organisation that would attract this classification but, without knowledge of the classification system, the person had no way of knowing that an offence was being committed.

11.5 The FCLC (Vic) submitted that this was particularly worrying in the case of migrants to Australia, who might have had no way of knowing that they were contravening Australian law yet might be subject to prosecution for contraventions of the legislation that occurred before they arrived in Australia, or perhaps before they even considered coming to Australia.

11.6 As a matter of constitutional law, the Commonwealth Parliament has a plenary power to legislate extra-territorially that is not limited in respect of any nexus with the 'peace, order and good government' of the Commonwealth (*Polyukhovich v The Commonwealth (War Crimes Act case)*⁸²). Terrorism in its current forms is known to operate without regard to borders or jurisdictional limits. Practical considerations of an evidential nature will bear upon the decision to prosecute within Australia. Bearing in mind that knowledge or recklessness is an essential feature of each of the offences, the SLRC would not recommend the application of any less extended geographical jurisdiction.

The 'the' to 'a' change

11.7 In its submission, Gilbert & Tobin Centre of Public Law referred to minor textual amendments made by the Anti-Terrorism Acts of 2005 and popularly referred to as "the 'the' to 'a' change". Making of the amendments was motivated by concern that the preparatory acts could only be prosecuted, under the offences as originally drafted, if they pointed to some specifically planned terrorist act. This perceived defect in the provisions was addressed by amendments to subsections 101.2(3), 101.4(3), 101.5(3), 101.6(2) and

⁸² (1991) 172 CLR 501

103.1(2) made by the *Anti-Terrorism Act (No 1) 2005* and subsections 102.1(1)(paragraph (a) of the definition of *terrorist organization*) and (2) made by the *Anti-Terrorism Act (No 2) 2005*.

11.8 On the assumption that change was necessary in order to have such an effect, it was submitted that these provisions now expressly have the effect of criminalising people for conduct committed before any specific criminal intent has formed. While preparatory conduct should certainly constitute an offence, two key objections might be raised to an attempt to provide for this in the absence of an intention to pursue a sufficiently detailed plan.

11.9 First, this is contrary to ordinary principles of criminal responsibility, since people who thought in a preliminary or provisional way about committing crimes might always change their minds and not implement their plans. This amendment allows a person to be prosecuted before a genuine criminal intention has taken place.

11.10 Second, (and the authors acknowledged that the argument that followed would benefit from seeing what transpired in the courts in respect of recent arrests), as a matter of the practicality of securing a criminal conviction, the width of the offences as amended seems hardly helpful. Indeed, it might be said to encourage authorities to act precipitately. Of course, with delay might lie danger, but to arrest persons on the basis of activities or possessions which could not, at that point in time, be connected with any specific terrorist act, risked failure in convincing the courts that the crime was

in fact being prepared. It also, by corollary, might be said to expose a range of innocent activities to criminal sanction by casting the net so wide.

11.11 The SLRC has been informed that these amendments were made after full debate in the Parliament. Given that the amendments are of recent origin, and that there are cases currently pending before the courts, the SLRC considers it premature to comment upon the operation, effectiveness and implications of these amendments. The SLRC does not recommend any change.

Penalties

11.12 Several parties submitted that the maximum penalties imposed for offences under Divisions 101 and 102, Subdivision B, were excessive. Comparison of the maximum sentences prescribed for each of the offences suggests, it is said, disproportion. For example, in section 102.5, 'Training a terrorist organisation etc', a person who does so, 'reckless as to whether the organisation is a terrorist organisation', faces a penalty of imprisonment for twenty-five years. Under section 101.2, a person who knowingly provides training 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act' faces the same penalty of twenty-five years imprisonment, but a person who does so 'reckless as to the existence of the connection described' faces a lesser penalty of fifteen years imprisonment.

11.13 The SLRC observes that the sentences are not mandatory sentences but represent the maximum penalty for the worst case. The Act does not limit

the discretion of a sentencing judge when fixing penalty to apply ordinary rules of mitigation taking account of matters prescribed in Part 1B of the *Crimes Act 1914* (Cth). This is as it should be.

11.14 Usually a sentencing judge would compare the penalty prescribed for the offence of which a person has been convicted with the penalties for other offences to form a view of the seriousness with which the legislature regards the offence charged. It is therefore important that the legislature pay careful attention to the relative seriousness of each offence in fixing penalty. However, this is a matter for the legislature and the inconsistencies are not such as to enable the SLRC to make any particular recommendation.

Treason

11.15 The SLRC rejects the general proposition that in a modern democratic society the offence of treason, so described, should no longer exist. Particular submissions are directed to section 80.1(1)(f). The earlier paragraphs in the section, namely (a) to (e), are modernised versions of what traditionally has been the law of treason. Paragraph (f) makes it an offence, called 'treason', if the person:

- (f) engages in conduct that assists by any means whatever, with intent to assist:
 - (i) another country; or
 - (ii) an organisation;

that is engaged in armed hostilities against the Australian Defence Force;

11.16 In the 1991 Gibbs Report⁸³ it was said:

‘31.49 On the other hand, it can be argued with considerable force that, if Australia sends part of its defence force overseas to oppose any armed force, it owes it to the defence force members to prohibit other Australians from doing any act to assist the other force.

31.50 A provision on the broad lines of the Canadian or New Zealand formulation, that is, making it an offence for an Australian citizen or a person voluntarily resident in Australia, to help a State or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities would express this principle. It may well be that a provision in such general terms would need to be supplemented in a particular situation by special legislation to deal with the peculiarities of the situation. Nevertheless, the review committee has concluded that this general principle should be recognised in the future consolidating law.

31.51 Given a situation short of war, the proposed offence must, it is thought, be distinguished from treason. Further, the right of a citizen to express his or her dissent must be recognised. However, there could be situations where, at least to the man or woman in the street, it would not be clear that hostilities involving Australian Defence Force members had commenced. Therefore, the operation of the provision must be dependent on a proclamation as to the existence of such hostilities. In this respect, the provision would differ from the Canadian and New Zealand proposed provisions.

⁸³ Sir Harry Gibbs, *Review of Commonwealth Criminal Law, Fifth Interim Report*, June 1991

31.52 While the proposed offence must be distinguished from treason, it would nevertheless be a very serious offence and should carry a maximum penalty of fourteen years imprisonment.'

11.17 The first sentence in paragraph 31.51 is explained by the conclusion in paragraph 31.28 that treason, in so far as it involves foreign States, should be confined to States at war with Australia.

11.18 No doubt paragraph (f) was intended to fill the gap seen as left by paragraph (e), which speaks of engaging in conduct that assists by any means whatever with intent to assist 'an enemy, "at war" with the Commonwealth'.

11.19 Paragraph (f) does not in terms require that the person engaging in the conduct knows that, for example, the organisation is engaged in armed hostilities against the Australian Defence Force (ADF). Section 5.6, 'Offences that do not specify fault elements', provides in subsection (2) that, if the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, then recklessness is the fault element for that physical element. By contrast paragraph (e) of section 80.1(1), dealing with conduct that assists an enemy at war with the Commonwealth, requires, in subparagraph (ii), specification by proclamation made for the purpose of paragraph (e), that the 'enemy' is an enemy at war with the Commonwealth. The SLRC considers that paragraph (f) should be amended to provide that, as an element of the offence, the person knows that the country or organisation is engaged in armed hostilities against the ADF.

11.20 The Law Council of Australia submitted that paragraph (f), which describes the conduct, the penalty for which is imprisonment for life, embraces conduct that could include the provision of material and other forms of humanitarian aid to enable conflict victims to restore their means or production. The criminalisation of such forms of assistance to an organisation engaged in armed hostilities against the ADF could, potentially, capture forms of humanitarian aid provided to groups such as the Bougainville Revolutionary Army. The potential for the criminalisation of many such acts of humanitarian assistance is particularly acute given the increased deployment of the ADF in peace keeping, border protection, disaster relief and other forms of non-military action.

11.21 However, subsection 80.1(1A) makes clear that paragraph (f), like paragraph (e), does not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature. The defendant bears an evidential burden in relation to this matter.

11.22 Despite what is said in the Gibbs Report, the SLRC considers that Australian soldiers deployed outside Australia and engaged in armed hostilities with organisations can appropriately be protected by treason law. The SLRC would not recommend abolition of paragraph (f) or of the treason law contained in section 80.1 as a whole. Section 80.3 provides that section 80.1 does not apply to a person for acts done in good faith.

11.23 The SLRC recommends that section 80.1(1)(f), 'Conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force', be amended to require, as an ingredient of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the Australian Defence Force.

CHAPTER 12

SUPPRESSION OF THE FINANCING OF TERRORISM ACT

2002

12.1 The SFT Act implemented Australia's obligations under the International Convention on the Suppression of the Financing of Terrorism, which was signed by Australia on 21 October 2001; the United Nations Security Council Resolutions 1267 (obligations to freeze all funds and other financial assets of the Taliban) and 1373 (obligations to freeze funds, financial assets and other economic resources of persons involved in terrorist acts); and other related resolutions imposing mandatory obligations on States.

12.2 The SFT Act brought Australia's systems for international cooperation on money laundering into compliance with the 40 Recommendations of the Financial Transaction Task Force (FATF)⁸⁴ in 1996 on money laundering, and was a step towards implementing the FATF's eight special recommendations. In October 2004 the FATF also added a ninth Special Recommendation. On 29 July 2005 the UN Security Council adopted Resolution 1617, which strongly urges all member States to implement the comprehensive international standards embodied in the FATF's 40 Recommendations and the 9 Special Recommendations on Terrorist Financing.

⁸⁴ Copy of the 40 recommendations can be found at the Financial Transaction Task Force website < <http://www.fatf-gafi.org> >

12.3 The SFT Act amended the Criminal Code, the *Extradition Act 1988*, the *Financial Transaction Reports Act 1988* (FTR Act), the *Mutual Assistance in Criminal Matters Act 1987* (MACM Act), and the *Charter of the United Nations Act 1945* (COTUNA).

Financing terrorism (Section 103.1)

12.4 The SFT Act introduced Division 103 into the Criminal Code. Section 103.1 was repealed and substituted, in the same terms, by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). Section 103.1(1) – Financing Terrorism – provided that a person committed an offence if:

- (a) the person provided or collected funds; and
- (b) the person was reckless as to whether the funds would be used to engage in a terrorist act.

Thus the offence was either to provide funds, presumably to another party or to collect funds. Knowledge as to how the funds were to be used was not expressly an ingredient of the offence; but see section 5.4(4) of the Criminal Code.

12.5 The *Anti-Terrorism Act (No 1) 2005* (Cth) (ATA No 1) repealed and substituted subsection 103.1(2) to provide that in addition to a person committing an offence even if a terrorist act does not occur, a person will also commit an offence even if the funds will not be used to facilitate or engage in a specific terrorist act, or the funds will be used to facilitate or engage in more than one terrorist act. The objective of this amendment was to clarify that it is not necessary for the prosecution to identify a specific terrorist act; it will be

sufficient for the prosecution to prove that the particular conduct was related to a terrorist act. See the ‘the’ to ‘a’ change discussion at page 149 of this report.

12.6 The *Anti-Terrorism Act (No 2) 2005* (Cth) (ATA No 2) repealed the subsection dealing with geographical jurisdiction and replaced it with a new subsection 103.3, which applies extended geographical jurisdiction – category D to both existing subsections 103.1(1) and 103.2(1). The SLRC is informed that Category D had always been the territorial jurisdiction applicable in Division 103. See the extension of geographical jurisdiction – category D discussion at page 147.

Financing a terrorist (section 103.2)

12.7 ATA No 2 also inserted a new offence of financing a terrorist (section 103.2(1)). Section 103.2(1) provides that a person commits an offence if:

- (a) the person intentionally:
 - (i) makes funds available to another person (whether directly or indirectly); or
 - (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and
- (b) the first mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

12.8 Thus this offence distinguished, if that is possible, making ‘funds available’ to another person from ‘providing funds’ under section 103.1(1)(a), presumably to another person, and ‘collecting funds for or on behalf of

another person' from simply 'collecting funds'. There is no direct statement that the first mentioned person knew how the other person would use the funds; see section 5.4(4). The penalty for both offences is imprisonment for life. On this analysis it seems that the offence specified in section 103.1(1) is wider and embraces the offence specified in section 103.2(1).

12.9 The Explanatory Memorandum for ATA No 2 stated that 'the amendments strengthen the existing terrorist financing offences and confirm Australia's commitment to the principles behind the FATF's Special Recommendations on Terrorist Financing. It is difficult on the above analysis to see how this could be so.

12.10 In its 2005 country evaluation report on Australia, FATF recommended that 'Australia should specifically criminalise the collection or provision of funds for an individual terrorist, as well as the funds for a terrorist organisation.'⁸⁵ The offence for getting funds to a terrorist organisation seems to be already covered by section 102.6, 'Getting funds to, from or for a terrorist organisation'. There is nothing in section 103.1, 'Financing terrorism', or section 103.2, 'Financing a terrorist', which defines the person to whom the funds are made available as an individual terrorist. But this should not be of any concern as the sections are both wide enough to cover the situation if the funds are provided to, or made available to, a terrorist or collected for, or on behalf of, an individual terrorist.

⁸⁵ FATF, *Third Mutual Evaluation Report on Money Laundering and Combating of the Financing of Terrorism – Australia*, 14 October 2005, para 2.2.2.

12.11 As the proposed offence of financing terrorism was based on these UN instruments, it was argued by the Law Council of Australia that there should be specific intent. In response to evidence received from the Law Council, the SLCLC noted that Article 2 of the Financing of Terrorism Convention and paragraph 1(b) of the UN Security Council Resolution 1373 contained a requirement for specific intent. This then became the basis for the SLCLC Recommendation 6, which recommended that the Bill be amended so that the financing of terrorism offence included an element of intent.

12.12 In response to Recommendation 6, the government inserted an explanatory note at the end of the financing of terrorism offence in section 103.1. The note states, 'Intention is the fault element for the conduct described in paragraph 1(a) and refers to section 5.6(1).' Presumably this means that the person intentionally provides or collects funds. Subsection (2) provides that a person commits an offence under subsection (1) even if a terrorist act does not occur, or the funds will not be used to facilitate or engage in more than one terrorist act.

12.13 It is not clear why different language is used when dealing with intention in sections 103.1 and 103.2 but the underlying concerns it has triggered are clear, as explained in the submissions received from FCLC (Vic) and AMCRAN. For the sake of clarity, **the SLRC recommends that section 103.1, 'Financing terrorism', should be amended by inserting 'intentionally' after 'the person' in paragraph (a) and removing the note.**

12.14 The FCLC (Vic) argues strongly that introducing section 103.2 does away with the need for section 103.1. They express unease regarding both sections but note that section 103.2 is more clearly drafted—it states whom the funds must be collected by or made available to, and the connection between that person and a terrorist act. The FCLC (Vic) observes that it is hard to imagine where section 103.2 might not suffice, apart from situations where there is only a tenuous link between the person providing or collecting funds and the terrorist act, in which case, the FCLC (Vic) argues, there should be no prosecution.

12.15 While the wording in both these provisions is similar, they do differ in that section 103.2, ‘Financing a terrorist’, relates to instances explicitly requiring that the funds be made available to, or collected for, or on behalf of, another person. Section 103.2 does not appear to the SLRC to meet the stated objective—that the collection or provision of funds is for an individual terrorist. Section 103.1(1)(b) requires that the first person is reckless as to whether the other person will use the funds to facilitate a terrorist act. On its face, this subsection does not stipulate that this person must be an individual terrorist. What if the other person does not intend to facilitate or engage in a terrorist act, for example, if that person was an innocent agent? It is hard to see where section 103.2 adds anything of substance over and above section 103.1. Both offences carry a penalty of life imprisonment. If a ‘financing a terrorist’ offence is considered necessary to meet our international obligations, the **SLRC recommends that consideration be given to re-drafting**

paragraph (b) of section 103.2(1) to make it clear that it is required that the intended recipient of the funds is a terrorist.

12.16 The SFT Act also amended the FTR Act to require financial institutions, security dealers, trustees and other cash dealers to report suspected terrorist related activities, and to streamline procedures for the disclosure of financial transaction reports by Australian law enforcement and security agencies to their foreign counter-parts.

12.17 The SFT Act inserted into Charter of the United Nations Act 1975 (COTUNA) a new Part 4, concerning offences, to give effect to Security Council decisions. Sections 20 and 21 in Part 4 create offences of dealing with freezable assets (section 20) and giving an asset to a proscribed person or entity (section 21). Pursuant to section 15, the Minister for Foreign Affairs must list a person or entity and may list an asset where satisfied of proscribed matters. It is notable that section 15 provides that the Governor-General may make regulations proscribing the matters of which the Minister must be satisfied before listing a person or entity under subsection.(1). Subsection (2) similarly enables the Governor-General to make regulations proscribing the matters of which the Minister must be satisfied before listing an asset under subsection (3) (see subsection (4)). A person or entity may also be proscribed by the Governor-General in a list contained in regulations, where the proscription gives effect to Chapter VII of the UN Charter as applicable to Australia (section 18).

12.18 Once a decision to list a person, entity or asset has been made, this listing is by a notice in the Gazette (section 16(6)(7)). Advanced notice of the Minister's decision to list may be provided by the Attorney-General's Department to any person engaged in the 'business of holding, dealing in, or facilitating in dealing in, assets' (see Part 4, Section 7 of the Regulations).

12.19 The Minister for Foreign Affairs can initiate the decision to revoke a listing (section 16), or a person or entity can apply for a revocation under section 17. A listing can be revoked if the Minister is satisfied that the listing no longer gives effect to the Chapter VII of the UN Charter as applicable to Australia (section 16(1)).

12.20 As a result of two recommendations by the Senate Committee in relation to the then Bill, which were accepted by the Senate, there was provision for regulations to be made setting out procedures to be followed in relation to the freezing of assets and the notification of the freezing of assets. These provisions were enacted by the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*.

12.21 The FCLC (Vic) expressed concerns that sections 20 and 21 of COTUNA far exceed the intention of Resolution 1373. It is said that the offences could lead to criminalising individuals who are innocent. They argue that section 20 does not require knowledge on the part of the offender that the asset is listed or an asset of a listed/proscribed organisation and furthermore, that the dealings are not required to be in some way connected to terrorist

activity. In respect of section 21, they argue that it is not required that the asset is given to the proscribed person or entity in connection with some terrorist activity.

12.22 The explanatory memorandum stated that the application of strict liability in sections 20 and 21 is necessary to ensure that a defendant, who uses or deals with an asset that he or she knows to be a freezable asset, cannot escape liability by demonstrating that they were not aware that the use or dealing was not in accordance with a Notice under section 22. Under section 22, the Minister has the authority to issue a conditional written notice permitting the owner, or holder of, a freezable asset to use or deal with the asset in a particular way. In reference to both sections 20 and 21, the defence of mistake of fact is available.

12.23 The SLRC is of the view that the provisions, such as those contained in sections 20 and 21 of COTUNA, are necessary to ensure that Australia meets its UN requirements, and that the provisions have fitting penalties to deter those who would engage in inappropriate dealings in connection with freezable assets. For reasons given in previous discussions regarding s102.5, the SLRC considers neither the offence nor any element of it should be of strict liability.

12.24 The FCLC (Vic) also expressed its opposition to the listing and proscription of persons and entities under COTUNA. While expressing its opposition, FCLC (Vic) acknowledges that the provisions are intended to give

effect to UN Resolution 1373. Nevertheless, it strongly voiced its opposition to the fact that the regime does not provide any opportunity for a person or entity to contest any of the allegations raised to support the listing or proscription before the proscription is effected. The SLRC notes this view but considers it should be distinguished from earlier discussions concerning proscription procedures for terrorist organisations (see Chapter 8). In the case of freezable assets, prior notice to relevant parties would open up the possibility that persons could dispose of freezable assets without penalty, thus making the laws ineffective.

12.25 The definition of 'political offence' in section 5 of the Extradition Act was amended by the SFT Act to ensure that financing of terrorism offences are not considered political offences for extradition or mutual assistance purposes.

12.26 The SFT Act repealed Part VIA of the MACM Act, which dealt with requests for financial transaction reports information from foreign countries.

12.27 The Australian Bankers' Association and its member banks expressed concerns about some aspects of the operation of the SFT Act and consequent amendments to the COTUNA. In particular, the Australian Bankers' Association raised the following matters:

- the need for the introduction of a definition of 'holder' to clarify that Australian Financial Institutions (AFIs) are covered by the immunity from suit provided for by section 24 of COTUNA

- the exposure of AFIs to foreign lawsuits given the extraterritorial application of offences established by the Act
- the potential that members offshore operations may be constrained by local laws from complying with COTUNA
- the lack of a compensation scheme to indemnify AFIs for any loss caused by blocking or delaying the provision of funds to overseas recipients, and
- the need for authorisation to return frozen funds to the sender of those funds ('payment u-turns').

12.28 All these matters created risks for Australian Banker's Association members. The Australian Bankers Association told the SLRC that they had been trying without success to resolve these matters with DFAT. In response to a request from the SLRC, DFAT wrote a letter outlining its response to the matters raised by the Australian Bankers Association. DFAT's response in part stated that Australia takes its UN Security Council obligations seriously and expects other member States to fully comply with their obligations as members of the UN. The Security Council Resolutions aim to establish an international network of prohibitions designed to starve terrorists and terrorist organisations of funds.

12.29 DFAT stated that Australian companies that do business overseas, in countries that have a different approach to meeting their international obligations, need to be aware that the potential may exist for them to expose themselves to a conflict of laws. Therefore, they may need to apply additional

measures to mitigate against such conflicts arising. Specifically, DFAT argues that it is not necessary to amend legislation to introduce a definition of the 'holder'. They argue that in accordance with accepted principles of statutory legislation, 'holder' in section 24 would have the same meaning as in section 22.

12.30 Further, DFAT argues that the Minister's power conferred by section 22 to permit dealings with freezable assets, or to permit assets to be made available to proscribed entities, is a flexible mechanism that would address possible conflict of law scenarios and limit the exposure of AFIs to foreign lawsuits.

12.31 DFAT also submitted that the Minister's power under section 22 is flexible enough to address the 'payment u-turn' concerns. DFAT did not specifically address the issue of a lack of a compensation scheme to indemnify AFI's for any loss caused by blocking or delaying the provision of funds to overseas recipients.

12.32 The SLRC understands that the matters raised by the Australian Bankers' Association have been outstanding for some time. It seems clear that the Australian Bankers' Association is not reassured by DFAT's views on these issues. From an operational perspective, little has occurred in this area. Only in one instance have assets been frozen. In August 2002, three bank accounts totaling \$2,196.99 were frozen by the relevant financial institution. At face value, the arguments submitted by DFAT appear sound. At this time

the SLRC can find no reason to recommend further legislative change. This is an area that needs to be monitored to ensure that ultimately AFIs are not put at risk as a result of the amendments to COTUNA.

12.33 In so far as the effectiveness of this legislation as amended is concerned, ASIO has indicated that the amendments to the FTR Act, requiring cash dealers to report transactions that are suspected to relate to terrorist activities, and allowing the Director-General of ASIO to disclose financial transaction information to foreign intelligence agencies, have been of assistance to ASIO in carrying out its functions. It also pointed to the importance in the overall national security framework of the various terrorism offences under COTUNA.

12.34 AUSTRAC has submitted that amendments to the FTR Act and MACM Act have enhanced Australia's capacity to identify and investigate suspected terrorist financing, and to share more effectively financial intelligence with relevant foreign government agencies.

12.35 The AFP indicated that it had experienced difficulties with the offences inserted in COTUNA by the SFT Act (sections 20 and 21) regarding the dealing in freezable assets or supplying assets to a proscribed organisation. The AFP's concerns revolve, in part, around difficulties establishing that persons and/or assets are connected to a proscribed entity. Experience has shown that terrorist organisations either lack any formal organisational and membership structure, or adapt and change their names once they are

proscribed. Further, the AFP states that there are also difficulties with regard to the non retrospective application of the provisions.

12.36 The AFP argues that, given these practical operational difficulties, it would be useful from a law enforcement perspective to have these issues addressed in legislation to ensure that terrorist financing can be effectively targeted. The AFP has raised a possible solution but this matter seems to be one that would be best addressed as a matter of further policy development.

12.37 The AFP also put before the SLRC concerns about the prospects of charities and other non-profit organisations being misused by terrorist organisations. This matter was discussed at the Special COAG meeting on Counter-terrorism on 27 September 2005, and is the subject of ongoing Commonwealth/State considerations. It is not, therefore, considered further by the SLRC.

CHAPTER 13

BORDER SECURITY LEGISLATION AMENDMENT 2002

13.1 The BSLA Act 2002 amended the law relating to border security principally by amendment of the *Customs Act 1901*, other Customs legislation, the *Migration Act 1958* and *Fisheries Management Act 1991*.

Concerns raised in submissions

13.2 Comments made in the submissions received on the operation of the BSLA Act were essentially confined to the Australian Customs Service, the Office of the Privacy Commissioner (OPC), the Attorney-General's Department, the AFP, the Australian Federal Police Association (AFP Association), ASIO, the Tasmanian Department of Premier and Cabinet, the LIV, and the APF. During the public hearings, the SLRC sought views from a number of witnesses and these comments are also referenced below.

13.3 The key issues arising out of the operation of the BSLA Act amendments appear to be contained in schedules 1, 2, 6, 7 and 10, about the privacy of information collected and the increased powers in relation to search and seizure. This, in part, reflected some of the original concerns by the SLCLC when it considered the BSLA Act in 2002.

13.4 In summary the submissions made the following points. The submissions from the Attorney-General's Department, ASIO and AFP argue for the need for the powers. The AFP Association's submission questions the need for non-police officers like Customs officers to carry guns. This view is

also supported by the LIV. The Tasmanian Department of Premier and Cabinet commented that the implementation of the Wheeler Report on Aviation Security⁸⁶ may necessitate changes to the BSLA Act. The OPC re-asserted the importance of ongoing accountability and oversight mechanisms, and stated that the legislative requirement to have periodic review of these Acts is essential in ensuring that an individual's privacy rights are given due regard⁸⁷. Customs argued that the legislation has 'proved itself over the years'⁸⁸ but made suggestions for improvement to the legislation. These improvements are detailed below.

13.5 Customs expressed concern about the possibility that crew leaving from international vessels at intermediate ports may not be reported until the final port of departure. On request from the SLRC, Customs provided further material in a supplementary submission. Customs advised that this could also be considered in the context of the Maritime Visa Initiative as announced by the government in late 2005.

13.6 Other submissions raised concerns about the increased powers of Customs as a result of the legislation. These are outlined below.

13.7 The AFP Association put submissions concerning the BSLA Act under the heading, 'The unique accountability and integrity regime of the AFP'. The AFP Association argued that the AFP, unlike ASIO, ASIS, DSD and Customs,

⁸⁶ The Rt Hon Sir John Wheeler DL, An Independent Review of Airport Security and Policing for Australia, September 2005

⁸⁷ Office of the Privacy Commissioner *Submission No 5*, page 3

⁸⁸ Covering letter to *Submission 18*, Australian Customs Service

is a structure with a unique integrity regime; that the integrity regime is in place to allow for accountability and transparency of the process and application of the laws; and that the AFP must therefore be regarded as the key law enforcement agency in the fight against terrorism.

13.8 For this reason, the AFP Association believes that police powers and operations should not be widened and passed on to other agencies that are not equipped to deal with such matters. When this occurs, it places the AFP in a position where its powers and processes are fettered and disseminated, and also bestows the same powers and processes on other agencies that are not covered by the unique accountability and integrity regime of the AFP.

13.9 Under section 10 of the BSLA Act, Customs officers have now been issued with a more general entitlement to use firearms and 'approved items of self-defence equipment'. It has always been the position of the AFP Association that protective equipment and law enforcement personnel should be provided by AFP and Protective Service officers when there are law enforcement related concerns within the Customs environment. These two groups (AFP and Protective Services) have been specifically trained and authorised to use such equipment on a general and permanent basis.

13.10 Prior to the enactment of the BSLA Act, the AFP Association says that there was no need for Customs officers to carry protective equipment, nor were there any cases where it could be shown that AFP personnel were

inadequate in a 'security situation' due to Customs officers not carrying protective equipment.

13.11 The AFP Association also submitted that situations where persons other than AFP personnel carry and use protective equipment create added occupational health and safety concerns because it is not the prime objective of Customs officers to undertake such activities. According to the AFP Association, occupational health and safety concerns also affect members of the public.

13.12 The LIV is concerned with the increased use of firearms and personnel defence equipment by Customs officers. It is concerned about guidance to Customs officers for the issue of firearms and other defensive equipment and, about training, about the 'terms of engagement' and about the qualifications of the authorised arms issuing officer.

13.13 The submissions of Customs dealt comprehensively with these concerns. In particular, it was pointed out that the degree to which Customs officers have now to enter and search premises means that it is not practicable on all occasions to be accompanied by AFP officers. There is no reason why Customs officers cannot be appropriately and completely trained in the use of firearms and protocols, established for the issue of firearms to particular officers who are certified to carry firearms and undertake regular re-certification training.

13.14 The AFP has noted it has worked closely with Customs in the development of its use of force policy, and use of force training and re-certification processes. The AFP believes that Customs has established accountability requirements equivalent to the AFP's for the issue, use and handling of incidents involving the use of force in a Customs environment.

13.15 The SLRC concluded that the powers of Customs officers are appropriate and that appropriate safeguards and guidelines are in place.

Customs recommendations

13.16 In both its written and oral submissions, Customs made the following eight recommendations to improve the operation of the legislation:

1. The legislation should be amended to define more closely who is authorised to access a Customs controlled area by virtue of holding a security identification card issued under the *Aviation Transport Security Act 2004* and associated regulations.
2. Section 234(1A)(a) should be amended to define who is entitled under the Customs Act to access a Customs controlled area when in possession of an Aviation Security Identity Card (ASIC). This might limit access to particular people with legitimate reasons for being in the area.
3. Paragraph 234AA(4)(c) should be amended to clarify what 'areas in the vicinity of restricted areas' means, to ensure certainty about the relevant powers that may be exercised.
4. An amendment to ss213A and 213B of the Customs Act should be made to enable Customs officers to:
 - (a) request identity information when necessary for the organisation to properly discharge its responsibilities

- (b) specify the form in which information must be received
- (c) seek an update on data received to confirm the status of the information received, eg whether the person is still employed at the airport; and
- (d) seek ASIC information when an application for a security identification card has been received, not when or after the card has been issued.

5. Section 193 of the Customs Act should be amended to:

- (a) ensure that Customs has the power to patrol man-made and natural features in, over, on or adjacent to ports, bays, harbours, lakes or rivers; and
- (b) require a person who owns or who is in possession or control of these areas to allow access and to assist officers in obtaining access.

6. Section 64ACB of the Customs Act should be amended to provide that if a crew member disembarks at a first or intermediate port, this is reported to Customs within 24 hours of that occurrence.

7. Section 64AF should be amended to permit the retention of passenger information.

8. The *Fisheries Management Act 1991* should be amended to ensure that Defence and Customs have a sound legal basis for the sharing of Vessel Monitoring System (VMS) information for the purposes of their offshore civil surveillance activities.⁸⁹

⁸⁹ *Submission 18* and Transcript of Public Hearings Canberra 3 February 2006.

Customs recommendation 7

13.17 In its initial submission and at the hearing, Customs outlined challenges faced in obtaining an ‘adequacy’ finding from the European Commission (EC) on the way Customs deals with Passenger Name Records (PNRs). The European Union (EU) has privacy directives that require member States to comply with privacy laws. One of the requirements is that the personal data of EU citizens will be handled in accordance with those privacy directives⁹⁰.

13.18 At the public hearing in Canberra on 3 February 2006, the Customs representatives indicated that Customs wished to qualify recommendation 7. The SLRC understands that Customs’ changed recommendation was in substance as follows: ‘If the European Commission (EC) does not accept the adequacy of the Australian PNR access system, section 64AF should be amended to permit the retention of passenger information for a limited period of time in order to conduct analysis.’⁹¹

13.19 Customs outlined its current processes for access to PNRs. The SLRC accepted the outlined processes as reasonable, noting that privacy protections were in place. At the same time, the effective and efficient flow of

⁹⁰ The European Parliament has given the European Commission the power to determine, on the basis of Article 25(6) of directive 95/46/EC, whether a third country ensures an adequate level of protection by reason of its domestic law or of the international commitments it has entered into.

The effect of such a decision is that personal data can flow from the 25 EU member states and three EEA member countries (Norway, Liechtenstein and Iceland) to that third country without any further safeguard being necessary. The Commission has so far recognised Switzerland, Canada, Argentina, Guernsey, Isle of Man, the US Department of Commerce’s Safe Harbour Privacy Principles, and the transfer of Air Passenger Name Record to the United States’ Bureau of Customs and Border Protection as providing adequate protection. Australia’s privacy laws and PNR transfers have not been deemed ‘adequate’.

⁹¹ Transcript of Public Hearings Canberra 3 February 2006.

people across Australia's borders was achieved. However, the SLRC was concerned with the evidence of Customs that if any finding by the EC that the handling by Customs of PNR information was not adequate, the system would have to be changed. This could result in the collection and keeping of more personal information.

13.20 The Office of the Privacy Commissioner's audit activities in relation to PNRs were outlined in its submission. The SLRC noted that this is one of the few areas in the package of security legislation under review where an assessment of the operation of activities has taken place.

13.21 The Passenger Analysis Unit (PAU) of Customs is responsible for collecting and analyses PNRs. The OPC has conducted two audits of the PAU to ensure that Customs' new powers to access advance airline passenger information, contained in Schedule 7 of the BSLA Act, were being used in compliance with the *Privacy Act 1988*. The audit revealed that the PAU in Customs generally complies with the information privacy principles contained in the Privacy Act As outlined in the OPC submission:

'In February 2003, and as a consequence of the 2002 amendments, the Office conducted an audit under Section 27(1)(h) of the Privacy Act of the Passenger Analysis Unit (PAU) in the Australian Customs Service (Customs). The principal purpose of this audit was to ascertain whether the PAU handles passenger name records (PNRs) in accordance with the Privacy Act. Customs requested the OPC to conduct this audit, to ensure that Customs' new powers to access advance airline passenger information contained in Schedule 7 of the *Border Security Legislation Amendment Act 2002* (BSLA Act) were being used in compliance with the Privacy Act.

The audit examined Customs' power to access advance airline passenger information (section 64AF of the *Customs Act 1901*) by analysing the operation of the PAU. The audit also focused on sections 213A and 213B of the *Customs Act 1901*. These sections were also inserted by the BSLA Act.

The audit revealed that the PAU in Customs generally complies with the Information Privacy Principles (IPPs) contained in the Privacy Act.

The OPC conducted a follow up audit of Customs' PAU between 20 and 22 September 2004. This audit revealed that the PAU at Customs generally manages PNR data in accordance with the Information Privacy Principles in the Privacy Act and the level of compliance in this regard had been assessed as satisfactory. Indeed, the PAU was observed to have a strong culture of privacy protections. The OPC suggested that improvements could be made in regard to a small number of matters.

To the limited extent that the OPC has had experience with the operation of the Border Security Legislation, Customs are adhering to the IPPs with respect to the collection, use and disclosure of PNR data, access to airline's records and collection of restricted area employee's personal information.⁹²

13.22 The APF asked that the outcome of the audits undertaken by the OPC be made public. It sought further information about the negotiations between Australian Government agencies and the EC. The SLRC noted these requests but accepted advice that it was inappropriate to make public the full audits or to release publicly the content of the negotiations with the EC.

⁹² *Submission 5* p.5-6

13.23 The SLRC concluded that, on balance, the PAU appeared to be operating effectively and protecting the personal information it collects appropriately. The system also appears to ensure the smooth transition of passengers through Customs. Therefore, the SLRC concluded that the audits of the PAU are a valuable monitoring mechanism. The SLRC considers that the government should fund the undertaking of the audits on a regular basis at least every two years.

13.24 The SLRC also concluded that efforts should be made to obtain an 'adequacy' finding from the EC for the Australian PNR system. The SLRC recommends that consideration be given by government as to how best to achieve such an 'adequacy' finding.

13.25 The SLRC noted that a comprehensive review of airport security and policing in Australia was conducted by the Rt. Hon. Sir John Wheeler, JP, DL, in September 2005.⁹³ Therefore, the SLRC has concluded that the relevant issues and recommendations found in the submissions should be taken into consideration by the government in implementing the Wheeler report.

13.26 The SLRC recommends that the government give consideration to implementation of Customs' eight recommendations on border security.

⁹³ Wheeler, Rt Hon Sir John, JP, DL, 'An independent review of airport security and policing for the Government of Australia', Commonwealth of Australia, Canberra, September 2005

CHAPTER 14

CRIMINAL CODE AMENDMENT (SUPPRESSION OF TERRORIST BOMBINGS) ACT 2002

Terrorist bombings

14.1 The STB Act amended the Criminal Code by the introduction of Division 72, 'International terrorist activities using explosive or lethal devices'. According to the explanatory memorandum, a purpose of Division 72 was to give effect to the International Convention for Suppression of Terrorist Bombings, which was made in New York on 15 December 1992 and came into effect on 23 May 2001 (see section 72.1). The purpose was to create offences relating to international activities using explosive or lethal devices and thereby give effect to the Convention, in particular to make it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss. This Act has attracted no adverse comment in the submissions.

CHAPTER 15

TELECOMMUNICATIONS INTERCEPTION LEGISLATION AMENDMENT ACT 2002

Telecommunications interception

15.1 The primary purpose of the *Telecommunications (Interception) Legislation Act 1979* (Interception Act) is to protect the privacy of individuals who use the Australian telecommunications system by making it an offence to intercept communications passing over that system, other than in accordance with the provisions of the Interception Act. The Act provides that a telecommunication service may be intercepted under the authority of a warrant by law enforcement agencies for the investigation of serious offences, or by ASIO for national security purposes.

15.2 The *Telecommunications (Interception) Legislation Amendment Act 2002* (TILA Act), assented to on 5 July 2002, made a number of amendments to the Interception Act. Insofar as terrorism is concerned, the TILA Act amended the Interception Act to include offences constituted by conduct involving acts of terrorism as offences in relation to which a telecommunications interception warrant may be sought.

15.3 The TILA Act provided for:

‘The amendment to the definition of a class 1 offence to insert a new paragraph (ca) to include within the definition an offence constituted by conduct involving an act or acts of terrorism.’ (Section 5)

15.4 The remainder of the amendments relate to the day to day operation of the Interception Act, and have not attracted any comments in written or oral submissions.

15.5 The TILA Act also amended the Customs Act to enable federal magistrates to be nominated to be judges for the purposes of the listening device provisions of the Act, consistent with the provision under the Interception Act and the *Australian Federal Police Act 1979*.

15.6 The original Telecommunications Interception Legislation Amendment Bill 2002 purported to clarify legislatively the application of the Interception Act to the telecommunications services involving a delay between the initiation of the communication and its access by the recipient, such as e-mail and short messaging services. These messages are collectively referred to as stored communications.

15.7 Evidence before the SLCLC in May 2002 indicated that there were two main issues arising from the TILA Bill. These were:

- the reduction in privacy of communications by way of email and short messaging services (SMS); and
- whether stored communications, such as e-mails and SMS, could be accessed by law enforcement officers under a search warrant on the premises of an Internet Service Provider (ISP), or whether an interception warrant is required.

15.8 Senate Amendments to the Bill resulted in the removal of the stored communication provisions from the Bill. These are, therefore, not directly subject to this review.

15.9 In its submission, the LIV raised concerns about stored communications and issues of privacy. In particular, the LIV noted concerns raised in the Privacy Commissioner's most recent submission on the interception of telecommunications and the need to balance relevant interests.

15.10 As indicated earlier the SLRC does not believe that the stored communications issue comes under its terms of reference. However, the SLRC notes that the concept of stored communications was revisited by the government in the *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* (Stored Communications Act) which introduced the concept of stored communications into the Interception Act.

15.11 The Stored Communications Act amended the Interception Act from 14 December 2004 by inserting a new exception to the general prohibition against interception. These amendments were intended only as an interim measure pending a thorough consideration of how best to regulate access to stored communications. A review was conducted by Mr A S Blunn, AO, which resulted in the *Report of the review of the regulation of access to communications*⁹⁴. The amendments were originally subject to a sunset

⁹⁴ Blunn AO, Anthony, 'Report of the Review of the Regulation of Access to Communications' Commonwealth of Australia, Canberra, August 2005.

clause, meaning that the provisions were to cease operating on 14 December 2005.

15.12 The *Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Act 2005* extended the sunset date until 14 June 2006 to provide sufficient time for the recommendations of the Blunn Report to be considered.

15.13 The *Telecommunications (Interception) Amendment Bill 2006*, which was introduced into Parliament on 16 February 2006, amends the *Telecommunications (Interception) Legislation Act 1979* to implement a number of recommendations of the Blunn Report. The Bill was passed by Parliament on 30 March 2006.

15.14 The LIV submission contained extensive comment concerning statistics provided by the Attorney-General in his 2004 annual report to each of the Houses of Parliament (required under Division 2 of Part IX of the *Interception Act*) on the use of the *Interception Act*. The LIV went on to conclude that arguably the figures confirm that the *Interception Act* is seldom used in connection with terrorism offences. They agree that this does not of itself support a conclusion that the legislation is unnecessary. However, it does, in LIV's view, suggest the need for the measures to be subject to ongoing review and reporting requirements to ensure that the powers available under the legislation relate to an actual threat and are justified in light of the need to balance privacy and security interests.

15.15 The SLRC notes that the statistics quoted in the LIV submission related to law enforcement matters only and did not include those in relation to intelligence agencies.

15.16 The SLRC agrees with the LIV's own conclusion that the issue of how many times the legislation is used is not of itself the critical factor in determining its value or the necessity for its very existence. On balance, it seems that this legislation is a necessary and invaluable tool that helps law enforcement and intelligence agencies in their quest to prevent serious terrorist offences. In particular, the AFP noted that, in times of increasing sophistication of the communication methods used by criminals, they had issued Telecommunication Interception (TI) warrants for terrorism-related offences more than twenty times. They pointed to one such operation that had resulted in the arrest of nineteen terrorist suspects in NSW and Victoria.

15.17 The SLRC notes that the Interception Act covers a large range of serious criminal matters, and the inclusion of terrorism offences is a reasonably small extension of matters that already were able to be lawfully dealt with under the provisions of the Act. In relation to the LIV suggestion that the measures be subject to ongoing review and reporting requirements, the SLRC highlights that extensive annual reporting to parliament is already legislatively mandated under the provisions of Part IX of the Interception Act.

15.18 AMCRAN raised issues similar to those raised by the LIV. In particular AMCRAN pointed out that, as applications for Telecommunications Interception (TI) warrants are not made public, there is minimal ability to monitor the application of the legislation. The sensitivity surrounding the issue of 'intercepted' communications is such that it is natural the public at large and interested community groups like AMCRAN would expect reassurance concerning the use and oversight of these powers.

15.19 The Interception Act in recognition of those very concerns contains various elements of accountability and oversight. All law enforcement applications for TI warrants are the subject of judicial process as specified in the Interception Act. The Commonwealth Ombudsman has a function of undertaking a periodic compliance audit of telephone interception records to ensure compliance by the AFP, with the detailed requirements of the Interception Act. Complementary legislation establishes similar oversight arrangement in relation to state interception agencies. The IGIS has a similar function in relation to intelligence agencies. Both the Commonwealth Ombudsmen and IGIS provide reports to the Commonwealth Parliament on the result of their inspection activities. Such oversight mechanisms are supported by the annual reports to parliament required to be provided by the Minister, as mentioned previously. The SLRC has no material before it, nor can it see any reason at this time, to suggest further amendment or change to the regime as it stands.

CHAPTER 16

CRIMINAL CODE AMENDMENT TERRORISM ACT 2003

16.1 A constitutional challenge to the proscription of organisations as terrorist organisations based upon the decision of the High Court in *Australian Communist Party v The Commonwealth*⁹⁵ has been suggested from time to time. In that case, the High Court by a majority struck down the *Communist Party Dissolution Act 1950* as *ultra vires* the Parliament of the Commonwealth and invalid.

16.2 The CCAT Act amended the Criminal Code so as to attract the support of State references of power in accordance with section 51(xxxvii) of the Constitution. As a result the constitutional basis for the operation of Part 5.3, so far as the States are concerned, is referred by the States under paragraph 51(xxxvii) of the Constitution. This is acknowledged in section 100.3 of the Criminal Code. For that reason, the decision in the *Australian Communist Party* case, where there was no such reference, has at best limited application. The operation of Part 5.3 in a Territory or outside Australia is based, in the one case, on section 122 of the Constitution; in the other, on paragraph 51(xxix) of the Constitution; and in both cases together, with the legislative powers of the Commonwealth other than paragraph 51(xxxvii).

16.3 During the SLRC's inquiry, this Act attracted no submissions.

⁹⁵ (1951) 83 CLR 1

CHAPTER 17

PROPOSED AMENDMENTS RAISED IN SUBMISSIONS

Hoax

17.1 The Commonwealth DPP pointed out that although a terrorist act includes a threat of action, the definition of ‘terrorist act’ requires that the threat must be made with the intention of advancing a political, religious or ideological cause, and the intention of coercing or intimidating. Where the threat is made without any evidence of one such intention, no offence is made out under Part 5.3, nor would the provisions contained in Part 2.4 of the Code apply. Part 2.4, ‘Extensions of criminal responsibility’, deal with attempt, complicity and common purpose, innocent agency, incitement and conspiracy. It is said that in most cases hoax threats would need to be addressed under State provisions. Given the potentially serious consequences of hoax threats to commit acts of terrorism, the Commonwealth DPP submitted that it would be desirable to proscribe such behaviour in Commonwealth legislation. The Commonwealth DPP recommends that an additional offence be inserted into Part 5.3 of the Code to deal with threats made, where the evidence does not support a finding that the intentions required by the definition of ‘terrorist act’ were made out, as for example could be the case with hoax threat.

17.2 In responding at the SLRC’s request, to this proposal, HREOC noted that draft Article 2(2) of the UN Draft Comprehensive Convention Against International Terrorism provides that it is an offence to make a ‘credible and serious threat’ to commit a terrorist act, and Article 2(3) provides that it is an

offence to attempt to commit any of these acts. This mirrors the position in New Zealand, where it is unlawful to make a 'credible threat' to carry out a terrorist act. Threatening to carry out a terrorist act (without the requirement that it be a 'credible threat') is also an offence under the UK Terrorism Act 2000⁹⁶; the US Patriot Act⁹⁷ and the Canadian Criminal Code⁹⁸.

17.3 In HREOC's view, given the likely severe penalties that will attach to such an offence, the more limited offence in Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism should be adopted. That is, it should only be an offence to threaten to carry out a terrorist act where the threat is serious and credible. This would ensure that the Act did not inadvertently apply to threats made in anger or as a joke (however distasteful) which are without substance and the product of ill judgment and, as such, disproportionately restrict the right to freedom of expression.

17.4 The SLRC agrees with HREOC's proposal and **recommends that a hoax offence be added to Part 5.3 in the terms of Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism to apply to a credible and serious threat to commit a terrorist act, where the evidence does not support a finding that there was such intention as described in the definition of 'terrorist act'.**

⁹⁶ Section 1(3)

⁹⁷ Section 18 United States Code 2332B

⁹⁸ Section 83.01(V)

Admissibility of evidence obtained overseas

17.5 The Commonwealth DPP submitted that clarification is needed regarding the procedures to apply when interviewing suspects overseas. Difficulties can arise with respect to the admissibility of evidence if the AFP is unable to comply with Part 1C of the Crimes Act when obtaining such evidence due to external constraints. No doubt a matter of particular concern is compliance with Division 3, 'Obligations of investigating officials'. In Division 3 are found sections 23F to 23W.

17.6 An example of these difficulties is to be found where the AFP have conducted a record of interview and failed to comply with Part 1C. Sections 23V(5) and (6) contain a discretion to admit evidence in circumstances where the requirements in section 23V, which deal with tape recording of confessions and admissions, have not been met. It is said that the issue of possible non-compliance applies to Part 1C generally and not only in relation to tape recording of interviews.

17.7 On the *voir dire* in *R v Thomas*⁹⁹, Cummins J held that the police record of interview taken in Pakistan was admissible evidence at trial. His Honour found that Part 1C did not operate in Pakistan but admitted the record of interview into evidence in the exercise of his discretion, finding that the relevant police officers had acted 'honestly and fairly' in all the circumstances. His Honour also found that Thomas voluntarily participated in the interview,

⁹⁹ *R v Thomas* 2006 USC 120

that his answers were voluntarily provided and that he fully understood his rights. It is anticipated that there may be an appeal from his conviction.

17.8 The SLRC is asked to consider the amendment of the Crimes Act specifically to allow evidence to be admitted in circumstances where the AFP has not complied with Part 1C overseas but has done all that it could reasonably be expected to do to comply with the Act's requirements.

17.9 At the request of the SLRC, HREOC commented on this proposal as follows:

'Division 3 of Part 1C of the *Crimes Act 1914* sets out the obligations of investigating officials in terrorism offences. Those obligations include: cautioning a person under arrest or who is a protected suspect¹⁰⁰ and informing a person under arrest or who is a protected suspect of their right to communicate with a relative or friend or legal practitioner of his or her choice¹⁰¹. Special obligations also apply in relation to indigenous persons¹⁰² and persons under eighteen years¹⁰³. *R v Thomas* involved the obligation to inform the accused (a protected person at the time) of his right to communicate with a legal practitioner of his choice.

Division 3 of Part 1C of the Crimes Act embodies the basic common law requirements to ensure that an accused has a fair trial. Those requirements similarly inhere in Articles 14(1) of the ICCPR and 6(3) of the ECHR which guarantee an accused the right to a fair hearing. As set out later in HREOC's comments on the anonymity of ASIO officers called to give evidence, 'the courts have recognised that there may be

¹⁰⁰ Section 23F

¹⁰¹ Section 23G

¹⁰² Section 23H

¹⁰³ Section 23K

some circumstances in which a departure from the general requirements of a fair trial will be necessary to do justice in the particular case.’¹⁰⁴

17.10 In HREOC’s view, in the event that the circumstances in a particular case render it necessary and appropriate to depart from the obligations set out in Part 1C, *Thomas* demonstrates that the court has adequate discretion to depart from those principles, and that established judicial principles are sufficient to guide the exercise of that discretion. In HREOC’s view, proposed legislative change is unnecessary.

17.11 It is doubtful whether the matter of the admissibility of evidence falls within the ambit of this review. On the basis of the material before it, the SLRC would not recommend amendment to Part 1C of the *Crimes Act* to allow the admissibility of evidence obtained overseas in circumstances where AFP officers have done ‘all that they could reasonably be expected to do to comply’ with that Part. However, after further case law is made, the topic may call for review.

Anonymity of ASIO officers called to give evidence

17.12 Yet again it is doubtful whether this falls within the scope of this review. In the unreported decision of *R v Lee*¹⁰⁵ Crispin J rejected an application made by the Director-General of Security for two ASIO officers to be permitted to give evidence at trial without revealing their real names to anyone other than the court and without revealing their visual identity to either the jury or the

¹⁰⁴HREOC Supplementary *Submission 11(b)*, paragraph 26-29, p.7-8.

¹⁰⁵ 17 February 2005

defendant. Although his Honour was satisfied of the genuine concern relating to the maintenance of confidentiality of the ASIO officers' identity, he held that to prevent the jury from seeing them and making any visual observation of their demeanor would go against the established principles of a fair trial.

17.13 In light of the decision in *Lee*, the Commonwealth DPP submitted that the legislation should be amended to provide for a statutory right protecting the anonymity of ASIO officers (or other officers involved in intelligence work such as ASIS or DSD) in counter-terrorism prosecutions. Without such a statutory provision, the Commonwealth may be placed in a position where it must choose either to proceed with the trial and reveal the identity of the witness, or if the preservation of the identity of the witness is of such fundamental importance to the public interest, the Crown may need to make the decision not to proceed. Whilst a similar application may be decided differently in the future, the trial, conducted on that basis with the law as it presently stands, will be vulnerable to being overturned on appeal.

17.14 In response to this proposal, HREOC pointed out that the right of an accused to a fair trial is a fundamental principle of the common law. It has long been recognised that an incident of that right is that witnesses should be in the presence of the accused when they testify (what has been referred to as the 'right of confrontation').¹⁰⁶ That the jury should be given an opportunity to assess the demeanor of a witness is also an aspect of that right. Indeed, the importance of the latter is embodied in the principle that courts should be

¹⁰⁶ *R v Dunne* (1928) Cr App Rep 176 and *R v Reynolds* [1950] 1 KB 606. See also *R v Ngo* (2003) 57 NSWLR 55.

reluctant to disturb a jury verdict on appeal as they have not had the benefit of seeing and hearing the witnesses.¹⁰⁷

17.15 However, HREOC pointed out that, as has been acknowledged by the courts, the right of confrontation is not an unqualified right. In *R v Goldman (No 1)*¹⁰⁸ Redlich J stated, having referred to the proposition that confrontation is a fundamental right of an accused:

‘The importance of an accusation being made in the accused’s presence and in circumstances where it can be properly assessed by the tribunal of fact is self evident. Yet the law has come to recognise that there are circumstances in which there may be a departure from the ‘right of confrontation’. One such circumstance employed by consent in the course of the closed proceedings before me is the right of the police witness responsible for the safety of Mr Kudryavstev to use his pseudonym. Counsel, in acknowledging the propriety of this course were giving recognition to the public interest in preserving the personal safety of an informant, an interest pursued, not as a matter of expediency but as an object of itself¹⁰⁹.

The interests of justice have sometimes been secured by removing the accused from the presence of the witness where it was feared that the witness would intimidate the witness¹¹⁰.

Another measure constituting an exception to the accused’s fundamental right to face his accusers arises in circumstances where a witness has been permitted to give evidence from behind a screen¹¹¹.

¹⁰⁷ See, for example, *Devries v Australian National Railways Commission* (1993) 177 CLR 479

¹⁰⁸ (2004) VSC 165

¹⁰⁹ *Jarvie v Magistrate’s Court of Victoria* (1995) 1 VR 84 at 88

¹¹⁰ *R v Smellie* (1919) 14 Cr App Rep 128

¹¹¹ *R v Taylor* (1994) TLR 484

In *R v Ngo*¹¹² the New South Wales Court of Criminal Appeal found that the decision to allow witnesses to give evidence by video link had not infringed the right of the accused to a fair trial.

17.16 HREOC's submission continued:

'Redlich J went on to note that this is also the position under Article 6(3) of the ECHR (which guarantees the right to a fair hearing)¹¹³ referring to the case of *R (on application for D) v Camberwell Green Youth Court*¹¹⁴. In that case the House of Lords reaffirmed that there is no absolute right for confrontation, though as a general principle witnesses and defendants should be present and in sight of each other. The European Court of Human Rights has acknowledged that the use of anonymous witnesses will not necessarily result in a breach of Article 6(3), provided sufficient steps are taken to counter-balance restrictions put on the defence, and that the conviction is not based solely or decisively on anonymous statements.'¹¹⁵

17.17 HREOC continued that the case law referred to illustrated that there is a well developed and substantial body of jurisprudence in relation to the principles to be applied in a case such as *R v Lee*. As such, HREOC considers that the legislative amendments sought by the Commonwealth DPP are not required and would unnecessarily hinder the courts' ability to do justice in the particular circumstances of the case.

17.18 In a case concerned with whether ASIO could resist the production of documents on the ground of prejudice to the national security¹¹⁶, Brennan J said: 'It is of the essence of free society that a balance is struck between the

¹¹² (2003) 57 NSWLR 55

¹¹³ Article 6 mirrors the right to a fair hearing guaranteed by Article 14 of the ICCPR

¹¹⁴ (2003) All ER (D) 32

¹¹⁵ *Submission 11(b)*, p.8.

¹¹⁶ *Alister v The Queen* (1984) 154 CLR 404 at 456

security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tip that way.' Compare *Sankey v Whitlam*¹¹⁷, where the Court accepted that the public interest that no innocent man should be convicted of crime was so powerful that it outweighed the general public interest that sources of police information should not be divulged.

17.19 At the request of the SLRC, the New South Wales DPP, Mr N R Cowdery, AM, QC, provided a copy of his office's research flyer which dealt in particular with pseudonym orders such as those in *R v Savvas*¹¹⁸, approved in *Witness v Marsden & Anor*¹¹⁹. The orders granted in *Savvas* were:

- (1) The witness is to be addressed and referred to in court only by a pseudonym.
- (2) Any matter which is likely to lead to the identification of the witness is not to be reported by those in court.
- (3) No photographs, film or video recording is to be taken of the witness in the court or within its precincts, and no drawings or other likenesses are to be made of the witness either in the court or within its precincts.

¹¹⁷ (1978) 142 CLR 1 at 42 and 61-62

¹¹⁸ (1989) 43 A Crim R 331 at 339

¹¹⁹ (2000) NSWCA 52

17.20 Such orders have been made where it is necessary to protect the identity of informers. Pseudonyms are not usually assigned to an accused.

The research paper continued:

‘Cases involving police informers may involve a claim of public interest immunity. Claims of public interest immunity raise similar considerations to applications for closed court or suppression orders, but the making of such orders is a separate matter.’¹²⁰

17.21 No doubt because the proposed anonymity of ASIO witnesses was not recognised as a subject of this inquiry, the question was not fully debated before the SLRC. The SLRC notes the concerns raised by the Commonwealth DPP but on the material before it does not recommend that there be legislative provisions providing for a statutory right protecting the anonymity of ASIO officers in counter-terrorism prosecutions.

The Commonwealth DPP’s right to appeal re the exceptional circumstances test in section 15AA of the Crimes Act

17.22 Bail in counter-terrorism prosecutions is governed by a combination of section 15AA of the Crimes Act and various State and Territory laws of bail as applied by section 68 of the *Judiciary Act 1903*.

17.23 The Commonwealth DPP recommended that the right of the Commonwealth to appeal a grant of bail on the grounds of exceptional circumstances in terrorism cases be addressed to ensure that such a right of appeal is available. At present it appears that where the State and Territory bail Acts grant a right of appeal to the Commonwealth DPP they do so in

¹²⁰ NSW DPP Research Flyer on Closed Courts and Suppression Orders, 7 July 2003.

relation to decisions made under the relevant bail Act in the State or Territory as applied to the Commonwealth prosecution. As the exceptional circumstances test is not part of the State and Territory bail laws, there is some doubt as to whether the Commonwealth DPP can appeal under those State and Territory laws on the ground that the test in the Commonwealth Act has not been properly applied.

17.24 This matter has not been fully addressed in the submissions and would require, at the least, a comprehensive and comparative review of the bail law in all jurisdictions in Australia. The SLRC is unable to comment further on the suggestion.

Application of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act)*

17.25 The Commonwealth DPP said that the NSI Act provides protection for matters of national security in Commonwealth prosecutions but does not apply to State and Territory prosecutions or joint Commonwealth and State and Territory prosecutions.

17.26 The NSI Act applies to ‘federal criminal proceedings’ as defined in section 14 of the Act. ‘Federal criminal proceedings’ is defined to mean ‘a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth.’

17.27 The Commonwealth DPP said that the mechanism should be extended to apply to State and Territory prosecutions where matters of national security exist. There was said to be a problem when a defendant faces both Commonwealth and State or Territory charges. Technically, the NSI Act can apply to any Commonwealth charges but not a charge brought under State or Territory legislation.

17.28 This matter has not been reviewed by the SLRC and in the SLRC's opinion does not fall within its terms of reference. While the DPP submissions appear attractive to the SLRC, the SLRC has not heard from any other party, particularly from the States about this proposal. Clearly the matter should be, if it has not already been, taken up by parties affected as soon as possible at a meeting of COAG. The SLRC makes no further comment on this matter.

CHAPTER 18

MECHANISMS OF REVIEW

Further review

18.1 A review of the operation, effectiveness and implications of the amendments has, to a certain extent, been a theoretical exercise because of the relatively short time in which the legislation, particularly in its latest amended form, has been operating. As at the date of submissions to the SLRC, twenty-four people had been charged with offences under the amended provisions of the Criminal Code originally enacted in 2002. In only two of these matters have the accused been tried. In the next few years more will be known about the operation of the legislation the subject of this review. At that time further reviews of the security legislation by an independent body would be better placed to judge.

18.2 The SLRC recommends that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years.

18.3 If an independent reviewer, as discussed in this report, has been appointed, the review to be commissioned by the Council of Australian Governments (COAG) in late 2010, could be expanded in its scope to include all of Part 5.3 of the Criminal Code. The SLRC also draws

attention to other models of review and urges the government to consider the models discussed in the report.

18.4 From information available to the SLRC, there are several existing models set up to undertake ongoing reviews of security legislation, such as a public advocate, a public interest monitor (PIM) and an independent reviewer, which governments could consider.

Independent reviewer

18.5 The United Kingdom has established a position known as the Independent Reviewer. This position was established pursuant to the *Terrorism Act 2000* and the *Prevention of Terrorism Act 2005*.

18.6 The Independent Reviewer reviews the working of the *Terrorism Act*¹²¹ and the *Prevention of Terrorism Act*¹²². More particularly, the Independent Reviewer must, every twelve months, provide the Secretary of State with a report that contains the opinion of that person on¹²³:

- (a) the implications for the operation of the *Prevention of Terrorism Act* of any proposal made by the Secretary of State for the amendment of the law relating to terrorism; and
- (b) the extent (if any) to which the Secretary of State has made use of his power to make non-derogating control orders in urgent cases without the permission of the court (by virtue of section 3(1)(b)).

¹²¹ Section 126 of the *Terrorism Act 2000*

¹²² Section 14(3) of the *Prevention of Terrorism Act 2005*

¹²³ Sections 14(4) and (5) of the *Prevention of Terrorism Act 2005*; see also section 126 of the *Terrorism Act*

18.7 The Secretary of State must lay a copy of such report before parliament¹²⁴. The current Independent Reviewer is Lord Carlile. The Independent Reviewer is able to see closed material including some products of criminal intelligence obtained from technical and human sources of various kinds.¹²⁵

18.8 If the Government is minded to establish a similar body in Australia, the SLRC favours it being attached to the office of the IGIS or the office of the Commonwealth Ombudsman. The Independent Reviewer would be required to provide a report to the Attorney-General every twelve months, which the Attorney-General should be obliged to table in parliament. The report would deal with:

- (a) the operation and effectiveness of Part 5.3 of the Criminal Code, and
- (b) the implications for the operation and effectiveness of part 5.3 of any Government proposals for the amendment of terrorism laws.

Public advocate

18.9 In its submission, the Australian Bar Association raised the question of public interest immunity and State interest immunity. Persons interested to oppose an application for proscription, might, if the application is successful, never have an opportunity to see the material produced to the court in support of the application, where a claim based on public interest immunity is made,

¹²⁴ Section 126 of the Terrorism Act; section 14(b) of the Prevention of Terrorism Act 2005

¹²⁵ Lord Carlile of Berriew QC *Proposals by Her Majesty's Government for Changes to the Laws Against Terrorism* 6 October 2005 at [11]

unless the claim for such immunity fails (see *Commonwealth v Northern Land Council*¹²⁶ and the NSI Act, Part 3). The Australian Bar Association proposes that the Commonwealth Government establish an office of the 'Special Advocate' relying on the experience of that office in the United Kingdom. The role of the Special Advocate would be to act as contradictor to any claim of public interest immunity and any statutory claim for discovery of evidence of any description before the court.

18.10 In the United Kingdom the Special Advocate is a specifically appointed lawyer, typically a barrister, who is instructed to represent a person's interests in relation to material that is kept secret from that person and his ordinary lawyers but is analysed by a court or similar body at an adversarial hearing held in private.

18.11 The independence from government of any proposed Office of Special Advocate would be an essential attribute of the office given that the government will normally be a party in the proceedings in which the Special Advocate is playing a role. The procedure for appointment of a Special Advocate and other features of the office that can bear upon the perception of its independence can become important issues.

18.12 The Special Advocate has the advantage of being able to go behind the curtain of secrecy. He is independent of both the investigator/Prosecutor/

¹²⁶ (1993) 176 CLR 604 at 620

/applicant and the detainee/defendant/respondent. He also acts as the contradictor to any claims of public interest immunity.

18.13 However, there are significant disadvantages of the UK Special Advocate model:

- The detainee/defendant/respondent does not have the choice of who will represent him.
- There can be no contact between the detainee/defendant/respondent and the Special Advocate once the Special Advocate views the closed material, which means that the Special Advocate cannot properly represent the detainee/defendant/respondent.
- The Special Advocate lacks the resources of an ordinary legal team for the purpose of conducting a full defence in secret (for example, for inquiries or research).
- The Special Advocate has no power to call witnesses.
- Appointment of Special Advocates by the Attorney-General can raise concerns about the appearance of fairness of the process in cases where the government is the prosecutor and the Attorney-General personally represented in the proceedings.¹²⁷

18.14 In *R v H and C*¹²⁸ Lord Bingham, referring to the appointment of a Special Advocate to represent, as an advocate in public interest immunity matters, a defendant in an ordinary criminal trial, said:

¹²⁷ Lord Bingham summarised the consequences of these defects in the Special Advocate in *R v H and C* [2004] 2 WLR 335 at 345-346

¹²⁸ (2004) 2 WLR 335

‘Such an appointment will always be exceptional, never automatic: a course of last resort and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.’¹²⁹

18.15 Queensland currently has a Public Interest Monitor (PIM). The PIM is provided for in both the *Crime and Misconduct Act 2001* and in the *Police Powers and Responsibilities Act 2000*. Simply put, the role of the Public Interest Monitor is to balance two competing expectations. These are

- (1) the community expectation that modern investigative agencies will have appropriate powers and technology available to them in combating contemporary crime, and
- (2) the erosion of fundamental rights of the individual that the granting of such powers necessarily involved will be minimised to the greatest possible extent.

18.16 The functions of the Public Interest Monitor are to:

- monitor compliance with the relevant legislation
- appear at hearings and ask questions, cross-examine witnesses and make submissions
- gather statistical information, and
- provide reports on non-compliance with the legislation.

¹²⁹ at pp 345-346

18.17 The SLRC considers there is merit in further investigation and consideration by all governments of the establishment of a body similar to the Special Advocate and/or PIM.

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ADF	Australian Defence Force
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFIs	Australian Financial Institutions
AFP	Australian Federal Police
AFPA	Australian Federal Police Association
AGD	Attorney-General's Department
ALRC	Australian Law Reform Commission
AMCRAN	Australian Muslim Civil Rights Advocacy Network
APF	Australian Privacy Foundation
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
ASIS	Australian Secret Intelligence Service
ATA No 2	<i>Anti-Terrorism Act (No 2) 2005 (Cth)</i>
AUSTRAC	Australian Transaction Reports and Analysis Centre
BSLA Act	<i>Border Security Legislation Amendment Act 2002</i>
CCAT Act	<i>Criminal Code Amendment (Terrorism) Act 2003</i>
COAG	Council of Australian Governments
COTUNA	<i>Charter of the United Nations Act 1945</i>
Crimes Act	<i>Crimes Act 1914 (Cth)</i>
Criminal Code	<i>Criminal Code Act 1995</i>
CCAT Act	<i>Criminal Code Amendment (Terrorism) Act 2003</i>
Customs Act	<i>Customs Act 1901</i>
Customs	Australian Customs Service

DFAT	Department of Foreign Affairs and Trade
DIGO	Defence Imagery and Geospatial Organisation
DIO	Defence Intelligence Organisation
DIMA	Department of Immigration and Multicultural Affairs
DPP	Director of Public Prosecutions
DSD	Defence Signals Directorate
EC	European Commission
EU	European Union
FATF	Financial Transaction Task Force
FCLC (Vic)	Federation of Community Legal Centres (Vic)
FTRA Act	<i>Financial Transaction Reports Act 1988</i>
Gibbs Report	Sir Harry Gibbs, <i>Review of Commonwealth Criminal Law, Fifth Interim Report</i> , June 1991
HRC	United Nations Human Rights Committee
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
IGA	Inter-governmental Agreement
IGIS	Inspector-General of Intelligence and Security
ISP	Internet Service Provider
LIV	Law Institute of Victoria
MACM Act	<i>Mutual Assistance in Criminal Matters Act 1987</i>
NSI Act	<i>National Security Information (Criminal and Civil Proceedings) Act 2004</i>
ONA	Office of National Assessments
OPC	Office of the Privacy Commissioner
PAU	Passenger Analysis Unit, Australian Customs Service

PIAC	Public Interest Advocacy Centre
PIM	Public Interest Monitor
PJC	Parliamentary Joint Committee on Intelligence and Security (previously the Parliamentary Joint Committee on ASIO, ASIS and DSD)
PNR	Passenger Name Records
POAC	Proscribed Organisations Appeal Commission
SFT Act	<i>Suppression of the Financing of Terrorism Act 2002</i>
SLAT Act	<i>Security Legislation Amendment (Terrorism) Act 2002</i>
SLCLC	Senate Legal and Constitutional Legislation Committee
SLRC	Security Legislation Review Committee
STB Act	<i>Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002</i>
TILA Act	<i>Telecommunications Interception Legislation Amendment Act 2002</i>
UK	United Kingdom
UN	United Nations

**Criminal Code as amended by the
Security Legislation Amendment
(Terrorism) Act 2002 and the
Suppression of the Financing of
Terrorism Act 2002**

**Criminal Code as amended at March
2006**

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

80.1 Treason

- (1) A person commits an offence, called treason, if the person:
- (a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister; or
 - (b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or
 - (c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or
 - (d) levies war, or does any act preparatory to levying war, against the Commonwealth; or
 - (e) engages in conduct that assists by any means whatever, with intent to assist, an enemy:
 - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
 - (ii) specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth; or
 - (f) engages in conduct that assists by any means whatever, with intent to assist:
 - (i) another country; or
 - (ii) an organisation; that is engaged in armed hostilities against the Australian Defence Force; or
 - (g) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
 - (h) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act.

80.1 Treason

- (1) A person commits an offence, called treason, if the person:
- (a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister; or
 - (b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or
 - (c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or
 - (d) levies war, or does any act preparatory to levying war, against the Commonwealth; or
 - (e) engages in conduct that assists by any means whatever, with intent to assist, an enemy:
 - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
 - (ii) specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth; or
 - (f) engages in conduct that assists by any means whatever, with intent to assist:
 - (i) another country; or
 - (ii) an organisation; that is engaged in armed

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>Penalty: Imprisonment for life.</p> <p>(1A) Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).</p> <p>(1B) Paragraph (1)(h) does not apply to formation of an intention to engage in conduct that:</p> <p>(a) is referred to in paragraph (1)(e) or (f); and</p> <p>(b) is by way of, or for the purposes of, the provision of aid of a humanitarian nature.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (1B). See subsection 13.3(3).</p> <p>(2) A person commits an offence if the person:</p> <p>(a) receives or assists another person who, to his or her knowledge, has committed treason with the intention of allowing him or her to escape punishment or apprehension; or</p> <p>(b) knowing that another person intends to commit treason, does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence.</p> <p>Penalty: Imprisonment for life.</p> <p>(3) Proceedings for an offence against this section must not be commenced without the Attorney-General's written consent.</p> <p>(4) Despite subsection (3):</p> <p>(a) a person may be arrested for an offence against this section; or</p> <p>(b) a warrant for the arrest of a person for such an offence may be issued and executed;</p> <p>and the person may be charged, and may be remanded in custody or on bail,</p>	<p>hostilities against the Australian Defence Force; or</p> <p>(g) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or</p> <p>(h) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act.</p> <p>Penalty: Imprisonment for life.</p> <p>(1A) Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.</p> <p>Note 1 A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).</p> <p>Note 2: There is a defence in section 80.3 for acts done in good faith.</p> <p>(1B) Paragraph (1)(h) does not apply to formation of an intention to engage in conduct that:</p> <p>(a) is referred to in paragraph (1)(e) or (f); and</p> <p>(b) is by way of, or for the purposes of, the provision of aid of a humanitarian nature.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (1B). See subsection 13.3(3).</p> <p>(2) A person commits an offence if the person:</p> <p>(a) receives or assists another person who, to his or her knowledge, has committed treason with the intention of allowing him or her to escape punishment or</p>
---	--

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>but:</p> <p>(c) no further proceedings may be taken until that consent has been obtained; and</p> <p>(d) the person must be discharged if proceedings are not continued within a reasonable time.</p> <p>(5) On the trial of a person charged with treason on the ground that he or she formed an intention to do an act referred to in paragraph (1)(a), (b), (c), (d), (e), (f) or (g) and manifested that intention by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment.</p> <p>(6) Section 24F of the <i>Crimes Act 1914</i> applies to this section in the same way it would if this section were a provision of Part II of that Act.</p> <p>(7) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.</p> <p>(8) In this section:</p> <p>constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.</p> <p>organisation means:</p> <p>(a) a body corporate; or</p> <p>(b) an unincorporated body;</p> <p>whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation</p>	<p>apprehension; or</p> <p>(b) knowing that another person intends to commit treason, does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence.</p> <p>Penalty: Imprisonment for life.</p> <p>(5) On the trial of a person charged with treason on the ground that he or she formed an intention to do an act referred to in paragraph (1)(a), (b), (c), (d), (e), (f) or (g) and manifested that intention by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment.</p> <p>(8) In this section:</p> <p>constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.</p>
<p><i>100.1 Definitions</i></p> <p>(1) In this Part:</p> <p>Commonwealth place has the same meaning as in the <i>Commonwealth Places (Application of Laws) Act 1970</i>.</p> <p>constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.</p> <p>funs means:</p> <p>(a) property and assets of every</p>	<p><i>100.1 Definitions.</i></p> <p>funds means:</p> <p>(a) property and assets of every kind, whether tangible or intangible, movable or immovable, however acquired; and</p> <p>(b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such property or assets, including, but not limited</p>

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>kind, whether tangible or intangible, movable or immovable, however acquired; and</p> <p>(b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such property or assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.</p> <p>organisation means:</p> <p>(a) a body corporate; or</p> <p>(b) an unincorporated body;</p> <p>whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation.</p> <p>terrorist act means an action or threat of action where:</p> <p>(a) the action falls within subsection (2) and does not fall within subsection (2A); and</p> <p>(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and</p> <p>(c) the action is done or the threat is made with the intention of:</p> <p>(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or</p> <p>(ii) intimidating the public or a section of the public.</p> <p>(2) Action falls within this subsection if it:</p>	<p>to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.</p> <p>listed terrorist organisation means an organisation that is specified by the regulations for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1.</p> <p>organisation means a body corporate or an unincorporated body, whether or not the body:</p> <p>(a) is based outside Australia; or</p> <p>(b) consists of persons who are not Australian citizens; or</p> <p>(c) is part of a larger organisation.</p> <p>terrorist act means an action or threat of action where:</p> <p>(a) the action falls within subsection (2) and does not fall within subsection (3); and</p> <p>(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and</p> <p>(c) the action is done or the threat is made with the intention of:</p> <p>(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or</p> <p>(ii) intimidating the public or a section of the public.</p> <p>(2) Action falls within this subsection if it:</p> <p>(a) causes serious harm that is physical harm to a person; or</p> <p>(b) causes serious damage to</p>
---	--

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>(a) causes serious harm that is physical harm to a person; or</p> <p>(b) causes serious damage to property; or</p> <p>(ba) causes a person's death; or</p> <p>(c) endangers a person's life, other than the life of the person taking the action; or</p> <p>(d) creates a serious risk to the health or safety of the public or a section of the public; or</p> <p>(e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:</p> <p>(i) an information system; or</p> <p>(ii) a telecommunications system; or</p> <p>(iii) a financial system; or</p> <p>(iv) a system used for the delivery of essential government services; or</p> <p>(v) a system used for, or by, an essential public utility; or</p> <p>(vi) a system used for, or by, a transport system.</p> <p>(2A) Action falls within this subsection if it:</p> <p>(a) is advocacy, protest, dissent or industrial action; and</p> <p>(b) is not intended:</p> <p>(i) to cause serious harm that is physical harm to a person; or</p> <p>(ii) to cause a person's death; or</p> <p>(iii) to endanger the life of a person, other than the person taking the action; or</p> <p>(iv) to create a serious risk to the health or safety of the public or a section of the</p>	<p>property; or</p> <p>(c) causes a person's death; or</p> <p>(d) endangers a person's life, other than the life of the person taking the action; or</p> <p>(e) creates a serious risk to the health or safety of the public or a section of the public; or</p> <p>(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:</p> <p>(i) an information system; or</p> <p>(ii) a telecommunications system; or</p> <p>(iii) a financial system; or</p> <p>(iv) a system used for the delivery of essential government services; or</p> <p>(v) a system used for, or by, an essential public utility; or</p> <p>(vi) a system used for, or by, a transport system.</p> <p>(3) Action falls within this subsection if it:</p> <p>(a) is advocacy, protest, dissent or industrial action; and</p> <p>(b) is not intended:</p> <p>(i) to cause serious harm that is physical harm to a person; or</p> <p>(ii) to cause a person's death; or</p> <p>(iii) to endanger the life of a person, other than the person taking the action; or</p> <p>(iv) to create a serious risk to the health or safety of the public or a section of the public.</p> <p>(4) In this Division:</p>
--	---

<p>Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002</p>	<p>Criminal Code as amended at March 2006</p> <p>NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.</p>
--	--

<p>public.</p> <p>(3) In this Division:</p> <p style="padding-left: 20px;">(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and</p> <p style="padding-left: 20px;">(b) a reference to the public includes a reference to the public of a country other than Australia.</p>	<p>(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and</p> <p>(b) a reference to the public includes a reference to the public of a country other than Australia.</p>
--	--

<p>101.1 Terrorist acts</p> <p>(1) A person commits an offence if the person engages in a terrorist act. Penalty: Imprisonment for life.</p> <p>(2) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).</p>	<p>No change</p>
---	------------------

<p>101.2 Providing or receiving training connected with terrorist acts</p> <p>(1) A person commits an offence if:</p> <p style="padding-left: 20px;">(a) the person provides or receives training; and</p> <p style="padding-left: 20px;">(b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and</p> <p style="padding-left: 20px;">(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <p style="padding-left: 20px;">(a) the person provides or receives training; and</p> <p style="padding-left: 20px;">(b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and</p> <p style="padding-left: 20px;">(c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).</p>	<p><i>101.2 Providing or receiving training connected with terrorist acts</i></p> <p>(1) A person commits an offence if:</p> <p style="padding-left: 20px;">(a) the person provides or receives training; and</p> <p style="padding-left: 20px;">(b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and</p> <p style="padding-left: 20px;">(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <p style="padding-left: 20px;">(a) the person provides or receives training; and</p> <p style="padding-left: 20px;">(b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and</p>
--	---

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>Penalty: Imprisonment for 15 years.</p> <p>(4) A person commits an offence under this section even if the terrorist act does not occur.</p> <p>(5) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.</p> <p>(6) If, in a prosecution for an offence (the <i>prosecuted offence</i>) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the <i>alternative offence</i>) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p>	<p>(c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).</p> <p>Penalty: Imprisonment for 15 years.</p> <p>(3) A person commits an offence under this section even if:</p> <p>(a) a terrorist act does not occur; or</p> <p>(b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or</p> <p>(c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.</p> <p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.</p> <p>(5) If, in a prosecution for an offence (the <i>prosecuted offence</i>) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the <i>alternative offence</i>) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p>
<p><i>101.4 Possessing things connected with terrorist acts</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person possesses a thing; and</p> <p>(b) the thing is connected with preparation for, the engagement</p>	<p><i>101.4 Possessing things connected with terrorist acts</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person possesses a thing; and</p> <p>(b) the thing is connected with preparation for, the engagement</p>

**Criminal Code as amended by the
Security Legislation Amendment
(Terrorism) Act 2002 and the
Suppression of the Financing of
Terrorism Act 2002**

**Criminal Code as amended at March
2006**

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>of a person in, or assistance in a terrorist act; and</p> <p>(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).</p> <p>Penalty: Imprisonment for 15 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person possesses a thing; and</p> <p>(b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and</p> <p>(c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(3) A person commits an offence under subsection (1) or (2) even if the terrorist act does not occur.</p> <p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.</p> <p>(5) Subsections (1) and (2) do not apply if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).</p> <p>(6) If, in a prosecution for an offence (the <i>prosecuted offence</i>) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the <i>alternative offence</i>) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p>	<p>of a person in, or assistance in a terrorist act; and</p> <p>(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).</p> <p>Penalty: Imprisonment for 15 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person possesses a thing; and</p> <p>(b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and</p> <p>(c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(3) A person commits an offence under subsection (1) or (2) even if:</p> <p>(a) a terrorist act does not occur; or</p> <p>(b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or</p> <p>(c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.</p> <p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.</p> <p>(5) Subsections (1) and (2) do not apply if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).</p>
--	---

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

(6) If, in a prosecution for an offence (the *prosecuted offence*) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the *alternative offence*) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.5 Collecting or making documents likely to facilitate terrorist acts

- (1) A person commits an offence if:
 - (a) the person collects or makes a document; and
 - (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

- (2) A person commits an offence if:
 - (a) the person collects or makes a document; and
 - (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 10 years.

- (3) A person commits an offence under subsection (1) or (2) even if the terrorist act does not occur.

101.5 Collecting or making documents likely to facilitate terrorist acts

- (1) A person commits an offence if:
 - (a) the person collects or makes a document; and
 - (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

- (2) A person commits an offence if:
 - (a) the person collects or makes a document; and
 - (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.</p> <p>(5) Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).</p> <p>(6) If, in a prosecution for an offence (the <i>prosecuted offence</i>) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the <i>alternative offence</i>) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p>	<p>Penalty: Imprisonment for 10 years.</p> <p>(3) A person commits an offence under subsection (1) or (2) even if:</p> <p>(a) a terrorist act does not occur; or</p> <p>(b) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or</p> <p>(c) the document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.</p> <p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.</p> <p>(5) Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).</p> <p>(6) If, in a prosecution for an offence (the <i>prosecuted offence</i>) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the <i>alternative offence</i>) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p>
<p><i>101.6 Other acts done in preparation for, or planning, terrorist acts</i></p> <p>(1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.</p> <p>Penalty: Imprisonment for life.</p> <p>(2) A person commits an offence under</p>	<p><i>101.6 Other acts done in preparation for, or planning, terrorist acts</i></p> <p>(1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.</p> <p>Penalty: Imprisonment for life.</p>

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>subsection (1) even if the terrorist act does not occur.</p> <p>(3) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).</p>	<p>(2) A person commits an offence under subsection (1) even if:</p> <p>(a) a terrorist act does not occur; or</p> <p>(b) the person’s act is not done in preparation for, or planning, a specific terrorist act; or</p> <p>(c) the person’s act is done in preparation for, or planning, more than one terrorist act.</p> <p>(3) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).</p>
<p>Division 102—Terrorist organisations</p> <p>Subdivision A—Definitions</p> <p><i>102.1 Definitions</i></p> <p>(1) In this Division:</p> <p>member of an organisation includes:</p> <p>(a) a person who is an informal member of the organisation; and</p> <p>(b) a person who has taken steps to become a member of the organisation; and</p> <p>(c) in the case of an organisation that is a body corporate—a director or an officer of the body corporate.</p> <p>recruit includes induce, incite and encourage.</p> <p>terrorist organisation means:</p> <p>(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 the terrorist act occurs); or</p> <p>(c) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (3), (4), (5) and (6)).</p> <p>(3) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (c) of the</p>	<p>Division 102—Terrorist organisations</p> <p>Subdivision A—Definitions</p> <p><i>102.1 Definitions</i></p> <p>(1) In this Division:</p> <p>advocate has the meaning given by subsection (1A).</p> <p>associate: a person associates with another person if the person meets or communicates with the other person.</p> <p>close family member of a person means:</p> <p>(a) the person’s spouse, de facto spouse or same-sex partner; or</p> <p>(b) a parent, step-parent or grandparent of the person; or</p> <p>(c) a child, step-child or grandchild of the person; or</p> <p>(d) a brother, sister, step-brother or step-sister of the person; or</p> <p>(e) a guardian or carer of the person.</p> <p>member of an organisation includes:</p> <p>(a) a person who is an informal member of the organisation; and</p> <p>(b) a person who has taken steps to</p>

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>definition of <i>terrorist organisation</i> in this section, the Minister must be satisfied on reasonable grounds that:</p> <ul style="list-style-type: none"> (a) the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and (b) the organisation is identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and (c) the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). <p>(4) Regulations for the purposes of paragraph (c) of the definition of <i>terrorist organisation</i> in this section may not take effect earlier than the day after the last day on which they may be disallowed under section 48 of the <i>Acts Interpretation Act 1901</i>. That section has effect subject to this subsection.</p> <p>(5) Regulations for the purposes of paragraph (c) of the definition of <i>terrorist organisation</i> in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:</p> <ul style="list-style-type: none"> (a) the repeal of those regulations; or (b) the cessation of effect of those regulations under subsection (6); or (c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection). <p>(6) A regulation specifying an organisation for the purposes of paragraph (c) of the definition of <i>terrorist organisation</i> in this section ceases to have effect when:</p> <ul style="list-style-type: none"> (a) the decision mentioned in paragraph (3)(b) ceases to have effect; or (b) the organisation ceases to be identified as described in 	<p>become a member of the organisation; and</p> <ul style="list-style-type: none"> (c) in the case of an organisation that is a body corporate—a director or an officer of the body corporate. <p><i>recruit</i> includes induce, incite and encourage.</p> <p><i>terrorist organisation</i> means:</p> <ul style="list-style-type: none"> (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)). <p><i>Definition of advocates</i></p> <p>(1A) In this Division, an organisation <i>advocates</i> the doing of a terrorist act if:</p> <ul style="list-style-type: none"> (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or (c) 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 (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act. <p><i>Terrorist organisation regulations</i></p> <p>(2) Before the Governor-General makes a regulation specifying an organisation</p>
---	--

**Criminal Code as amended by the
Security Legislation Amendment
(Terrorism) Act 2002 and the
Suppression of the Financing of
Terrorism Act 2002**

**Criminal Code as amended at March
2006**

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>paragraph (3)(b). The regulation does not revive even if the organisation is again identified as described in paragraph (3)(b).</p> <p>(7) To avoid doubt, subsection (6) does not prevent:</p> <ul style="list-style-type: none"> (a) the repeal of a regulation; or (b) the making of a regulation that is the same in substance as a regulation that has ceased to have effect because of that subsection. 	<p>for the purposes of paragraph (b) of the definition of terrorist organisation in this section, the Minister must be satisfied on reasonable grounds that the organisation:</p> <ul style="list-style-type: none"> (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). <p>(2A) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of terrorist organisation in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.</p> <p>(3) Regulations for the purposes of paragraph (b) of the definition of terrorist organisation in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:</p> <ul style="list-style-type: none"> (a) the repeal of those regulations; or (b) the cessation of effect of those regulations under subsection (4); or (c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection). <p>(4) If:</p> <ul style="list-style-type: none"> (a) an organisation is specified by
--	--

ANNEXURE A

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

	<p>regulations made for the purposes of paragraph (b) of the definition of <i>terrorist organisation</i> in this section; and</p> <p>(b) the Minister ceases to be satisfied of either of the following (as the case requires):</p> <ul style="list-style-type: none"> (i) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); (ii) that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); <p>the Minister must, by written notice published in the <i>Gazette</i>, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.</p> <p>(5) To avoid doubt, subsection (4) does not prevent the organisation from being subsequently specified by regulations made for the purposes of paragraph (b) of the definition of <i>terrorist organisation</i> in this section if the Minister becomes satisfied as mentioned in subsection (2).</p> <p>(6) If, under subsection (3) or (4), a regulation ceases to have effect, section 15 of the <i>Legislative Instruments Act 2003</i> applies as if the regulation had been repealed.</p> <p>(17) If:</p> <ul style="list-style-type: none"> (a) an organisation (the <i>listed</i>
--	---

ANNEXURE A	
Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002	Criminal Code as amended at March 2006 NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.
<i>102.2 Directing the activities of a terrorist organisation</i> (1) A person commits an offence if: (a) the person intentionally directs the activities of an organisation; and (b) the organisation is a terrorist	<p><i>organisation</i>) is specified in regulations made for the purposes of paragraph (b) of the definition of <i>terrorist organisation</i> in this section; and</p> <p>(b) an individual or an organisation (which may be the listed organisation) makes an application (the <i>de-listing application</i>) to the Minister for a declaration under subsection (4) in relation to the listed organisation; and</p> <p>(c) the de-listing application is made on the grounds that there is no basis for the Minister to be satisfied that the listed organisation:</p> <p style="padding-left: 40px;">(i) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or</p> <p style="padding-left: 40px;">(ii) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);</p> <p style="padding-left: 40px;">as the case requires;</p> <p>the Minister must consider the de-listing application.</p> <p>(18) Subsection (17) does not limit the matters that may be considered by the Minister for the purposes of subsection (4).</p>
<i>102.2 Directing the activities of a terrorist organisation</i> (1) A person commits an offence if: (a) the person intentionally directs the activities of an organisation; and (b) the organisation is a terrorist	No change

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>organisation; and</p> <p>(c) the person knows the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person intentionally directs the activities of an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person is reckless as to whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 15 years</p>	
<p><i>102.3 Membership of a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person intentionally is a member of an organisation; and</p> <p>(b) the organisation is a terrorist organisation because of paragraph (c) of the definition of terrorist organisation in this Division (whether or not the organisation is a terrorist organisation because of another paragraph of that definition also); and</p> <p>(c) the person knows the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(2) Subsection (1) does not apply if 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.</p> <p>Note: A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).</p>	<p><i>102.3 Membership of a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person intentionally is a member of an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person knows the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(2) Subsection (1) does not apply if 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.</p> <p>Note: A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).</p>
<p><i>102.4 Recruiting for a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person intentionally recruits</p>	<p><i>102.4 Recruiting for a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person intentionally recruits</p>

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>a person to join, or participate in the activities of, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the first-mentioned person knows the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person intentionally recruits a person to join, or participate in the activities of, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the first-mentioned person is reckless as to whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 15 years.</p>	<p>a person to join, or participate in the activities of, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the first-mentioned person knows the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person intentionally recruits a person to join, or participate in the activities of, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the first-mentioned person is reckless as to whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 15 years.</p>
<p><i>102.5 Training a terrorist organisation or receiving training from a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person knows the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person is reckless as to</p>	<p><i>102.5 Training a terrorist organisation or receiving training from a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person is reckless as to whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and</p>

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 15 years.</p>	<p>(b) the organisation is a terrorist organisation that is covered by paragraph (b) of the definition of terrorist organisation in subsection 102.1(1).</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(3) Subject to subsection (4), strict liability applies to paragraph (2)(b).</p> <p>(4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3)).</p>
<p>102.6 Getting funds to or from a terrorist organisation</p> <p>(1) <i>A person commits an offence if:</i></p> <ul style="list-style-type: none"> (a) the person intentionally receives funds from, or makes funds available to, an organisation (whether directly or indirectly); and (b) the organisation is a terrorist organisation; and (c) the person knows the organisation is a terrorist organisation. <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person intentionally receives funds from, or makes funds available to, an organisation (whether directly or indirectly); and (b) the organisation is a terrorist organisation; and (c) the person is reckless as to whether the organisation is a terrorist organisation. 	<p><i>102.6 Getting funds to, from or for a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person intentionally: <ul style="list-style-type: none"> (i) receives funds from, or makes funds available to, an organisation (whether directly or indirectly); or (ii) collects funds for, or on behalf of, an organisation (whether directly or indirectly); and (b) the organisation is a terrorist organisation; and (c) the person knows the organisation is a terrorist organisation. <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person intentionally: <ul style="list-style-type: none"> (i) receives funds from, or makes funds available to, an organisation (whether directly or indirectly); or

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

<p>Penalty: Imprisonment for 15 years.</p> <p>(4) Subsections (1) and (2) do not apply to the person's receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of:</p> <p>(a) legal representation for a person in proceedings relating to this Division; or</p> <p>(b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.</p> <p>Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).</p>	<p>(ii) collects funds for, or on behalf of, an organisation (whether directly or indirectly); and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person is reckless as to whether the organisation is a terrorist organisation.</p> <p>Penalty: Imprisonment for 15 years.</p> <p>(3) Subsections (1) and (2) do not apply to the person's receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of:</p> <p>(a) legal representation for a person in proceedings relating to this Division; or</p> <p>(b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.</p> <p>Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4).</p>
<p><i>102.7 Providing support to a terrorist organisation</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in this Division; and</p> <p>(b) the organisation is a terrorist organisation; and</p> <p>(c) the person knows the organisation is a terrorist organisation.</p>	<p>No Change</p>

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
- (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

This section did not exist in 2002 and was first inserted into the Criminal Code by the *Anti-Terrorism Act (No 2) 2004*

102.8 Associating with terrorist organisations

- (1) A person commits an offence if:
- (a) on 2 or more occasions:
 - (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
 - (ii) the person knows that the organisation is a terrorist organisation; and
 - (iii) the association provides support to the organisation; and
 - (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
 - (v) the person knows that the other person is a member of, or a person who promotes or directs the

ANNEXURE A

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

	<p>activities of, the organisation; and</p> <p>(b) the organisation is a terrorist organisation because of paragraph (b) of the definition of terrorist organisation in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).</p> <p>Penalty: Imprisonment for 3 years.</p> <p>(2) A person commits an offence if:</p> <p>(a) the person has previously been convicted of an offence against subsection (1); and</p> <p>(b) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and</p> <p>(c) the person knows that the organisation is a terrorist organisation; and</p> <p>(d) the association provides support to the organisation; and</p> <p>(e) the person intends that the support assist the organisation to expand or to continue to exist; and</p> <p>(f) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and</p> <p>(g) the organisation is a terrorist organisation because of paragraph (b) of the definition of terrorist organisation in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).</p>
--	--

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

Penalty: Imprisonment for 3 years.

- (3) Strict liability applies to paragraphs (1)(b) and (2)(g).
- (4) This section does not apply if:
- (a) the association is with a close family member and relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern; or
 - (b) the association is in a place being used for public religious worship and takes place in the course of practising a religion; or
 - (c) the association is only for the purpose of providing aid of a humanitarian nature; or
 - (d) the association is only for the purpose of providing legal advice or legal representation in connection with:
 - (i) criminal proceedings or proceedings related to criminal proceedings (including possible criminal proceedings in the future); or
 - (ii) proceedings relating to whether the organisation in question is a terrorist organisation; or
 - (iii) a decision made or proposed to be made under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*, or proceedings relating to such a decision or proposed decision; or
 - (iv) a listing or proposed listing under section 15 of

ANNEXURE A

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

- the *Charter of the United Nations Act 1945* or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or
- (v) proceedings conducted by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”; or
 - (vi) proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

- (5) This section does not apply unless the person is reckless as to the circumstance mentioned in paragraph (1)(b) and (2)(g) (as the case requires).

Note: A defendant bears an evidential burden in relation to the matter in subsection (5). See subsection 13.3(3).

Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002

Criminal Code as amended at March 2006

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

	<p>(6) This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (6). See subsection 13.3(3).</p> <p>(7) A person who is convicted of an offence under subsection (1) in relation to the person's conduct on 2 or more occasions is not liable to be punished for an offence under subsection (1) for other conduct of the person that takes place:</p> <p>(a) at the same time as that conduct; or</p> <p>(b) within 7 days before or after any of those occasions.</p>
<p><i>102.9 Extended geographical jurisdiction for offences</i></p> <p>Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Division.</p>	<p>No change</p>
<p><i>102.10 Alternative verdicts</i></p> <p>(1) This section applies if, in a prosecution for an offence (the <i>prosecuted offence</i>) against a subsection of a section of this Division, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the <i>alternative offence</i>) against another subsection of that section.</p> <p>(2) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded</p>	<p>No change</p>

**Criminal Code as amended by the
Security Legislation Amendment
(Terrorism) Act 2002 and the
Suppression of the Financing of
Terrorism Act 2002**

**Criminal Code as amended at March
2006**

NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.

procedural fairness in relation to that finding of guilt.	
<p>103.1 Financing terrorism</p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person provides or collects funds; and (b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. <p>Penalty: Imprisonment for life.</p> <p>Note: Intention is the fault element for the conduct described in paragraph (1)(a). See subsection 5.6(1).</p> <p>(2) A person commits an offence under subsection (1) even if the terrorist act does not occur.</p> <p>(3) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).</p>	<p><i>103.1 Financing terrorism</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person provides or collects funds; and (b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. <p>Penalty: Imprisonment for life.</p> <p>Note: Intention is the fault element for the conduct described in paragraph (1)(a). See subsection 5.6(1).</p> <p>(2) A person commits an offence under subsection (1) even if:</p> <ul style="list-style-type: none"> (a) a terrorist act does not occur; or (b) the funds will not be used to facilitate or engage in a specific terrorist act; or (c) the funds will be used to facilitate or engage in more than one terrorist act.
<p>This section did not exist in 2002 and was first inserted into the Criminal Code by the <i>Anti-Terrorism Act (No.2) 2005</i></p>	<p><i>103.2 Financing a terrorist</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person intentionally: <ul style="list-style-type: none"> (i) makes funds available to another person (whether directly or indirectly); or (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and (b) the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act. <p>Penalty: Imprisonment for life.</p>

ANNEXURE A	
Criminal Code as amended by the Security Legislation Amendment (Terrorism) Act 2002 and the Suppression of the Financing of Terrorism Act 2002	Criminal Code as amended at March 2006 NOTE: this table only contains those sections and definitions relevant to the legislation being reviewed by the Security Legislation Review Committee.
	<ul style="list-style-type: none"> (2) A person commits an offence under subsection (1) even if: <ul style="list-style-type: none"> (a) a terrorist act does not occur; or (b) the funds will not be used to facilitate or engage in a specific terrorist act; or (c) the funds will be used to facilitate or engage in more than one terrorist act.
This section did not exist in 2002 and was first inserted into the Criminal Code by the <i>Anti-Terrorism Act (No.2) 2005</i>	<p><i>103.3 Extended geographical jurisdiction for offences</i></p> <p>Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Division.</p>

NOTE: this table only contains those sections and definitions (100.1 and 102.1) relevant to the legislation being reviewed by the Security Legislation Review Committee. A complete copy of the *Criminal Code 1995* as amended can be found at http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/

Annexure B

Submissions Received available at www.ag.gov.au/slr

No.	Submission
1	Multicultural Council of Tasmania
2	Robert Cowley
3	Federation of Community Legal Centres (Vic) Inc (a) Submission (b) Supplementary Submission
4	Australian Bankers' Association
5	Office of the Privacy Commissioner
6	Uniting Justice Australia
7	Australian Privacy Foundation (a) Submission (b) Supplementary Submission 1 (c) Supplementary Submission 2
8	Australian Federal Police Association
9	Islamic Information and Support Centre of Australia
10	Australian Security Intelligence Organisation (a) Submission (b) Supplementary Submission
11	Human Rights and Equal Opportunity Commission (a) Submission (b) Supplementary Submission

12	Australian Federal Police (AFP) (a) Submission (b) Supplementary Submission
13	Premier of Western Australian (a) Submission (b) Supplementary Submission
14	Attorney- General's Department (AGD) (a) Interim Submission – December 2005 (b) Submission – February 2006 (c) Supplementary Submission – March 2006
15	Commonwealth Director of Public Prosecution
16	Patrick Emerton
17	Australian Muslim Civil Rights Advocacy Network (a) Submission – December 2005 (b) Supplementary Submission – February 2006
18	The Australian Customs Service (a) Submission (b) Supplementary Submission
19	The Uniting Church in Australia – Synod of Vic & Tas
20	Premier of New South Wales
21	Premier of Tasmanian Government
22	Law Council of Australia
23	Law Institute of Victoria (a) Submission

	(b) Supplementary Submission
24	AUSTRAC
25	Gilbert & Tobin Centre for Public Law
26	Victorian Privacy Commissioner
27	Public Interest Advocacy Centre
28	Member of the Public (a) Submission 1 (b) Submission 2
29	National Legal Aid Secretariat
30	International Commission of Jurists – Tasmanian Branch
31	Australian Press Council
32	Mr Tony Robinson MP
33	Australian Bar Association (a) Submission (b) Supplementary Submission
34	Department of Immigration and Multicultural Affairs
35	Liberty – National Council for Civil Liberties Inc

SUMMARY OF SUBMISSIONS

This summary of submissions is divided into sections with headings describing in general terms the group of parties concerned in making the submissions. The number in **bold** the number allocated to the submissions on the website.

Representative bodies of professions and community or special interest groups

- Law Council of Australia **(22)**
- Gilbert & Tobin Centre of Public Law **(25)**
- Law Institute of Victoria **(23)**
- Australian Privacy Foundation **(7)**
- Federation of Community Legal Centres (Vic) Inc **(3)**
- Australian Muslim Civil Rights Advocacy Network **(17)**
- Islamic Information & Support Centre of Australia Inc **(9)**
- Uniting Justice Australia **(6)**
- The Uniting Church in Australia – Synod of Vic & Tas **(19)**
- Public Interest Advocacy Centre **(28)**
- Multicultural Council of Tasmania Inc **(1)**
- National legal Aid Secretariat **(29)**
- International Commission of Jurists – Tasmanian Branch **(30)**
- Australian Press Council **(31)**
- Australian Bankers' Association **(4)**
- Australian Bar Association **(33)**
- Australian Federal Police Association **(8)**

Individual Representations

- Mr Patrick Emerton **(16)**
- Mr Robert Cowley **(2)**
- Member of the Public **(28)**

State Governments

New South Wales Government **(20)**

Western Australia Government **(13)**

Tasmanian Government **(21)**

Police and Security Organisations

Australian Federal Police **(12)**

Australian Security Intelligence Organization **(10)**

Directors of Public Prosecutions

Commonwealth Director of Public Prosecutions **(15)**

New South Wales Director of Public Prosecutions

Federal Government Bodies

Attorney-General's Department **(14)**

Australian Customs Service **(18)**

AUSTRAC **(24)**

Department of Immigration and Multicultural Affairs **(34)**

Independent Statutory Bodies

Human Rights and Equal Opportunity Commission **(11)**

Office of the Privacy Commissioner **(5)**

Victorian Privacy Commissioner **(26)**

List of participants at Public Hearings

Sydney - Tuesday, 31 January 2006

Human Rights and Equal Opportunity Commission (submission 11)

The Honourable John von Doussa QC, President.

Ms Joanna Hemingway, Lawyer.

Mr Craig Lenehan, Deputy Director, Legal Services.

Australian Privacy Foundation (submission 7)

Ms Anna Johnstone, Chair.

Mr Nigel Waters, Public Officer.

Sydney - Wednesday, 1 February 2006

Australian Muslim Civil Rights Advocacy Network (submission 17)

Dr Waleed Kadous, Co-convener, AMCRAN.

New South Wales Director of Public Prosecutions (no written submission)

Mr Nicholas Cowdery AM QC, Director of Public Prosecutions for NSW.

Law Council of Australia (submission 22)

Mr John North, President.

Ms Pradeepa Jayawardena, Policy Lawyer.

Canberra - Friday, 3 February 2006

Australian Customs Service (submission 18)

Ms Gail Batman, National Director, Border Intelligence and Passengers Division.

Ms Marion Grant, National Director, Border Compliance and Enforcement Division.

Mr John Valastro, National Manager, Law Enforcement Strategy and Security Branch.

Attorney-General's Department (submission 14)

Mr Keith Holland, First Assistant Secretary, Security and Critical Infrastructure Division.

Mr Geoff McDonald, Assistant Secretary, Security Law Branch.

Mr Karl Alderson, Assistant Secretary, Office of Legal Services Coordination.

Melbourne - Tuesday, 7 February 2006

Law Institute of Victoria (submission 23)

Mr Andrew Hudson, Partner, Hunt & Hunt and Chair, International Law Committee, Law Institute of Victoria.

Mr Andrew Closey, Solicitor, Criminal Law Section.

Australian Transaction Reports and Analysis Centre (submission 24)

Mr Neil Jensen PSM Director.

Mr Andrew Joyce, Senior Manager, Strategic Coordination.

Ms Elizabeth Rigg, Senior Policy Officer

Federation of Community Legal Centres (Vic) (submission 3) AWAITING CONFIRMATION

Ms Marika Dias, Community Lawyer and Convenor, Anti-Terrorism Laws Working Group, Federation of Community Legal Centres.

Uniting Justice Australia (submission 6)

Dr Mark Zirnsak, Director of Justice and International Mission, Uniting Church in Australia.

Melbourne - Wednesday, 8 February 2006

Mr Patrick Emerton, Lecturer, Faculty of Law, Monash University.
(submission 16)

Australian Federal Police (submission 12)

Mr John Lawler, Deputy Commissioner.

Mr Frank Prendergast, National Manager, Counter-Terrorism.

Mr Peter Whowell, Manager, Legislation.

Perth - Monday, 20 February 2006

Australian Bar Association (submission 33)

Mr Toner SC, Barrister, NSW Bar Association.

Ms Karen Vernon, Barrister, WA Bar Association.

Western Australian Department of the Premier and Cabinet (submission 13)

Ms Tania Lawrence, Principal Policy Officer, Security Planning and Coordination Unit, Department of the Premier and Cabinet.

Dr Jim Thompson, Legal Officer for the Attorney-General's Department.

Mr John Young, Deputy State Solicitor, State Solicitor's Office.

Sydney Tuesday, 7 March 2006

Attorney-General's Department (submission 14)

Mr Keith Holland, First Assistant Secretary Security and Critical Infrastructure Division.

Mr Geoff McDonald, Assistant Secretary Security Law Branch.

Commonwealth Director of Public Prosecutions (submission 15)

Mr Damian Bugg QC, Commonwealth Director Public Prosecutions.

Mr Graeme Davidson, Senior Assistant Director, Mutual Assistance and Extradition.

Department of Immigration and Multicultural Affairs (submission 35)

Mr Peter Vardos PSM, First Assistant Secretary Citizenship and Multicultural Affairs Division.

Dr Thu Nguyen-Hoan, Assistant Secretary, Multicultural Affairs.

Sydney Wednesday, 8 March 2006

Australian Security Intelligence Organisation (submission 10)

Mr Paul O'Sullivan, Director-General.

Gilbert and Tobin Centre for Public Law (submission 25)

Dr Andrew Lynch, Director Terrorism and Law Project.

Professor George Williams, Director.

Public Interest Advocacy Centre (submission 27)

Ms Robin Banks, Chief Executive Officer.

Mr Simon Moran, Principal Solicitor.

Scope of legislation reviewed

Section 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002* requires a public and independent review of the operation, effectiveness and implications of the amendments made by:

- the *Security Legislation Amendment (Terrorism) Act 2002*;
- the *Suppression of the Financing of Terrorism Act 2002*;
- the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*;
- the *Border Security Legislation Amendment Act 2002*;
- the *Telecommunications Interception Legislation Amendment Act 2002*;
- and
- the *Criminal Code Amendment (Terrorism) Act 2003*.

It is important to note that all six Acts are amending Acts, which are inter-related. The amendments made by these Acts are set out below.

(1) *Security Legislation Amendment (Terrorism) Act 2002*

The *Security Legislation Amendment (Terrorism) Act 2002* (SLAT Act) primary purpose was to enact criminal offences to deal with terrorism. The Act provided for a number of new terrorism offences by amending the *Criminal Code Act 1995* (the Criminal Code) to insert a new Part 5.3 Terrorism. Part 5.3 includes the definition of a “terrorist act” (s100.1 – repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*) and a number of new terrorist act offences.

Terrorist Act Offences

- Engaging in a terrorist act (s.101.1 - subsequently amended - repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*)
- Providing or receiving training connected with terrorist acts (s.101.2 – subsequently amended - repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*, amended by the *Anti-Terrorism Act 2005*)
- Possessing things connected with terrorist acts (s.101.4 – subsequently amended -repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*, amended by the *Anti-Terrorism Act 2005*)

- Collecting or making documents likely to facilitate terrorist acts (s.101.5 - subsequently amended -repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*, amended by the *Anti-Terrorism Act 2005*)
- Other acts done in preparation for, or planning, terrorist acts (s.101.6 - subsequently amended- repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*, amended by the *Anti-Terrorism Act 2005*)

The Act also introduced a definition of terrorist organisation and provided for a regime for proscribing terrorist organisations (s.102.1). This proscription regime required an organisation to have been named in a United Nations Security Council decision prior to being listed under this Act. It is important to note that this proscription regime has been amended by later Acts (amended by the *Criminal Code Amendment (Terrorist Organisations) Act 2002*, repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*, and amended by the *Criminal Code Amendment (Hizballah) Act 2003*, *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003*, *Criminal Code Amendment (Terrorist Organisations) Act 2004*, the *Anti-Terrorism Act (No.2) 2004*) and the *Anti-Terrorism Act (No. 2) 2005*.

Terrorist Organisation Offences

- Directing the activities of a terrorist organisation (s. 102.2 - subsequently amended repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*).
- Membership of a terrorist organisation (s.102.3 - subsequently amended - repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*, amended by the *Criminal Code Amendment (Hizballah) Act 2003*, *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* and the *Anti-Terrorism Act (No.2) 2004*).
- Recruiting for a terrorist organisation (s. 102.4 - subsequently amended – repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*).
- Training a terrorist organisation or receiving training from a terrorist organisation (s. 102.5 - subsequently amended – repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*), and amended by the *Anti-Terrorism Act (No.2) 2004* and the *Anti-Terrorism Act (No.2) 2005*).
- Getting funds to or from a terrorist organisation (s. 102.6 - subsequently amended– repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003* and amended by the *Anti-Terrorism Act (No.2) 2005*).

- Providing support to a terrorist organisation (s. 102.7 - subsequently amended– repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*)

Associating with a listed terrorist organisation (s. 102.8) was inserted by the *Anti-terrorism Act (No.2) 2004*, and amended by the *Anti-Terrorism Act (No.2) 2005*.

The Act also inserted and updated the treason offence (section 80.1 of the Criminal Code), which was amended by the *Anti-Terrorism Act (No.2) 2005*.

The SLAT Act also amended the following Acts:

The *Crimes Act 1914* (the Crimes Act)

- Repealed the treason offence from the Crimes Act for inclusion in the Criminal Code.
- Amended section 4J (7) of the Crimes Act to maintain the current rule that the treason offence is not to be dealt with summarily (subsequently amended – the *Criminal Code Amendment (Espionage and Related Matters) Act 2002* and *Crimes Legislation Enhancement Act 2003*).
- Repealed reference to treason offence in subsection 24AC (1) of the Crimes Act as the rules governing institution of proceedings in section 24AC are now governed by Division 80 of the Criminal Code.
- Amended subsection 24F (2) of the Crimes Act so that the ‘good faith’ exemption from criminal liability extends to the broadened treason offence (s.80.1).
- Ensured that a proclamation specifying an enemy of the Commonwealth under paragraph 24(1) (d) of the Crimes Act remained in force at the repeal of section 24.

The *Australian Protective Service Act 1987*

- Amended subsection 13(2) to extend the list of specified offences in relation to which members of the Australian Protective Service (APS) could exercise their arrest without warrant powers to include the terrorist-bombing and terrorism offences.

The *Crimes (Aviation) Act 1991*

- Amended section 3 (subsequently amended – *Australian Federal Police and Other Legislation Amendment Act 2004* and *Crimes Legislation Amendment (Telecommunications Offences and other Measures) Act (No.2) 2004*) and 8 to extend the coverage of offences in relation to which members of the APS could exercise their arrest without warrant powers to aircraft that are operating on intra-state flights.

(2) *Suppression of the Financing of Terrorism Act 2002*

The *Suppression of the Financing of Terrorism Act 2002* implements Australia's obligations under United Nations Security Council Resolution 1373 and the International Convention for the Suppression of the Financing of Terrorism. It provided for:

- An offence directed at those who provide or collect funds with the intention that they be used to facilitate terrorist activities (s. 103.1 – Financing terrorism), and the new offence of financing a terrorist, s. 103.2, inserted by the *Anti-Terrorism Act (No.2) 2005*.
- The requirement that cash dealers report transactions that are suspected to relate to terrorist activities (s. 16(1A)).
- Enabled the Director of the Australian Transaction Reports and Analysis Centre, the Federal Police Commissioner and the Director-General of Security to disclose financial transaction reports information directly to foreign countries, foreign law enforcement agencies and foreign intelligence agencies (s.27(1)(d) & s. 27(1)).
- Higher penalty offences for providing assets to, or dealing in assets of, persons and entities engaged in terrorist activities.

The *Suppression of the Financing of Terrorism Act 2002* amended the following Acts:

The Criminal Code

- The insertion of a new offence at 103.1 of the Criminal Code directed at those who provide or collect funds with the intention that they be used to facilitate terrorist activities (s. 103.1 – Financing Terrorism - subsequently amended – *Anti-Terrorism Act 2005* and the *Anti-Terrorism Act (No.2) 2005*).

The Extradition Act 1988

- Amended the definition of "political offence" (s. 5) to ensure that financing of terrorism offences are not considered political offences for extradition or mutual assistance purposes.

The Financial Transaction Reports Act 1988

- Amended section 16 (Reports of suspect transactions) to require cash dealers to report transactions that are suspected to relate to terrorist activities (subsequently amended – *Australian Crime Commission Establishment Act 2002* and *Statute Law Revision Act 2005*);
- Amended section 27 (Access to FTR information) to enable the Director of the Australian Transaction Reports and Analysis Centre, the Australian Federal Police Commissioner and the Director-General of Security to disclose financial transaction reports information directly to foreign countries, foreign law enforcement agencies and foreign intelligence

agencies (subsequently amended - *Australian Crime Commission Establishment Act 2002 Telecommunications Interception and Other Legislation Amendment Act 2003, Family and Community Services and Veterans' Affairs Legislation Amendment (2003 Budget and Other Measures) Act 2003 and Statute Law Revision Act 2005*)).

The *Mutual Assistance in Criminal Matters Act 1987*

- Repealed Part VIA of the Mutual Assistance Act which provided that where a foreign country asks the Attorney-General for information, the Attorney-General may direct the Director of the AUSTRAC to give the Attorney-General access to FTR information for the purpose of enabling the Attorney-General to deal with the request. The amendments to the FTR Act gave the Director of AUSTRAC the general responsibility for disclosure of information outside of Australia (s. 27).

The *Charter of the United Nations Act 1945*

- Introduced new Part 4 to the Charter which created offences directed at those who provide assets to, or deal in the assets of, persons and entities involved in terrorist activities and associated provisions allowing for the Minister for Foreign Affairs to list persons and entities for the purpose of the offences, to revoke a listing and to permit a specified dealing in a freezable asset (s.22 - subsequently amended – *Charter of the United Nations Amendment Act 2002*).

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

The *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* gives effect to Australia's obligations under the International Convention for the Suppression of Terrorist Bombings. The main purpose of this Act was to establish offences in the Criminal Code which make it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss. It amended the following Acts:

The Criminal Code

- Inserted a new Division 72 – International terrorist activities using explosive or lethal devices, into the Criminal Code which creates offences relating to international terrorist activities using explosive or lethal devices

The *Extradition Act 1988*

- Amended the definition of 'political offence' (ss. 5) to ensure that the offences in the Act shall not be regarded, for the purposes of extradition, as political offences.

(4) Border Security Legislation Amendment Act 2002

The *Border Security Legislation Amendment Act 2002* amended the following Acts:

The *Customs Act 1901*:

- increased Customs powers at airports by allowing Customs officers to patrol airports, increasing the restricted areas in which unauthorised entry is prohibited and by allowing officers to remove people from those restricted areas (s.234ABA - subsequently amended - *Australian Federal Police and Other Legislation Amendment Act 2004*)
- required employers of people who work in restricted areas of the airport to provide information about those people to Customs (s.213A)
- required the issuers of security identification cards (which are issued to most people who work at airports) to provide information about the people to whom they have issued security identification cards (s. 213B)
- required goods that are in transit through Australia to be reported to Customs (s.6AB(3AA) & s. 6AB(3AB))
- allowed in transit goods to be examined and certain in transit goods to be seized (s.203DA)
- required mail to be electronically reported to Customs as part of a cargo report (s. 63A)
- required certain airlines and shipping operators to report passengers (s.64ACA - subsequently amended - *Customs Legislation Amendment (Airport, Port and Cargo Security) Act 2004*) and crew (s.64ACB) to Customs electronically
- required certain airlines to provide Customs with access to their computer reservation systems (s. 64AF)
- allowed the Chief Executive Officer of Customs to authorise a person to perform the functions of a Customs officer by reference to their position or office even if that position or office does not exist at the time of making the authorisation (ss. 4(1))
- tightened provisions allowing the Chief Executive Officer of Customs to authorise the carriage of approved firearms and personal defence equipment by Customs officers for the safe

exercise of powers conferred under the Customs Act and other Acts (s.189A(1))

- restored the power to arrest persons who assault, resist, molest, obstruct or intimidate a Customs officer in the course of his or her duties, which was inadvertently removed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (s. 210(1A))
- provided that certain undeclared dutiable goods found in the unaccompanied personal and household effects of a person are forfeited goods (s.229(1)).

The *Customs Administration Act 1985*

- included the Australian Bureau of Criminal Intelligence as a Commonwealth agency for the purposes of section 16 of the Customs Administration Act.

The *Fisheries Management Act 1991*

- allowed the Australian Fisheries Management Authority to disclose vessel monitoring system data to Customs under the Fisheries Management Act (s. 167B).

The *Migration Act 1958*

- required certain airlines and shipping operators to report passengers and crew to the Department of Immigration and Multicultural and Indigenous Affairs electronically (Div. 128).

(5) *Telecommunications Interception Legislation Amendment Act 2002*

The *Telecommunications Interception Legislation Amendment Act 2002* provided for:

- the amendment to the definition of class 1 offence to insert a new paragraph (ca) to include within the definition an offence constituted by conduct involving an act or acts of terrorism. (ss. 5).
- The amendment of the definition of permitted purpose for which intercepted information can be communicated (ss. 5):
 - information relating to a police officer that could be used to dismiss the officer, and
 - investigation by the Anti-Corruption Commission of Western Australia.
- Clarification of the operation of warrants authorising entry into premises (s. 6H).

(6) *Criminal Code Amendment (Terrorism) Act 2003*

The *Criminal Code Amendment (Terrorism) Act 2003* amends the Criminal Code so as to attract the support of State references of power in accordance with section 51(xxxvii) of the Constitution. It re-enacts Part 5.3 (which contained terrorism offences enacted in June 2002 by the SLAT so as to enable the offences to be capable of operating throughout Australia, without any limitations arising from Commonwealth constitutional powers.

Annexure E

Proscribed terrorist organisations

19 organisations are proscribed as terrorist organisations. They are:

- [Abu Sayyaf Group - Listed 14 November 2002 and re-listed 7 November 2004](#)
- [Al Qa'ida - Listed 21 October 2002 and re-listed 1 September 2004](#)
- **Al-Zarqawi** – Listed 26 February 2005
- **Ansar Al-Islam** - Listed 27 March 2003 and re-listed 23 March 2005
- **Armed Islamic Group** - Listed 14 November 2002 and re-listed 7 November 2004
- **Asbat al-Ansar** - Listed 11 April 2003 and re-listed 11 April 2005
- **Egyptian Islamic Jihad** - Listed 11 April 2003 and re-listed 11 April 2005
- **Hamas's Izz al-Din al-Qassam Brigades** Listed in Australia 9 November 2003 and re-listed 5 June 2005
- **Hizballah External Security Organisation** - Listed 5 June 2003 and re-listed 5 June 2005
- **Islamic Army of Aden** - Listed 11 April 2003 and re-listed 11 April 2005
- **Islamic Movement of Uzbekistan** - Listed 11 April 2003 and re-listed 11 April 2005
- **Jaish-i-Mohammed** - Listed 11 April 2003 and re-listed 11 April 2005
- **Jamiat ul-Ansar** (formerly known as Harakat Ul-Mujahideen) - Listed 14 November 2002 and re-listed 7 November 2004
- **Jemaah Islamiyah** - Listed 27 October 2002 and re-listed 1 September 2004
- **Kurdistan Workers Party (PKK)** - Listed 15 December 2005

- **Lashkar I Jhangvi** - Listed 1 1 April 2003 and re-listed 11 April 2005
- **Lashkar-e-Tayyiba** Listed 9 November 2003 and re-listed 5 June 2005
- **Palestinian Islamic Jihad** - Listed 3 May 2004 and re-listed 5 June 2005
- **Salafist Group for Call and Combat** - Listed 14 November 2002 and re-listed 7 November 2004