



Anti-Terrorism Reform Project

**A consolidation of the Law Council of
Australia's advocacy in relation to Australia's
anti-terrorism measures**

October 2013

Table of Contents

1. Introduction	5
1.1.1 History of Law Council Advocacy on Anti-Terror Laws	5
1.1.2 Moves towards reform	8
1.1.2.1 Inquiries into the Haneef Case	10
1.1.2.2 Discussion Paper on Proposed Amendments to National Security Legislation and the <i>National Security Legislation Amendment Act 2010</i>	11
1.1.2.3 Independent National Security Legislation Monitor	13
1.1.2.4 The Government's Counter-Terrorism White Paper	16
1.1.2.5 Australia's Human Rights Framework	18
1.1.2.6 COAG Review of Counter-Terrorism legislation	19
1.1.2.7 Australia's National Security Strategy	21
2. Background and Context	21
2.1 What measures were introduced?	21
2.2 Why were the new laws introduced?	22
2.3 Were the new laws necessary?	24
2.3.1 Were the new laws required to meet Australia's international obligations?	24
2.3.2 Were the new laws necessary to fill a gap in protection?	24
2.4 How have the laws been used so far?	26
2.5 Need for continued review	28
3. Terrorism Offences and the Meaning of 'Terrorist Act'	30
3.1 What measures were introduced and why?	30
3.2 Meaning of 'terrorist act'	32
3.2.1 Law Council Concerns	33
3.2.2 Proposed reforms to the definition of 'terrorist act'	37
3.2.3 Law Council Recommendations	39
3.3 Terrorist Offences	40
3.3.1 What measures were introduced?	40
3.3.2 Law Council Concerns	40
3.3.3 Proposal to introduce a new hoax offence	44
3.3.4 Law Council Recommendations	46
3.4 Financing Terrorism	46
3.4.1 What measures were introduced and why?	46
3.4.2 Law Council Concerns	48
3.4.3 Law Council Recommendations	49
3.5 Terrorism Offences and Bail	49
3.5.1 Law Council Concerns	50
3.5.2 Law Council Recommendations	53
3.6 Sedition Offences	53

3.6.1	What measures were introduced and why?.....	53
3.6.2	The Urging Violence Offences	55
3.6.3	Law Council Concerns	56
3.6.4	Law Council Recommendations.....	58
4.	Terrorist Organisations	59
4.1	What measures were introduced and why?	59
4.2	Proscribing Terrorist Organisations	62
4.2.1	Proscription by Regulation	62
4.2.2	Law Council Concerns	64
4.2.3	Law Council Recommendations.....	74
4.3	Terrorist Organisation Offences.....	74
4.3.1	What measures were introduced?.....	74
4.3.2	Law Council Concerns	75
4.3.3	Law Council Recommendations.....	83
5.	Investigation Powers of Law Enforcement and Intelligence Agencies	83
5.1	What measures were introduced and why?	83
5.1.1	Measures introduced in 2002 and 2003	84
5.1.2	Measures introduced in 2004.....	85
5.1.3	Measures introduced in 2005.....	85
5.2	Law Council's Concerns	86
5.3	Police Search and Seizure Powers.....	89
5.3.1	Law Council Concerns	91
5.3.2	Law Council Recommendations.....	92
5.4	Dead time provisions in Part IC <i>Crimes Act</i>	93
5.4.1	What provisions were introduced?	93
5.4.2	Why were the dead time provisions introduced?	94
5.4.3	Law Council Concerns	95
5.4.4	Law Council Recommendations.....	97
5.5	Control orders and Preventative Detention Orders	97
5.5.1	Control Orders	98
5.5.2	Preventative Detention Orders.....	99
5.5.3	When have control orders and preventive detention orders been used?	100
5.5.4	Law Council Concerns	100
5.5.5	Law Council Recommendations.....	104
5.6	Questioning and Detention powers of ASIO	105
5.6.1	What measures were introduced and why?.....	105
5.6.2	Questioning and Detention Warrants	106
5.6.3	Law Council Concerns	109
5.6.4	Law Council Recommendations.....	113

6. Procedural and Classification Reforms	114
6.1 What measures were introduced?	114
6.2 National Security Information and Court Proceedings.....	114
6.2.1 What measures were introduced and why?.....	114
6.2.2 Law Council Concerns	117
6.2.3 Law Council Recommendations.....	122
6.3 Classification of Terrorist Material.....	124
6.3.1 What changes were introduced and why?.....	124
6.3.2 Law Council Concerns	125
6.3.3 Law Council Recommendations.....	127
6.4 Foreign Evidence	127
6.4.1 What measures were introduced and why?.....	127
6.4.3 Law Council Concerns	129
6.4.4 Law Council's Recommendations	131
7. Summary of key recommendations.....	132
7.1 Terrorism Offences and the meaning of 'terrorist act'	132
7.2 Terrorist Organisations and Related Offences.....	133
7.3 Investigation Powers of Law Enforcement and Intelligence Agencies.....	134
7.4 Procedural and Classification Reforms.....	137
Attachment A: Profile of the Law Council of Australia	139
Attachment B: Relevant Law Council Submissions.....	140
Attachment C: Terrorism Cases	145
Attachment D: Glossary	150
Legislation	150
Other	150

Note: A glossary of acronyms and abbreviations is at Attachment D.

1. Introduction

1.1.1 History of Law Council Advocacy on Anti-Terror Laws

The Law Council has long been involved in advocacy on the introduction and operation of national security and anti-terrorism measures at the federal level.

While the Law Council has always acknowledged the need to safeguard Australia's national security and supported measures to protect the community from possible terrorist acts, the Council has often been critical of national security measures that detract from established principles of the Australian criminal justice system, fail to comply with international human rights standards or abrogate rule of law principles.

This paper represents a consolidation of a wide range of past Law Council advocacy, including submissions to Parliamentary Inquiries, the Australian Law Reform Commission (ALRC) and other national and international bodies. It also reflects on the findings of past inquiries and reviews and Government responses to these findings.

The contents of this paper reflect those matters to which the Law Council has devoted considerable attention and advocacy for reform.¹ They are:

- the definition of 'terrorist act' in section 100.1 of the *Criminal Code Act 1995* (Cth) ('the *Criminal Code*');
- the terrorist offences in Part 5.3 of the *Criminal Code*;
- changes to the presumption of bail and section 15AA of the *Crimes Act 1914* (Cth) ('the *Crimes Act*');
- the sedition offences in Division 80 of the *Criminal Code*;
- the proscription of organisations as terrorist organisations and the offences in Division 102 of the *Criminal Code*;
- the expansion of the powers of law enforcement and intelligence agencies, including:
 - extended search and seizure powers in Part 1AA Division 3A of the *Crimes Act*;
 - control orders and preventative detention orders in Divisions 104 and 105 of the *Criminal Code*;
 - questioning and detention powers of the Australian Security and Intelligence Organisation (ASIO) in Part III Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('the *ASIO Act*');

¹ Key Commonwealth legislative acts discussed are: *Security Legislation Amendment (Terrorism) Act 2002*; *Suppression of the Financing of Terrorism Act 2002*; *Criminal Code Amendment (Terrorism) Act 2003*; *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*; *Criminal Code Amendment (Terrorist Organisations) Act 2004*; *Anti-Terrorism Act 2004*; *Anti-Terrorism Act (No 2) 2004*; *National Security Information (Civil and Criminal Proceedings) Act 2004*; *Anti-Terrorism Act (No 2) 2005*; *Law and Justice Legislation Amendment (Video Evidence and Other Measures) Act 2005*; *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*; *National Security Legislation Amendment Act 2010*; *Intelligence Services Legislation Amendment Bill 2011*.

- laws restricting access to and disclosure of information that could prejudice national security in criminal and civil proceedings;
- changes to the classification regime to refuse classification for terrorist related material; and
- changes to the laws relating to evidence in terrorist related criminal proceedings.

During the period March 2002 to October 2013 the Law Council of Australia made over 50 separate submissions on Australia's anti-terrorism measures (all of which are available on the Law Council website [at http://www1.lawcouncil.asn.au/lawcouncil/](http://www1.lawcouncil.asn.au/lawcouncil/)). A full list of these submissions can be found at Attachment B. Key submissions include:

- Submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002)
- Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional Legislation Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, (29 April 2002)
- Submission to the Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002* (14 October 2002)
- Submission to the ALRC, *Inquiry into Protecting Classified and Security Sensitive Information* (12 September 2003)
- Submission to the Attorney-General, *Criminal Code Amendment (Terrorist Organisation) Bill* (3 March 2004)
- Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill 2004* (26 April 2004)
- Submission to the Senate Legal and Constitutional Committee, *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* (2 July 2004)
- Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill (No. 2) 2004* (15 July 2004)
- Submission to the Parliamentary Joint Committee on ASIO, *Review of ASIO Questioning and Detention Powers* (4 April 2005)
- Submission to the Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002* (7 October 2005)
- Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism (No. 2) Bill 2005* (11 November 2005)
- Submission to the ALRC, *Review of Seditious Laws* (19 July 2006)
- Submission to the Senate Legal and Constitutional Affairs Committee, *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* (17 November 2006)

- Submission to the Parliamentary Joint Committee on Intelligence and Security, *Review of the Power to Proscribe Organisations as Terrorist Organisations* (9 February 2007)
- Submission to the Attorney-General's Department, *Law Council Response to Discussion Paper on Material that Advocates Terrorists Acts* (28 May 2007)
- Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (13 July 2007)
- Submission to the Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007* (1 April 2008)
- Submission to the Hon John Clarke QC, *Inquiry into the case of Dr Mohamed Haneef* (16 May 2008)
- Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document* (29 August 2008)
- Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 (No 2)* (15 September 2008)
- Submission to the National Consultation on Human Rights, *A Charter: Protecting the Rights of all Australians* (6 May 2009)
- Submission to the Senate Finance and Public Administration Committee, *Inquiry into National Security Legislation Monitor Bill 2009* (27 July 2009)
- Submission to the Senate Committee on Legal and Constitutional Affairs, *Inquiry into the provisions of the Anti-Terrorism Laws Reform Bill* (August 2009)
- Submission to the Attorney-General's Department on the *National Security Legislation Discussion Paper* (October 2009)
- Submission to the Senate Committee on Legal and Constitutional Affairs, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010).
- Submission to the Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Telecommunications Interception and Intelligence Services Bill 2010* (28 October 2010).
- Submission to the Senate Committee on Legal and Constitutional Affairs *Inquiry into the Intelligence Services Legislation Amendment Bill 2011 [Provisions]* (3 May 2011).
- Submission to the Parliamentary Joint Committee on Intelligence and Security's *Inquiry into National Security Law Reform* (20 August 2012).
- Submission to the Independent National Security Legislation Monitor's *Inquiry into Questioning and Detention Warrants, and Preventative Detention and Control Orders* (10 September 2012).

- Submission to the Council of Australian Government's (COAG) Review of Counter-Terrorism Legislation (27 September 2012).
- Submissions to the Independent National Security Legislation Monitor's inquiries into the *NSI Act* (19 July 2013) and Financing Terrorism Offences (2 August 2013).

The Law Council's key recommendations for reform of Australia's national security laws are summarised at the end of this paper, but can broadly be categorised as follows:

- Australia's national security and anti-terrorism measures must:
 - be shown to be necessary to counter the threat posed to the Australian community by international terrorism, and constitute a proportionate response to that threat;
 - comply with Australia's international human rights obligations and rule of law principles;
 - contain mechanisms for independent, regular and comprehensive review of both the content and the operation of Australia's national security and anti-terrorism measures;
 - contain clearly defined key terms to ensure clarity and certainty, to provide limits on the scope of criminal liability and to avoid arbitrary or inconsistent application; and
 - include safeguards to protect against overuse or misuse of executive power, such as:
 - judicial oversight of the exercise of executive power;
 - full access to confidential legal advice by a legal adviser of a person's choice;
 - access to information supporting applications or decisions that affect a person's liberty, and the ability to effectively challenge orders restricting a person's liberty; and
 - independent review and monitoring of the use of executive power.

The Law Council wishes to acknowledge the contributions of its constituent bodies, both through ongoing advocacy in respect of national security and anti-terrorism measures introduced within their own jurisdictions and for their contributions to the Law Council's efforts at the national level.

This paper was originally published in November 2008. It has since been updated and is now current as at October 2013.

1.1.2 Moves towards reform

The Law Council's efforts over the past twelve years to promote review and reform of Australia's anti-terrorism measures have not been in vain. In response to concerted advocacy, some changes have been made to Australia's national security laws to better safeguard individual rights.² Perhaps more significantly, in recent years the public debate

² For example, changes made to the provisions of the *Security Legislation Amendment (Terrorism) Bill 2002 (No 2)* introducing the definition of 'terrorist act' and the enacted definition in section 100.1 of the *Criminal Code*; the changes made

has shifted from one dominated by the fear of international terrorism and the need for 'something to be done', to a more critical analysis of Australia's response to this increasingly complex phenomena. Developments that have been particularly significant include:

- the Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (the Clarke Inquiry);³
- the passage of legislation establishing the Independent National Security Legislation Monitor (the Monitor)⁴ and the Government's appointment of Mr Bret Walker SC to this position on 21 April 2011;⁵
- the Government's July 2009 Discussion Paper on Proposed Amendments to National Security Legislation and subsequent introduction of the *National Security Legislation Amendment Bill 2010 (Cth) (NSLA Bill)* and the *Parliamentary Joint Committee on Law Enforcement Bill 2010 (Cth)*; ⁶
- the Government's Counter-Terrorism White Paper released on 23 February 2010;⁷
- the Government's release of Australia's Human Rights Framework in April 2010 in response to the 2009 National Consultation on Human Rights;⁸
- the release of the Monitor's first annual report to the Government in December 2011;⁹
- the commencement of the Council of Australian Governments' (COAG) Review of Counter-terrorism Legislation in August 2012;¹⁰
- the launch of Australia's first National Security Strategy by then Prime Minister Julia Gillard on 23 January 2013;¹¹ and
- the release of the Monitor's second annual report to the Government in May 2013.¹²

The Law Council also welcomed the establishment of the Monitor's position and the launch of the COAG Review of Counter-Terrorism Legislation. The Law Council hopes that the Government will consider and act on the recommendations of the Monitor and the COAG Counter-Terrorism Review Committee and deliver the type of comprehensive reform of Australia's anti-terror laws which is required.

to the Bill introducing Divisions 104 and 105 of the *Criminal Code* (the *Anti-Terrorism Act (No 2) Bill 2005*) and the enactment of the *Anti-Terrorism Act (No 2) 2005* (Cth); changes made to Division 102 of the *Criminal Code* by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth); review mechanisms introduced by the *Anti-Terrorism (No 1) Act 2005*.

³ See the Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008 (Clarke Report)

⁴ The *Independent National Security Monitor Bill 2010* was passed on 18 March 2010 and assented to on 13 April 2010

⁵ See Media Release by the Hon. Wayne Swan MP announcing Bret Walker's appointment to the position of Independent Monitor, available at

<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/036.htm&pageID=003&min=wms&Year=&DocType=>

⁶ Commonwealth Attorney-General's Department, *National Security Legislation - Discussion Paper on Proposed Amendments*, July 2009. The National Security Legislation Amendment Bill 2010 and the Parliamentary Joint Committee on Law Enforcement Bill 2010 are available at <http://parlinfo.aph.gov.au>

⁷ Available at http://www.dpmc.gov.au/publications/counter_terrorism/index.cfm

⁸ Australia's Human Rights Framework is available at <http://www.ag.gov.au/humanrightsframework>. Details of the National Human Rights Consultation are available at

<http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>

⁹ Bret Walker SC, *Independent National Security Legislation Monitor Annual Report*, 16 December 2011. Available from http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf

¹⁰ See COAG Counter-Terrorism Review Committee, Council of Australian Governments Review of Counter-Terrorism Legislation, 14 May 2013, p.2, available from <http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF>

¹¹ See http://www.dpmc.gov.au/national_security/national-security-strategy.cfm

¹² See B. Walker SC, *Independent National Security Legislation Monitor 2012 Annual Report*, 20 December 2012, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf

1.1.2.1 Inquiries into the Haneef Case

Issues arising from the case of Dr Mohamed Haneef served to highlight growing public concerns about Australia's response to potential terrorist threats.

Dr Haneef was an Indian doctor working in Australia, who was arrested and detained in July 2007 for 12 days without charge on suspicion of having been involved in a terrorist attack in London. After this period, Dr Haneef was charged with providing support to a terrorist organisation but the charge was subsequently withdrawn.¹³

On 22 November 2007, in the context of significant public debate regarding the handling of the Haneef case, the Government directed that a review be undertaken into the interoperability between the Australian Federal Police (AFP) and its national security partners in relation to the case. The Inquiry was conducted by former NSW Chief Justice Sir Laurence Street, former Director of the Defence Signals Directorate, Martin Brady and former NSW Police Commissioner Ken Moroney (the Street Review). On 26 February 2008 the Review Panel delivered 10 recommendations to improve the way joint agency counter-terrorism investigations would be managed in the future. The recommendations covered four broad areas – operational decision making; joint taskforce arrangements; information sharing; and training and education.¹⁴

In October 2008, the then Attorney-General, the Hon Robert McClelland MP, announced that ASIO, the AFP and the Commonwealth Director of Public Prosecutions (CDPP) had made considerable progress in implementing the key recommendations of the Street Review. In particular, they had implemented key recommendations relating to:

- Putting in place new Counterterrorism Prosecution Guidelines, to improve consultation and communication in the investigation and prosecution of terrorist offences; and
- Agreeing on a new Joint Operations Protocol between ASIO and the AFP, to provide for regular and accountable exchange of national security information and ongoing high-level consultations on operations.¹⁵

In March 2008 the then Commonwealth Attorney-General announced the Clarke Inquiry. The Law Council made detailed written and oral submissions to the Clarke Inquiry,¹⁶ as did many other non-government organisations and relevant Government agencies and departments. On 21 November 2008 Mr Clarke handed down his report (the Haneef Report), making a number of findings highly critical of the handling of the case by key Government agencies.¹⁷ The Haneef Report contained 10 key recommendations for reform, many of which corresponded to the recommendations made by the Law Council in its submissions, including that the Commonwealth Government:

- amend Part 1C of the *Crimes Act*, which permitted the detention of Dr Haneef for 12 days without charge;
- appoint an independent reviewer of terrorism laws; and
- amend the *Criminal Code* offence of providing support to a terrorist organisation.

¹³ Op.cit, Clarke Report.

¹⁴ See <http://www.afp.gov.au/media-centre/news/afp/2008/March/afp-releases-street-review>

¹⁵ See <http://www.robertmcclelland.com.au/2008/10/16/attorney-general-welcomes-progress-on-implementation-of-street-review/>

¹⁶ For example, see Law Council of Australia, *Submission to the Clarke Inquiry into the Haneef Case* (June 2008) available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LawCouncilSubmissiontoHaneefInquiry-Final.pdf>

¹⁷ Op.cit., Clarke Report.

Other recommendations were directed towards improving cooperation and information sharing between key government agencies.

Following the release of the Haneef Report, the Government announced its response to Mr Clarke's recommendations, and a range of previous reviews of Australia's anti-terrorism laws, including the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of terrorist organisation laws and the ALRC's review of sedition laws. In this response, the Government indicated that it would consider appointing a new National Security Legislation Monitor to review Australia's anti-terrorism laws and report to Parliament.¹⁸

The Government also indicated that it would review and consider amending: certain terrorist organisation offences; the sedition offences; the definition of 'terrorist act'; and Part 1C of the *Crimes Act*.¹⁹

1.1.2.2 Discussion Paper on Proposed Amendments to National Security Legislation and the National Security Legislation Amendment Act 2010

On 12 August 2009, the then Commonwealth Attorney-General released a lengthy discussion paper which outlined proposed reforms to Australia's anti-terror laws. The discussion paper contemplated amendments to:

- the definition of a terrorist act and a limited number of the offence provisions in the *Criminal Code*;
- procedures governing criminal investigations, police entry, search and seizure powers and the bail provisions set out in the *Crimes Act* ;
- the terrorist organisation listing provisions in the *Criminal Code* and the *Charter of the United Nations Act 1945 (Cth) UN Charter Act* ; and
- the notice provisions, the pre-trial hearing provisions, the consent agreement provisions and the provisions relating to the Attorney-General's right to appear in the *NSI Act*.

The discussion paper also proposed a new Act which would establish the Parliamentary Joint Committee on Law Enforcement (PJCLE). It proposed that this new Committee would have broad oversight of the AFP and the Australian Crime Commission (ACC), and examine trends and changes in criminal activities.

The reforms floated in the discussion paper represented the Government's proposed response to a number of reviews of the content and operation of Australia's existing anti-terror laws. These reviews included:

- The Clarke Inquiry;
- Inquiry into the proscription of 'terrorist organisations' under the *Criminal Code* by the PJCIS;
- Review of Security and Counter-Terrorism Legislation by the PJCIS; and
- Review of Seditious Laws in Australia by the ALRC.

¹⁸ Commonwealth Attorney-General's Department, 'Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef – December 2008', 23 December 2008, available from <http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Documents/Government%20response%20to%20the%20report%20of%20the%20inquiry%20into%20the%20case%20of%20Dr%20Mohamed%20Haneef.pdf>

¹⁹ Ibid

In March 2010, the Attorney-General introduced the *NSLA Bill* into Parliament. The Bill sought to implement some of the reforms proposed in the discussion paper. Specifically, the Bill pursued the amendments proposed in the discussion paper that related to:

- the treason offences in the *Criminal Code*;
- the urging violence offences (previously known as the sedition offences) in the *Criminal Code*;
- the ‘dead-time provisions’ in the *Crimes Act*,²⁰
- the bail provisions in the *Crimes Act*;
- the introduction into the *Crimes Act* of a new emergency warrantless entry and search power; and
- the *NSI Act*.

The then Attorney-General also introduced the *Parliamentary Joint Committee on Law Enforcement Bill 2010* (Cth) which sought to implement the recommendation of the Haneef Report that the AFP should be subject to Parliamentary oversight.

The Bills were referred to the Senate Legal and Constitutional Affairs Committee and the Committee reported on 17 June 2010, with a number of recommended changes. The Bills were not passed before Parliament was prorogued in advance of the 2010 election.

However, both Bills were reintroduced into the new Parliament in September 2010, and were passed on 15 November 2010.

It is not known whether the other reforms, which were proposed in the discussion paper but which were not included in the Bills, have been abandoned or whether they will be pursued in subsequent Bills. The then Attorney-General suggested that at least some of the reforms had been postponed pending consultation with the States and Territories.

The detail of the reforms proposed in the discussion paper and later implemented in the Bills, the Law Council’s submissions in response and the report of the Senate Legal and Constitutional Affairs Committee are discussed below in the context of the particular legislative provisions affected.

In general, the Law Council expressed disappointment that both the discussion paper and the *NSLA Act* adopted a very conservative approach to reform. In particular, the Law Council was critical of:

- the selective, and often unexplained, adoption of some earlier review recommendations and not others; and;
- the minimalist approach which was taken, in general, to the implementation of earlier review recommendations.

The Law Council noted that the amendments proposed and pursued fell far short of the complete overhaul of Australia’s national security laws which the Law Council has long advocated is required.

²⁰ These provisions are discussed below at 5.4 – they allow certain time to be excluded from the defined period to detain a person without charge for the investigation of an offence.

1.1.2.3 Independent National Security Legislation Monitor

On 18 March 2010, the *Independent National Security Legislation Monitor Act 2010* (Cth) was passed by Parliament. This Act established the position of the Monitor to review and report on the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis. The Monitor is also responsible for considering if counter-terrorism and national security laws remain necessary and are proportionate to any threat of terrorism or to national security. The Act responded to recommendations made by the PJCIS, the Clarke Inquiry and the Security Legislation Review Committee (Sheller Committee) of 2006.²¹

On 21 April 2011, the Acting Prime Minister, the Hon. Wayne Swan MP announced that Mr Bret Walker SC had been appointed to the Monitor position. The Law Council welcomed this appointment,²² which followed a number of media statements and letters by the Law Council, urging the Government to move swiftly to appoint the Monitor and ensure that whoever was appointed was adequately resourced to fulfil this critical role.²³

The Monitor is supported by staff from the Department of Prime Minister and Cabinet.

On 19 March 2012, the first annual report of the Monitor (the Monitor's first report) was tabled in Parliament. The Monitor must report annually as soon as practicable after 30 June and in any event by 31 December. Due to the short time period in which to prepare the Monitor's first report and the scope and depth of the subject, it posed questions rather than suggested answers. The Monitor's first report stated three purposes:

- To set out matters of principle and general policy considered fundamental to continuing scrutiny of terrorism laws;
- To highlight questions raised by the terrorism laws, chiefly whether they are effective criminal laws and contain appropriate human rights safeguards; and
- To notify a provisional agenda for the Monitor's further work.

The Monitor's first report identified issues relating to:

- Principles and policy underlying terrorism laws;
- Australia's international obligations to comply with global efforts to combat terrorism and to protect human rights;
- Compulsory questioning and detention powers of ASIO;

²¹ See Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006 at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report.htm; see also The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*; Security Legislation Review Committee Report, June 2006 at <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Report%20of%20the%20Security%20Legislation%20Review%20Committee.pdf>. The Attorney-General established the independent Security Legislation Review Committee, a special committee established to review Australia's anti-terrorism laws, on 12 October 2005 under the Chairmanship of the Honourable Simon Sheller AO QC (the Sheller Committee). The Sheller Committee was made up of representatives of major stakeholder organisations. It conducted a public inquiry, receiving 29 submissions and taking evidence from 18 witnesses over 5 days of hearings in Melbourne, Sydney, Canberra and Perth. The Sheller Committee reported to the Attorney-General on 21 April 2006 ('the Sheller Report 2006')

²² See Law Council Media Release, 27 April 2011 at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1115%20Law%20Council%20applauds%20appointment%20of%20Independent%20National%20Security%20Legislation%20Monitor.pdf>

²³ Letter to the Prime Minister on 1 October 2010; Letter to the then Cabinet Secretary, Senator Joe Ludwig on 21 June 2010; See <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/IndependentNationalSecurityLegislationMonitor.pdf>; See Media Release, 8 September 2009 at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/MR2309%20Independent%20Monitor%20of%20Anti-Terror%20Laws%20Should%20be%20Implemented%20Swiftly.pdf>

- Prohibition of dealings with and freezing of assets of certain persons and entities under the *UN Charter Act*;
- *Crimes Act* provisions relating to investigation of terrorist offences; bail and sentencing;
- *Criminal Code* provisions relating to terrorist offences, control orders and preventative detention orders;
- Use of the *Defence Act 1903* (Cth) to meet emergencies presented by terrorism; and
- The utility of the *NSI Act* in the conduct of terrorism trials.²⁴

In July 2012, the Monitor commenced an inquiry into the powers relating to questioning warrants and questioning and detention warrants under the *ASIO Act* and control orders and preventative detention orders under the *Criminal Code*. The purpose of this inquiry was to inform the Monitor's second Annual Report to the Prime Minister.

The Law Council made a submission to the Monitor's inquiry on 10 September 2012.²⁵ The Law Council's submission reiterated previous concerns about the scope of ASIO's questioning and detention powers and the significant impact of these powers on individual rights. The Law Council also expressed concerns about the control order and preventative detention order regimes in the *Criminal Code* – in particular, the absence of demonstrated necessity for such extraordinary powers, particularly in light of the broad range of alternative provisions for the prevention and prosecution of terrorist acts; the restriction of liberty based on suspicion rather than charge; and the absence of independent review.

The Law Council recommended that the questioning and detention powers contained in Part III Division 3 of the *ASIO Act* be repealed and replaced with a compulsory questioning regime that incorporates a level of independent judicial oversight and accords with other recognised criminal intelligence and investigation procedures; and that the control order and preventative detention order regimes in the *Criminal Code* should be repealed.

The Monitor's second Annual Report was tabled in Parliament in May 2013.²⁶ The Monitor's report contained a number of conclusions and recommendations that aligned with those advanced by the Law Council. For example, the Monitor concluded that control orders in their present form are not effective, not appropriate and not necessary and recommends that they be repealed. The Monitor suggested that consideration be given to the use of alternative provisions that could be used to restrict the movements or other activities of persons already convicted of terrorist offences whose dangerousness at the expiry of their sentences of imprisonment can be shown. The Monitor also concluded that preventative detention orders are not effective, not appropriate and not necessary and recommends that they be abolished.

The Monitor also made a number of recommendations in relation to the use of questioning and questioning and detention warrants by ASIO, which allow ASIO to question and in some cases detain people who have not been charged with an offence. The Monitor supported the continued existence of questioning warrants for ASIO, which he described as 'sufficiently effective to be appropriate, and in a relevant sense necessary'. However,

²⁴ See B. Walker SC, Independent National Security Legislation Monitor, Annual Report, 16 December 2011 at <http://www.dpmc.gov.au/publications/INSLM/index.cfm>

²⁵ See Law Council of Australia, Submission to Bret Walker SC in response to his Inquiry into Questioning and Detention Warrants, and Preventative Detention and Control Orders, 10 September 2012. Available from www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2645 - Inquiry into questioning and detention warrants, control orders and preventative detention orders.pdf.

²⁶ B. Walker SC, Independent National Security Legislation Monitor 2012 Annual Report, 20 December 2013, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf

he also recommended that the more intrusive questioning and detention warrant regime contained in the ASIO Act be repealed and replaced with an approach which provides a detention power narrower in scope than the power that currently exists. The Monitor explained that such an approach recognises the legitimate need of ASIO to ensure the attendance of a person for questioning while balancing the rights of individuals not to be unnecessarily detained on a pre-emptive basis.

On 19 July 2013 and 5 August 2013, the Law Council made submissions in response to the Monitor's inquiries into the NSI Act²⁷ and Australia's terrorism financing legislation as contained in Chapter 5 of the *Criminal Code* and Part 4 of the *UN Charter Act*.²⁸ The purpose of these inquiries is to inform the Monitor's 2013 Annual Report to the Prime Minister.

The Law Council's submission on the NSI Act outlined a number of the Law Council's concerns with provisions in this Act. These concerns related to:

- The notification provisions, which require parties to notify the Attorney-General of possible disclosure of national security information, being unworkable and too broad. They place a heavy burden on parties and lawyers, and lead to delay and disturbance to the trial process. Furthermore, they are not necessary in light of pre-existing options for protecting national security information in court proceedings;
- The prescribed security clearance system for lawyers threatening the right to a fair trial. It does so by potentially restricting a person's right to a legal representative of his or choosing, and allowing the executive arm of government to effectively "vet" the class of lawyers who are able to act in matters involving national security information. In addition, the security clearance requirements are intrusive, disruptive and unnecessary given other obligations and mechanisms for protecting security information; and
- The court's discretion to maintain, modify or remove restrictions on disclosure of information, which is unduly fettered.

The Law Council noted that although the more intrusive features of the NSI Act have been used infrequently, the existence of these provisions continues to cast a shadow over the expedient and fair conduct of proceedings, particularly terrorism related criminal proceedings, and if triggered, threatens to undermine the defendant's right to a fair trial and the independence of the legal profession.

The Law Council also responded to a number of more specific questions posed by the Monitor. As part of this response, it examined the possible use of security-cleared 'special advocates', who may access national security information or participate in relevant proceedings rather than the defendant or a party or his or her legal representative. The Law Council concluded that the use of special advocates under the NSI Act would not necessarily mitigate the unfairness experienced by the defendant or a party to the proceedings who is excluded from accessing national security information. However, if further consideration was to be given to the use of special advocates, the Law Council noted that the experience of the United Kingdom and other comparable jurisdictions

²⁷ Law Council of Australia, Submission to Bret Walker SC in response to his inquiry into the *National Security Information (Criminal and Civil Proceedings) Act 2004*, 19 July 2013, available at http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2745_-_Inquiry_into_the_Operation_of_the_National_Security_Information_Criminal_and_Civil_Proceedings_Act_2004.pdf

²⁸ Law Council of Australia, Submission to Bret Walker SC in response to his inquiry into Financing Terrorism Legislation, 2 August 2013, available at http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2748_-_Financing_Terrorism_Offenses.pdf

indicated that a number of fundamental safeguards must be met if such a system was adopted.

The Law Council's submission regarding the financing terrorism offences under the *Criminal Code* and the UN Charter Act also outlined a number of the Law Council's concerns with respect to the operation of this legislation. The Law Council expressed concerns about the broad scope of definitions which are used in the *Criminal Code* such as those relating to terrorist acts and terrorist organisations. It also expressed concerns about the process for proscription of terrorist organisations; the grounds for proscription and the processes for review of proscription. The Law Council made a number of recommendations in relation to narrowing the scope of the definition of a terrorist act and for improving accountability, fairness and transparency in relation to the proscription of terrorist organisations under the *Criminal Code*.

In addition to this, the Law Council's submission addressed the broad scope of offences relating to receiving funds from, making funds available to or collecting funds on behalf of terrorist organisations under the *Criminal Code*. The Law Council made recommendations for narrowing the scope of these offences and for facilitating the ability of legal practitioners to rely on a relevant exemption from committing an offence if they provide legal assistance to people charged with terrorist organisation offences or seeking assistance to comply with relevant laws.

The Law Council's submission also expressed concern about the complexity and broad scope of the offences of providing support to a terrorist organisation under the *Criminal Code* and made recommendations to clarify and narrow the scope of these offences.

In relation to the *UN Charter Act*, the Law Council noted the lack of a definition of terrorism in the Act and regulations made pursuant to it. The Law Council expressed concern about the broad scope of executive discretion in relation to proscribing persons, entities and assets under that legislation and the limited scope of the discretion to revoke such proscriptions. It also expressed concern about inappropriate fault elements in offences under the *UN Charter Act* and the scope of these offences. It made recommendations for reform of these provisions.

The Monitor's 2013 Annual Report is expected to be released in early 2014.

1.1.2.4 The Government's Counter-Terrorism White Paper

On 23 February 2010, the Government released the Counter-Terrorism White Paper: *Securing Australia – Protecting our Community*.²⁹ This paper set out Australia's counter-terrorism objectives and the ways in which the Government would pursue them.

The Law Council welcomed a number of comments in the paper - in particular, those that acknowledged and/or reaffirmed:

- The Government's commitment to meeting its obligations under United Nations (UN) counter-terrorism instruments;
- That the Government's counter-terrorism response should be targeted, proportionate and uphold the fundamental rights and freedoms of Australians; and
- That the Government does not support the use of torture or other unlawful methods in response to terrorism.

²⁹ Available at http://www.dpmp.gov.au/publications/counter_terrorism/index.cfm

However, despite these positive comments, the paper also raised a number of issues of concern to the Law Council.

Of particular concern were two significant new proposals for improving Australia's counter-terrorism capabilities. These proposals involved the establishment of:

- A new Counter-Terrorism Control Centre, which would integrate the collection and distribution of Counter-Terrorism information. It would be a multi-agency initiative but located within ASIO; and
- A new biometric-based visa system for applicants from 10 overseas countries, which would match biometric data from applicants against databases maintained by the Department of Immigration and Citizenship (DIAC) and the overseas countries.

The Law Council's concerns in relation to these proposals focused on the privacy protections afforded to information handled by ASIO, and the collection, storage and sharing of biometric data.

On 21 October 2010, the Government announced the opening of the new Counter-Terrorism Control Centre at the ASIO headquarters in Canberra.³⁰ In a speech to mark the launch of the centre, the then Attorney-General described the centre as playing a lead role in "strengthening the coordination of Australia's counter-terrorism intelligence efforts by setting and managing counter-terrorism priorities, identifying intelligence requirements and ensuring that the process of collecting and distributing intelligence is fully harmonised".³¹

In October 2010, the Government's rollout of the new biometric-based visa system also commenced. On 18 November 2010, the Law Council made a submission to DIAC on 'Biometrics and Offshore Processing of Asylum Seekers'.³² In its submission, the Law Council raised concerns about the lack of safeguards to protect biometric information.

In addition to the two new proposals, the White Paper also made a number of references to initiatives arising from the Street Review and the Clarke Inquiry into Australian anti-terrorism laws: initiatives that the Law Council had in fact advocated for previously in its submissions to these inquiries. These initiatives included:

- The establishment of the Monitor's position;
- The introduction of the *NSLA Bill*;
- Increased powers for the Inspector General of Intelligence and Security (IGIS) to examine actions of Commonwealth agencies outside the intelligence community in relation to terrorism;³³ and
- Increased scrutiny of the AFP's actions relating to terrorism through the establishment of the new PJCLE.

³⁰ See speech by Attorney-General Robert McClelland on 21 October 2010, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22media%2Fpressrel%2F302817%22>

³¹ Ibid

³² Law Council Submission on 'Biometrics and Offshore Processing of Asylum Seekers', 18 November 2010. Available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2400-2499/2444%20Biometrics%20and%20Offshore%20Processing%20of%20Asylum%20Seekers.pdf>

³³ The Inspector-General of Intelligence and Security Amendment Bill 2011 was assented to on 14 October 2011.

Although these initiatives took considerably longer to implement than the Law Council would have liked, the Law Council is pleased that the Government has now implemented, or taken steps to implement, all of these proposals.

Notwithstanding these positive initiatives, the Law Council expressed concern about the fact that the White Paper referred to terrorism laws as containing 'certain limited powers' to assist relevant agencies to prevent terrorist acts. The Law Council is of the view that many of these laws contain significant extensions of a number of agencies' powers and these extensions of powers are aspects of anti-terrorism legislation that the Law Council would like to see subjected to review by the Monitor.

1.1.2.5 Australia's Human Rights Framework

In December 2008, the Government announced a National Consultation on the protection and promotion of human rights in Australia. The Consultation was conducted by an independent committee led by Father Frank Brennan.³⁴

The Law Council was actively involved in the Consultation and developed a policy in favour of the enactment of a federal Charter of Human Rights as the best available mechanism to improve human rights protection in Australia.³⁵ The consultation process provided another opportunity for the Law Council to highlight growing concerns surrounding national security and anti-terrorism legislation and its impact upon human rights. Through the consultation process, many citizens and community groups also raised significant concerns about the infringement of civil liberties and human rights as a result of national security measures such as control orders and detention without charge.³⁶

The Consultation Committee's Report of September 2009 included recommendations for: human rights education; a legislation audit; statements of compatibility with human rights for all Bills; a parliamentary committee on human rights; and a Human Rights Act. Disappointingly, a Human Rights Act was not supported by the then Government. However, it did announce on 21 April 2010 a new Human Rights Framework for Australia which includes an action plan, education plan, statements of compatibility for all new Bills, an audit of existing legislation for human rights compliance and a new Parliamentary Joint Committee on Human Rights (PJCHR).

The PJCHR was established on 13 March 2012 with the following functions:

- To examine Bills and draft legislative instruments for compatibility with human rights and to report to Parliament;
- To examine Acts for compatibility with human rights and to report to Parliament;
- To inquire into any matter referred by the Attorney-General and report to Parliament.

On 9 December 2011, the Attorney-General's Department released an Exposure Draft of Australia's National Human Rights Action Plan and a final version of a Baseline Study,

³⁴ For further information on the National Consultation on Human Rights see <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>

³⁵ Law Council of Australia, 'A Charter: Protecting the Rights of all Australians', 6 May 2009, <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCASubmissiontoNationalConsultationonHumanRights060509.pdf>.

³⁶ National Human Rights Consultation Report, September 2009, pp.42-43 at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>

which identified gaps in human rights protection in Australia.³⁷ The issues identified in the Baseline Study formed the basis for government action under the National Action Plan and also assisted with the development of government practices beyond the National Action Plan. The Baseline Study made a number of comments about Australia's counter-terrorism laws and acknowledged that this was an area that has attracted a considerable amount of community concern in relation to potential breaches of Australia's human rights obligations.³⁸

A number of these concerns were also reflected in recommendations made by the UN Human Rights Council (UN HR Council) following Australia's Universal Periodic Review in January 2011. In particular, the Council recommended that the Australian Government "investigate and bring to justice, perpetrators of torture in the context of counter-terrorism"³⁹ and "review and where necessary, reform anti-terrorism laws to ensure compliance with international obligations".⁴⁰ The Government accepted these recommendations in its response to the Council's recommendations in June 2011,⁴¹ noting amongst other things that it had recently strengthened its legislative prohibition on torture and that in April 2011, the Government had appointed the Monitor to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation.

The final version of the National Human Rights Action Plan was launched by the then Government on 10 December 2012. It contains ongoing initiatives and initiatives to be achieved up to 2018. It also contains a monitoring mechanism for review at Australia's next Universal Periodic Review before the UN in 2015. It includes a number of action items relating to counter-terrorism. For example, it states that the Government will continue to ensure that the Monitor has the power to review the practical operation, effectiveness and implications of Australia's counterterrorism and national security legislation on an ongoing basis.⁴²

1.1.2.6 COAG Review of Counter-Terrorism legislation

The COAG Review of Counter-Terrorism legislation was announced by the then Prime Minister on 9 August 2012.⁴³ A specialist Committee chaired by the Honourable Anthony Whealy QC was appointed to undertake the Review which encompassed a range of Commonwealth counter-terrorism provisions, including: the terrorist act offences; the terrorist organisation offences; the control order and preventative detention order regimes contained in the *Criminal Code*; and special police powers contained in the *Crimes Act*. The Review also considered a range of State and Territory laws introduced to complement these Commonwealth measures, such as preventative detention order provisions and special police powers.

³⁷ A copy of the final Baseline Study is available at <http://www.ag.gov.au/Consultations/Documents/NationalHumanRightsActionPlan/TheBaselineStudy.pdf>

³⁸ For example, see pp.18-24 of the final Baseline Study.

³⁹ See recommendation 86.136 in the UN Human Rights Council's report, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

⁴⁰ See recommendations 86.137 to 86.139 in the UN Human Rights Council's report, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

⁴¹ See the Government's response to the Human Rights Council's 145 recommendations, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/A_HRC_17_10_Add.1_Australia_E.pdf

⁴² See Attorney-General's Department, *Australia's National Human Rights Action Plan*, December 2012, available from <http://www.ag.gov.au/Consultations/Documents/NationalHumanRightsActionPlan/National%20Human%20Rights%20Plan.pdf>

⁴³ COAG Counter-Terrorism Review Committee, Council of Australian Governments Review of Counter-Terrorism Legislation, 14 May 2013, p.2, available from <http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF>

The Law Council made a submission to the COAG Review Committee on 27 September 2012.⁴⁴ In line with its past advocacy in this area the Law Council expressed the view that the legislative response agreed by COAG went beyond what was necessary and proportionate to respond to the threat of terrorism faced by Australia and failed to adhere to rule of law or human rights standards.

The Law Council raised fundamental concerns with some of the provisions, such as the preventative detention order regimes, submitting that these provisions, which have not been used, depart significantly from established principles of criminal law; have the potential to disproportionately impact on human rights; and should be repealed.

In other instances, such as in respect of certain terrorist act and terrorist association offences, the Law Council called for amendments to be made and safeguards introduced so as to clarify their scope and to bring them more closely into line with traditional criminal law principles.

The COAG Review Committee delivered its report in May 2013.⁴⁵

The COAG Committee quoted the Law Council's submissions extensively in its lengthy report and made a number of recommendations for reform that align with those made by the Law Council. For example, the Committee recommended that:

- the Commonwealth, State and Territory 'preventative detention' legislation be repealed; and
- it no longer be an offence to associate with terrorist organisations, or for an organisation to be proscribed as a terrorist organisation if it advocates the doing of a terrorist act by 'praising' such an act.

While the COAG Committee supported the continuation of the control order regime, it made a number of recommendations to improve safeguards and oversight mechanisms within the existing regime. For example it recommended that:

- consideration be given to amending the legislation to provide for the introduction of a nationwide system of 'Special Advocates' to participate in control order proceedings;
- minimum standards be introduced concerning the extent of the information to be given to a person the subject of an application for a control order; and
- the Criminal Code be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.

The Committee also made a number of recommendations designed to ensure more robust oversight of the use of State and Territory police powers of search, entry and seizure.

⁴⁴ See Law Council of Australia, Submission to COAG Counter-Terrorism Review Committee, *COAG Review of Counter-Terrorism Legislation*, 27 September 2012, available from <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2644%20-%20COAG%20Review%20of%20Counter-Terrorism%20Legislation.pdf>

⁴⁵ COAG Counter-Terrorism Review Committee, Council of Australian Governments Review of Counter-Terrorism Legislation, 14 May 2013, available from <http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF>

1.1.2.7 Australia's National Security Strategy

On 23 January 2013, former Prime Minister Julia Gillard launched Australia's first National Security Strategy (the Strategy).⁴⁶

The Strategy outlines national security priorities over five years to ensure that Australia is able to address national security challenges in the future. The Strategy discusses Australia's national security objectives such as: ensuring that Australia's population remains safe and resilient; protecting and strengthening Australia's sovereignty; securing Australian assets and infrastructure; and promoting a secure international environment to advance Australia's interests. Enhanced regional engagement; integrated cyber policy and operations to enhance Australia's defence of its digital networks; and creating effective partnerships to achieve innovative national security outcomes are critical aspects of the Strategy in this regard.

The Strategy also outlines the national security challenges that Australia is likely to face in the future. Central to these is global economic uncertainty and shifts in the global balance of power; an increase in malicious cyber activity; ongoing irregular migration patterns; military modernisation across Asia; the continuing role of non-state actors in violent political activities, including terrorism; climate change; competition over resource availability in the Asia-Pacific region; and greater competition for influence in Asia from countries in and outside of the Asia-Pacific region.

In line with the Strategy's focus on cyber threats to Australia's security, on 24 January 2013, the former Prime Minister announced that a new Cyber Security Centre would be established in Canberra to boost Australia's ability to protect itself against cyber-attacks.⁴⁷

As an accompaniment to the Strategy, the then Government also released a Guide to Australia's National Security Capability (the Guide).⁴⁸ The Guide provides an overview of Australia's national security capability planning and identifies the functions of the national security community and how these functions achieve the objectives outlined in the Strategy.⁴⁹

2. Background and Context

2.1 What measures were introduced?

The past twelve years have seen prolific legislative activity in an effort to protect the Australian community from the threat of international terrorism and to maintain national security. Since 2001 the Commonwealth Parliament has passed over 50 separate pieces of legislation dealing with terrorism and security, accompanied by significant budget increases to fund these new security measures.⁵⁰

In July 2002 the Australian Government introduced its first package of counter-terrorism legislation. This legislative package included:

⁴⁶ See Department of Prime Minister and Cabinet, *Strong and Secure – A Strategy for Australia's National Security*, available from http://www.dpmc.gov.au/national_security/docs/national_security_strategy.pdf

⁴⁷ See <http://www.defence.gov.au/defencenews/stories/2013/jan/0124.htm>

⁴⁸ Australian Government, *Guide to Australia's National Security Capability*, 2013, available from http://apo.org.au/sites/default/files/docs/AGD_GuideToAustraliasNationalSecurityCapability_Aug_2013.pdf

⁴⁹ *Ibid.*, p.3.

⁵⁰ The full list appears at the National Security Australia web site:

<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument>

- *Security Legislation Amendment (Terrorism) Act 2002 (Cth)*;
- *Border Security Legislation Amendment Act 2002 (Cth)*;
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth)*;
- *Suppression of the Financing of Terrorism Act 2002 (Cth)*;
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth)*;
- *Crimes Amendment Act 2002 (Cth)*;
- *Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth)*;
- *Telecommunications Interception Legislation Amendment Act 2002 (Cth)*; and
- *Criminal Code Amendment (Terrorism) Act 2003 (Cth)*.

Further counter-terrorism measures were introduced during 2004, including:

- *Anti-Terrorism Act 2004 (Cth)*;
- *Anti-Terrorism Act (No. 2) 2004 (Cth)*;
- *Anti-Terrorism Act (No. 3) 2004 (Cth)*;
- *Surveillance Devices Act 2004 (Cth)*;
- *Australian Federal Police and Other Legislation Amendment Act 2004 (Cth)*;
- *National Security Information (Criminal Proceedings) Act 2004 (Cth)*;
- *Anti-Terrorism Act (No. 2) 2005 (Cth)*; and
- *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005 (Cth)*.

Since these particular Acts were introduced, further amendments to existing legislation have been made in response to the threat of terrorism.⁵¹

2.2 Why were the new laws introduced?

The notion of ‘terrorism’ and the threat posed by terrorist violence has changed significantly over the last decade.

Before 2001, terrorism was generally regarded as something that concerned troubled but isolated pockets of the world, such as Northern Ireland, Israel or Sub-Saharan Africa.⁵²

A significant shift in the way the world understood ‘terrorism’ occurred following the attack on the United States (US) on 11 September 2001. The terrorist attacks in Bali in 2002 and 2005; on the Madrid railway system in 2004; on the London Underground on 7 July 2005; in Mumbai in 2008; in Lahore in 2009; in Jakarta in 2004 and 2009; and in Kenya in 2013 are potent reminders of the risks and consequences of modern terrorism violence.

The impact of these horrific events was brought home for Australia particularly by the bombings in Bali in 2002 and 2005; in Jakarta in 2004 and 2009; in Mumbai in 2008 and in Kenya in 2013, which killed and injured many Australians.

This modern form of terrorism is thought to be distinct from previous notions of terrorism, and is instead characterised by acts of violence:

⁵¹ See for example: *Telecommunications (Interception) Amendment Act 2006*; *ASIO Legislation Amendment Act 2006*; *Law And Justice Legislation Amendment (Marking Of Plastic Explosives) Act 2007*; *Anti-Money Laundering And Counter-Terrorism Financing Amendment Act 2007*; *Australian Crime Commission Amendment Act 2007*; *Telecommunications (Interception And Access) Amendment Act 2007*; *Classification (Publications, Films And Computer Games) Amendment (Terrorist Material) Act 2007*; *Independent National Security Legislation Monitor Act 2010*; *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*; *Intelligence Services Legislation Amendment Act 2011*.

⁵² For a concise summary of the history of terrorism see Professor Adam Roberts, *The Changing Faces of Terrorism*, BBC History, published 27 August 2002, available at http://www.bbc.co.uk/history/recent/sept_11/changing_faces_01.shtml

- perpetrated by people often operating through loose personal networks;
- aimed at maximising civilian casualties;
- with perpetrators likely to receive training or to get financial support from sources in other countries; and
- that change in response to new security measures and make use of modern technologies.⁵³

In response to this 'new' form of terrorism, the international community called member States into action. A number of new UN Conventions were developed and resolutions passed and Australia expressed its firm commitment to do its part to combat this threat.⁵⁴

Within Australia there has been bipartisan and broad community support to take strong action to protect against and eliminate terrorist violence.⁵⁵

The threat posed by international terrorism to Australia has been assessed as 'medium' since 2003,⁵⁶ and terrorism continues to be cited as a key national security concern for Australia. ASIO describes terrorism as 'the most immediate threat' to Australian security,⁵⁷ and has identified a number of terrorist attacks or incidents affecting Australian civilians in recent years.⁵⁸ ASIO further reports that statements by radical and extremist elements, including groups associated with al-Qaeda, continue to mention Australia.⁵⁹

Whilst the death of Osama bin Laden in May 2011 was a significant blow to al-Qaeda's leadership, bin Laden's death has not allayed fears of a terrorist attack on Australian soil. If anything, it has reinforced fears of retaliatory attacks against the United States and its allies, prompting Prime Minister Julia Gillard to warn that "It's very important that Australians do not succumb to the impression that with Osama bin Laden gone, that al-Qaeda is finished."⁶⁰ These sentiments were recently echoed by ASIO, which noted that "As important as Osama bin Laden's death is symbolically, we have seen so far absolutely

⁵³ Parliamentary Joint Committee on Intelligence and Security report: *Review of Security and Counter Terrorism Legislation*, 4 December 2006 (PJCIS Review 2006) at [2.12], n 16.

⁵⁴ The relevant international Conventions and resolutions are discussed later in this Paper at 2.3.1.

⁵⁵ Joint Media Release by Prime Minister Kevin Rudd, former Attorney-General Robert McLelland and Minister for Foreign Affairs Steven Smith, 'Securing Australia, Protecting our Community', 23 February 2010 at <http://foreignminister.gov.au/releases/2010/fa-s100223.htm>; Then Opposition Leader Tony Abbott, Speech, Address to the Lowy Institute Sydney, 'National Security Fundamentals', 23 April 2010, at <http://tonyabbott.com.au/LatestNews/Speeches/tabid/88/articleType/ArticleView/articleId/7347/Address-to-the-Lowy-Institute--National-Security-Fundamentals.aspx>

⁵⁶ The National Counter-Terrorism Alert System is a range of four levels (low, medium, high, extreme) that communicate an assessed risk of terrorism to Australia. Low—terrorist attack is not expected; Medium—terrorist attack could occur; High—terrorist attack is likely; and Extreme—terrorist attack is imminent or has occurred. The Australian Government Counter-Terrorism Committee is responsible for reviewing the alert level. The committee meets twice a year and is comprised of representatives from the Australian Government and State and Territory Governments. See [http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/PublicbySrc/Alert+levels+-+Australian+Government+public+fact+sheet.PDF/\\$file/Alert+levels+-+Australian+Government+public+fact+sheet.PDF](http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/PublicbySrc/Alert+levels+-+Australian+Government+public+fact+sheet.PDF/$file/Alert+levels+-+Australian+Government+public+fact+sheet.PDF)

⁵⁷ ASIO Annual Report to Parliament 2012-13 page vii, available from <http://www.asio.gov.au/Publications/Report-to-Parliament/Report-to-Parliament.html>

⁵⁸ *Ibid.*, pp.4-5.

⁵⁹ For example, on 2 April 2008, al-Qa'ida's media arm, as-Sahab, posted to jihadist Internet forums an audio file of Ayman al-Zawahiri responding to questions from forum participants. Al-Zawahiri justified attacks against the United States and its allies, including Australia, saying these countries supported Israel. ASIO, Annual Report to Parliament 2007-08 p. 6, available at <http://www.asio.gov.au/img/files/ASIOsReportToParliament07-08.pdf> See also ASIO Report to Parliament 2008-09, pages 6-7, available from <http://www.asio.gov.au/img/files/ASIOsReportToParliament08-09.pdf>

⁶⁰ 'Al Qaeda remains a threat, says PM', Sydney Morning Herald, 3 May 2011, available from <http://www.smh.com.au/national/alqaeda-remains-a-threat-says-pm-20110502-1e58m.html#ixzz1Ub6POAAy>

no indication that it has changed fundamentally the dynamics of anti-Western transnational terrorism. Nor does it mean the threat is diminished in any way.”⁶¹

2.3 Were the new laws necessary?

As noted above, the Law Council has never questioned the serious threat posed to Australia’s national security by modern terrorist violence. Rather it is the nature and appropriateness of Australia’s response to such a threat that has been the subject of considerable advocacy.

2.3.1 Were the new laws required to meet Australia’s international obligations?

Australia is a party to 11 of the 12 UN extant terrorism related conventions⁶² and has supported a number of terrorism-related resolutions.⁶³

While these resolutions have been cited by some as placing strong pressure on Australia to enact tough new anti-terrorist laws similar to those in the United Kingdom (UK) and the US,⁶⁴ other commentators have asserted that the laws may not need to be so exacting and should only address gaps in existing Australian laws.⁶⁵

While encouraging nation States to take steps to combat international terrorism, the UN and the Security Council have also made it clear that States should exercise caution when enacting new laws to avoid breaching their international human rights, refugee and humanitarian law obligations.⁶⁶

2.3.2 Were the new laws necessary to fill a gap in protection?

Prior to the introduction of the first package of counter-terrorism measures in 2002, there already existed a wide range of Commonwealth, State and Territory offences relating to murder, kidnap, conduct likely to involve serious risk to life or personal injury and damage to property⁶⁷ as well as offences covering conduct more specifically associated with

⁶¹ Director-General’s Opening Statement to the Senate Standing Committee on Legal and Constitutional Affairs, 25 May 2011, available from: <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/25-May-2011-Opening-Statement.html>

⁶² For example, Australia is a party to: *International Convention for the Suppression of the Financing of Terrorism*; *International Convention for the Suppression of Terrorist Bombings*; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*; *International Convention against the Taking of Hostages*. For further information on Conventions to which Australia is a party see <http://www.austlii.edu.au/au/other/dfat/subjects/>

⁶³ See for example, UN Security Council Resolution 1373 ‘*Threats to international peace and security caused by terrorist acts*’ (28 September 2001); UN Security Council Resolution 1452 ‘*Threats to international peace and security caused by terrorist acts*’ 20 December 2002); UN Security Council Resolution 1566, ‘*Threats to international peace and security caused by terrorist acts*’ (adopted on 8 October 2004). For a full list of UN Security Council Resolutions see http://www.un.org/Docs/sc/unsc_resolutions.html

⁶⁴ For example see Former Minister for Foreign Affairs Mr Alexander Downer, Speech to the International Law Conference ‘The Challenge of Conflict, International Law Responds’, 27 February 2004, Adelaide, available from http://www.foreignminister.gov.au/speeches/2004/040227_international_law.html

⁶⁵ See for example Australian Parliament Research Paper No. 12 2001-2002 ‘*Terrorism and the Law in Australia: Legislation, Commentary and Constraints*’, Nathan Hancock, Law and Bills Digest Group (19 March 2002) at [2.1.3]. This document is available at <http://www.aph.gov.au/binaries/library/pubs/rp/2001-02/02rp12.pdf>

⁶⁶ For example the Joint Statement by UN High Commissioner for Human Rights, the Secretary-General of the Council of Europe and the Director of the Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (29 November 2001); Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 10 December 2001, UN Doc E/CN.4/2002/137, Annex 1, UN Security Council Resolution 1805, 20 March 2008, S/RES/1805(2008).

⁶⁷ For example, see Part 3 of the *Crimes Act 1900* (NSW) which contains offences against the person, including murder, acts causing danger to life or bodily harm and kidnapping and Part 4 of the *Crimes Act 1900* (NSW), which contains offences against property. Similar offence provisions exist in all other State and Territories in Australia.

terrorism.⁶⁸ For example, prior to September 2001 laws were in place making it an offence to recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil.⁶⁹

In addition to these substantive offences, under the *Criminal Code*, liability already extended to cover inchoate or secondary liability offences, making it an offence, for example, to attempt or procure a criminal offence; or to aid, abet or counsel another to commit an offence; or to conspire with another to commit an offence.⁷⁰ These secondary liability offences already allowed law enforcement agencies to take action proactively to prevent offences from occurring.

Accompanying this broad range of criminal offences, law enforcement and intelligence agencies also already had powers to collect intelligence inside and outside Australia regarding security threats and take action to address those threats. Some of these agencies had the power to engage in telecommunications interception;⁷¹ use listening and tracking devices; gain access to computers;⁷² and engage in undercover operations.⁷³

A National Crime Authority also existed with power to investigate and combat serious and organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence to law enforcement agencies.⁷⁴ The Government also had the power to amend the *Migration Regulations 1994* (Cth) to exclude from Australia government officials from a particular country based on that country's complicity in acts of terrorism.⁷⁵

On 28 September 2001, in its first report to the UN Counter-Terrorism Committee on the implementation of Security Council Resolution 1373 (and prior to the introduction of the first package of counter-terrorism measures), Australia stated that it had:

*...a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies... [and] already had in place extensive measures to prevent in Australia the financing of, preparation and basing from Australia of terrorist attacks on other countries*⁷⁶
...

It was also reported that Australia had an 'extensive network' of law enforcement liaison officers and bilateral treaties on extradition and mutual legal assistance 'to facilitate cooperation with other countries in the prevention, investigation and prosecution of terrorist acts'.⁷⁷

Therefore, there was a heavy onus on the Australian Government to justify the necessity for the creation of new statutory offences and the introduction of increased law enforcement and intelligence gathering powers.

⁶⁸ For a comprehensive discussion of pre-2002 measures see Department of the Parliamentary Library's Information and Research Services' Research Paper No.12, 2001-02 '*Terrorism and the Law in Australia: Legislation, Commentary and Constraints*'.

⁶⁹ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

⁷⁰ *Criminal Code Act 1995* (Cth) Division 11.

⁷¹ *Telecommunications (Interception) Act 1979* (Cth).

⁷² *Australian Security and Intelligence Organisation Act 1979* (Cth).

⁷³ *Crimes Act 1914* (Cth).

⁷⁴ *National Crime Authority Act 1984* (Cth). The National Crime Authority was superseded in 2002 by the Australian Crime Commission – see *Australian Crime Commission Establishment Act 2002*.

⁷⁵ See *Migration (Republic of Sudan - UN Security Council Resolution No. 1054) Regulations 1996*.

⁷⁶ Report of Australia to the Counter-Terrorism Committee of the UN Council pursuant to paragraph 6 of Security Council Resolution 1373 (28 September 2001).

⁷⁷ *ibid.*

As noted by the UN High Commissioner for Human Rights, when introducing new laws to combat terrorism, the Australian Government was obliged to undertake an assessment of whether the proposed measures were both necessary and proportionate to the threat – that is, it was necessary to assess whether the particular measure adopted was the least restrictive means of achieving a legitimate protective purpose.⁷⁸ Such an assessment needed to include explanation of the importance of any individual right affected and the seriousness of the interference with the right.

As will be discussed in further detail below, the Law Council does not believe that the Australian Government undertook a proper assessment of whether each of the anti-terrorism laws it enacted was necessary and proportionate to the threat posed to Australia by international terrorism.

2.4 How have the laws been used so far?

The dynamic nature of the modern terrorist threat and the cloak of secrecy surrounding terrorist investigations make it difficult to generalise as to the effectiveness of Australia's anti-terrorism laws.

Independent review of the operation of these laws, such as reviews by the Ombudsman and the IGIS⁷⁹ appointed to regularly monitor and report on the activities of Australia's intelligence and security agencies, provide some insight into how often the laws have been used and whether they have been effective. Parliamentary Committees and the Monitor also provide a useful source of information.

As at January 2012, 38 people had been charged with terrorism related offences⁸⁰ since 2001, 23 of whom were charged with terrorism offences under the *Criminal Code*.⁸¹

While reviewing the number and type of cases considered by the courts provides only a narrow perspective on the rate of use and effectiveness of Australia's anti-terror laws, it can be observed that, despite the prolific legislative activity seen in the past ten years, few prosecutions have resulted from the anti-terrorism laws and even fewer convictions. The case of *Director of Public Prosecutions v Aruran Vinayagamoorthy*⁸² demonstrates some of the difficulties inherent within the legislation. Charges under the *Criminal Code* were eventually withdrawn in favour of charges under the *UN Charter Act* due to the difficulties in proceeding under the *Criminal Code*.⁸³

⁷⁸ Joint Statement by UN High Commissioner for Human Rights, the Secretary-General of the Council of Europe and the Director of the OSCE Office for Democratic Institutions and Human Rights (29 November 2001).

⁷⁹ For example, the IGIS has used its own motion powers under s8 (1) (a) of the *Inspector-General of Intelligence and Security Act 1986* in order to investigate terrorism related issues, such as the actions taken by ASIO in respect of Izhar Ul-Haque. The report is available at http://www.igis.gov.au/inquiries/docs/ul_haque_asio_2003.pdf.

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⁸⁰ See Director-General of Security, David Irvine, Address to the Sydney Institute, 24 January 2012, available from <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/24-Jan-2012-Sydney-Institute.html>

⁸¹ See Director-General of Security, David Irvine, speech to the Biennial Conference of the District and County Court Judges (of Australia and New Zealand, 'Security and Freedom – Striking a Balance', 26 June 2013, available from <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/DGs-Speech-June-26th.html>. See also Robert McClelland, former Attorney General, Address to the Australian National University National Security College Senior Executive Development Course Dinner, Canberra, 10 March 2011, available from http://www.securitymanagement.com.au/content/file/110310_National%20Security%20College%20Dinner.pdf?asm=f0fac6d5e87ca3e82620e381db14788b. It should be noted that a number of those persons who were charged with terrorism offences under the *Criminal Code* were eventually convicted of other offences, for example *Director of Public Prosecutions (Cth) v Aruran Vinayagamoorthy* [2010] VSC 148, *R v Mallah* [2005] NSWSC 317 and *R v Thomas* [2008] VSC 620.

⁸² [2010] VSC 148.

⁸³ See 4.2 on the proscription of terrorist organisations.

Cases that have proceeded to trial include: *R v Mallah*,⁸⁴ *R v Roche*,⁸⁵ *R v Lodhi*,⁸⁶ *R v Ul-Haque*,⁸⁷ *R v Khazaal*,⁸⁸ *R v Benbrika & Others*,⁸⁹ *R v Kent*,⁹⁰ *R v Thomas*,⁹¹ *Aruran Vinayagamoorthy and Anor v DPP*,⁹² *R v Elomar and Others*,⁹³ and *R v Khaled Sharrouf*.⁹⁴ The most recent case which proceeded to trial was *R v Fattal and Others*, which involved a plan to attack Holsworthy Army barracks.⁹⁵

The accused, Saney Edow Aweys, Nayef El Sayed, Yacqub Khayre, Abdirahman Ahmed and Wissam Mahmoud Fattal were charged with conspiracy to engage in acts done in preparation for, or planning, a terrorist attack.⁹⁶

On 22 December 2010, a jury found Saney Edow Aweys, Nayef El Sayed and Wissam Mahmoud Fattal guilty of conspiring to do acts in preparation for, or planning, a terrorist act. In December 2011, they were sentenced to 18 years imprisonment, with a minimum term of 13 and a half years.⁹⁷ On 29 August 2013, they appealed their convictions and sentences in the Victorian Court of Appeal. The Commonwealth Director of Public Prosecutions also appealed against the inadequacy of the sentences. On 2 October 2013, the Victorian Court of Appeal upheld the convictions and the sentences imposed at first instance with the Court of Appeal finding that whilst the sentences imposed were severe, this was quite properly so. While the offending was not in the worst category, which would have attracted the maximum penalty of life imprisonment, it was serious and the sentences were within the range of sentences for similar offences.⁹⁸

There have also been a number of other high profile occasions in which Australia's terrorism laws have been invoked and considered by the courts, including in the cases of Dr Mohamed Haneef⁹⁹ and David Hicks.¹⁰⁰

⁸⁴ [2005] NSWSC 317 (21 April 2005).

⁸⁵ [2005] WASCA 4.

⁸⁶ [2006] NSWSC 584 (14 February 2006).

⁸⁷ [2007] NSWSC 1251.

⁸⁸ [2006] NSWSC 1061, see also *R v Khazaal* [2009] NSWSC 1015 and *R v Khazaal* (2012) 289 ALR 586

⁸⁹ [2009] VSC 21.

⁹⁰ *R v Kent* [2009] VSC 375. Mr Kent was originally indicted with 12 other men on counts alleging offences against Pt 5.3 of the *Commonwealth Criminal Code*, see *R v Benbrika & Ors* [2007] VSC 141.

⁹¹ [2006] VSC 120. See also *R v Thomas* (No 3) (2006) 14 VR 512.

Joseph Thomas was charged with offences under Division 102 of the *Criminal Code*, including receiving financial support from al-Qa'ida, providing al-Qa'ida with resources or support to help it carry out a terrorist attack and having a false passport.

⁹² [2007] VSC 265. See also *R v Vinayagamoorthy* [2010] VSC 148.

⁹³ [2010] NSWSC 10.

⁹⁴ [2009] NSWSC 1002.

⁹⁵ [2011] VSC 681. See also 'Three men guilty of planning terror attack on NSW army base' *Herald Sun* (23 December 2010), available at <http://www.heraldsun.com.au/news/victoria/three-melbourne-men-guilty-of-planning-terror-attack-on-nsw-army-base/story-e6frf7kx-1225975357525>; 'Suspects arrested in early hours' *The Australian* (5 August 2009); 'Somali extremists on a 'fatwa order' from God' *The Australian* (5 August 2009); 'Four men arrested over alleged army attack' *Sydney Morning Herald* (5 August 2009).

⁹⁶ s11.5 and s101.6 of the *Commonwealth Criminal Code*.

⁹⁷ [2011] VSC 681; See also Norrie Ross, 'Judge berates terrorists who were given refuge in Australia', *Herald Sun*, 17 December 2011.

⁹⁸ See M. Russell, 'Holsworthy Terror Plot Trio Lose Appeal,' *The Age*, 2 October 2013, available from <http://www.theage.com.au/national/holsworthy-terror-plot-trio-lose-appeal-20131002-2uroa.html>

⁹⁹ This case was the subject of a public inquiry, headed by the Hon Mr Clarke QC. A report was handed down on 21 November 2008 and presented to the Attorney-General. For a chronology of the key events in this case and for submissions from Dr Haneef's legal team as well as the key Government Departments involved see the report of the Clarke Inquiry into the Case of Dr Mohamed Haneef. For the Law Council's concerns with the case, see Law Council of Australia Submission to the Hon Mr Clarke QC, *Clarke Inquiry into the case of Dr Mohamed Haneef* (16 May 2008), <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LawCouncilSubmissiontoHaneefInquiry-Final.pdf>

¹⁰⁰ See <http://www.lawcouncil.asn.au/lawcouncil/index.php/david-hicks> See also *Jabbour v Hicks* [2007] FMCA 2139.

The courts' interpretation and application of Australia's anti-terrorism laws will be discussed further in the context of the particular offences or powers receiving judicial consideration.

2.5 Need for continued review

While the threat of international terrorism undoubtedly poses significant challenges for law makers, many of the legislative measures introduced depart from established principles of the criminal law and have a restrictive impact on individual rights. As observed by former NSW Chief Justice Spigelman:

*The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.*¹⁰¹

For many years, the Law Council has submitted that the exceptional nature of Australia's anti-terrorism measures – and the often disproportionate impact they have on the enjoyment of individual rights - should not become normalised within the Australian criminal justice system and must be subject to regular and comprehensive review. As noted by the PJCIS, without such review 'there is a real risk that the terrorism law regime may, over time, influence legal policy more generally with potentially detrimental impacts on the rule of law'.¹⁰²

While valuable in their own right, past reviews of Australia's terrorism laws¹⁰³ have failed to provide a comprehensive analysis of the content and workings of Australia's terrorism laws.

The timing of some reviews has also resulted in a largely theoretical exercise, where the laws to be examined had not yet been exercised in practice.

While the Commonwealth Ombudsman and the IGIS have the power to initiate investigations¹⁰⁴ into the activities and practices of the AFP and Australian intelligence agencies, many aspects of the anti-terrorism regime, and in particular the way the regime's provisions have been understood and applied by those agencies, have not been subject to comprehensive, independent review by either the Ombudsman or the IGIS.

As demonstrated in the Haneef case, the way the AFP understood and applied their law enforcement powers in the context of a terrorism investigation was not subject to independent review by any pre-existing review body. It was not until the case attracted significant public and political controversy that a separate public inquiry was established.

The Law Council has long been of the view that a dedicated, independent review mechanism capable of conducting comprehensive and ongoing review of the content and

¹⁰¹ *Lodhi v R* [2006] NSWCCA 121 at 66.

¹⁰² PJCIS Review 2006 at [2.48], n 16

¹⁰³ The 2002 package of legislation were passed subject to an agreement that a review of the operation, effectiveness and implications of the new laws would be conducted after three years. Provision was made for: (1) an independent committee of review to be initiated by the Commonwealth Attorney-General and to report to the Attorney-General and (2) the PJCIS to conduct a separate review on behalf of the Parliament. Other independent reviews have also been conducted. For example: Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* was reviewed by a Parliamentary Joint Committee in November 2006 and will be subject to further review in 2016; Schedule 7 of the *Anti Terrorism Act 2005 (No.2)(Cth)*, which revised the law of sedition, was referred to the Australian Law Reform Commission (ALRC) for inquiry in 2006; and Division 102 of the *Criminal Code*, containing the terrorist organisation proscription regime and related offences, was reviewed by the PJCIS in 2007.

¹⁰⁴ See section 5 of the *Ombudsman Act 1976* and section 8 of the *Inspector-General of Intelligence and Security Act 1986*

operation of Australia's national security laws is required.¹⁰⁵ For that reason, the Law Council strongly supported legislative attempts to create a review role of this kind.

On 18 March 2010, the *Independent National Security Legislation Monitor Act 2010* (Cth) was passed by Parliament. This Act established the position of the Monitor to review and report on the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis. The Monitor is also responsible for considering if counter-terrorism and national security laws remain necessary and are proportionate to any threat of terrorism or to national security.

The Law Council congratulated the Government on the passage of the Act and is pleased that many of its recommendations about improving the role were adopted in amendments approved by Parliament. Although critical of the length of time it took to appoint the Monitor, the Law Council welcomed the appointment of Mr Bret Walker SC to the Monitor position on 21 April 2011. The Law Council is hopeful that the Monitor will deliver the type of comprehensive reform of Australia's anti-terror laws which is required.

In 2009 the United Nations Human Rights Committee (UNHRC) conducted a review of Australia's compliance with the International Covenant on Civil and Political Rights (ICCPR) and delivered its observations on Australia's human rights performance.¹⁰⁶ The Committee recommended that Australia review its anti-terrorism laws and ensure that these measures are in compliance with the human rights protected under the ICCPR. In particular, concerns were expressed regarding the definition of a terrorist act contained in the *Criminal Code*.¹⁰⁷

A number of these concerns were also reflected in recommendations made by the UN HR Council following Australia's Universal Periodic Review in January 2011, particularly in relation to criminalising torture and reforming anti-terror laws to reflect international obligations.¹⁰⁸ The Government accepted these recommendations in its response to the Council's recommendations in June 2011,¹⁰⁹ noting amongst other things that it had recently strengthened its legislative prohibition on torture and that in April 2011, it had appointed the Monitor.

¹⁰⁵ For further discussion see Law Council of Australia Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 (No 2)* (15 September 2008).

¹⁰⁶ UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: 5th periodic report of States parties: Australia*, 2 April 2009, CCPR/C/AUS/CO/5, available at: <http://www.unhcr.org/refworld/docid/48c7b1062.html>. The Committee considered the fifth periodic report of Australia (CCPR/C/AUS/5) at its 2609th, 2610th and 2611th meetings (CCPR/C/SR.2609-2611), held on 23 and 24 March 2009, and adopted the following concluding observations at its 2624 meeting (CCPR/C/SR.2624), held on 2 April 2009.

¹⁰⁷ UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: 5th periodic report of States parties: Australia*, 2 April 2009, CCPR/C/AUS/CO/5, para [11].

¹⁰⁸ See recommendation 86.136 to 86.139 in the UN Human Rights Council's report, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>.

¹⁰⁹ See the Government's response to the Human Rights Council's 145 recommendations, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/A_HRC_17_10_Add.1_Australia_E.pdf

3. Terrorism Offences and the Meaning of 'Terrorist Act'

3.1 What measures were introduced and why?

Until 2002 there had been little discussion in Australia about the need for separate terrorism offences or for a legal definition of terrorism.¹¹⁰ For example, in 1979 in the Protective Security Review, which followed the Sydney Hilton bombing, Justice Hope acknowledged that:

*...virtually all terrorist acts involve what might be called ordinary crimes – murder, kidnapping, assault, malicious damage and so on – albeit for political motives.*¹¹¹

On this basis, there was little apparent need to define terrorism or enact specific offences to target terrorists and their associates. For example, in 1993, an Australian Defence Studies Centre paper noted that:

*We suspect that the nature of terrorism and its relationship to politically motivated violence probably means that no one 'definition' would be satisfactory, or widely accepted in the Australian community.*¹¹²

Following the terrorist attacks in the US in September 2001, Australia found itself under international pressure to join the global 'war against terror' and to outlaw terrorist related activity in its own jurisdiction.¹¹³

While the Government asserted that it already had in place a wide range of laws which addressed the core elements of terrorism and laws which dealt in some detail with law enforcement agencies and law enforcement methods, the Government also acknowledged limitations in its preparedness to counter international terrorism.¹¹⁴

On 2 October 2001 the then Government announced proposed amendments to legislation to:

- permit, under warrant, the formal questioning by ASIO of people 'who may have information that may be relevant to ASIO's investigations into politically motivated violence' and the arrest by State or Federal police of people 'in order to protect the public from politically motivated violence';

¹¹⁰ Until 2002 the only statutory definition of terrorism in any Australian jurisdiction was found in the Northern Territory where it is still defined as 'the use or threatened use of violence to procure or attempt to procure the alteration, cessation or doing of any matter or thing established by a law of ... a legally constituted government or other political body'. It includes such acts done 'for the purpose of putting the public or a section of the public in fear' or 'for the purpose of preventing or dissuading the public or a section of the public from carrying out, either generally or at a particular place, an activity it is entitled to carry out'. See *Criminal Code Act 1983* (NT) Schedule 1, s 54.

¹¹¹ Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. xv. For details of the Sydney Hilton bombing, see <http://www.abc.net.au/gnt/history/Transcripts/s1202891.htm>. A bomb exploded outside the hotel on 13 February 1978, killing 3 people and injuring 7. The Australian Prime Minister and 11 regional heads of government were at the hotel at the time.

¹¹² Alan Thompson, 'Management of Australia's Counter-Terrorism Program', Australian Defence Studies Centre, Working Paper No. 28, Canberra, September 1994.

¹¹³ As noted above, in Resolution 1373 the UN Security Council called for States to 'prevent and suppress the financing of terrorist acts [and shall] [c]riminalize the wilful provision or collection ... of [terrorist] funds by their nationals or in their territories'. It also required States to ensure that 'terrorist acts are established as serious criminal offences in domestic laws ... and that the punishment duly reflects the seriousness of such terrorist acts'.

¹¹⁴ Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001.

- introduce new general offences based on the *Terrorist Act 1994 (UK)* covering 'violent attacks and threats of violent attacks intended to advance a political, religious or ideological cause which are directed against or endanger Commonwealth interests'; and
- increase AFP powers 'to search for and seize property of any kind that is used or intended to be used for terrorism or is the proceeds of terrorism'.¹¹⁵

On 28 October 2001, former Prime Minister John Howard recommended a summit of State and Territory leaders to 'develop a new framework under which transnational crime and terrorism can be dealt with by law enforcement at a Commonwealth level'.¹¹⁶ One objective of the summit would be '[a] reference of constitutional power to the Commonwealth to support an effective national response to the threats of transnational crime and terrorism'.¹¹⁷

The *Security Legislation Amendment (Terrorism) Bill [No 2] 2002 (Cth)* (the *SLAT Bill*) was introduced on 13 March 2002¹¹⁸ along with a package of counter-terrorism legislation.¹¹⁹ The *SLAT Bill* included a definition of 'terrorist act' and a range of new terrorist-related offences to be inserted into a new Part 5.3 of the *Criminal Code*.

When introducing this Bill, the then Attorney-General said these new measures were necessary to 'strengthen Australia's counter-terrorism capabilities and bolster Australia's armory in the war against terrorism'.¹²⁰ The need for the new laws was explained further by Government agencies.¹²¹ For example, the then Director-General of Security, Dennis Richardson said that legislation was 'necessary to deter, to punish and to seek to prevent' terrorist activity'.¹²² The Attorney-General's Department said that specific laws were needed to address 'legislative gaps,' particularly in relation to providing or receiving training, directing an organisation that fosters preparation for a terrorist act and possessing things connected with a terrorist act.¹²³

¹¹⁵ The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.

¹¹⁶ The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.

¹¹⁷ *ibid.*

¹¹⁸ The original Bill, the *Security Legislation Amendment (Terrorism) Bill 2002*, which was introduced on 12 March 2002, was withdrawn on 13 March 2002 and the [No.2] Bill was substituted. The reason was that the Office of Parliamentary Counsel had drawn the Government's attention to a discrepancy between the title of the original Bill and the title referred to in the notice of presentation given by the Attorney-General.

¹¹⁹ The other Bills in the package were the *Suppression of the Financing of Terrorism Bill 2002*, and the *Border Security Legislation Amendment Bill 2002*. Other components of the anti-terrorism package were the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002*, the *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002* and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*. The Government also introduced a *Telecommunications Interception Legislation Amendment Bill 2002* which enabled interception warrants to be granted to investigate 'an offence constituted by conduct involving an act or acts or terrorism'.

¹²⁰ House of Representatives Hansard, Second Reading Speech, *Security Legislation Amendment (Terrorism) Bill 2002*, 12 March 2002, p. 1040. The Second Reading Speech was subsequently incorporated into Hansard when the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]* was introduced into the House of Representatives by the Parliamentary Secretary to the Minister for Finance and Administration, Mr Slipper, on 13 March 2002.

¹²¹ See for example Report of Senate Legal and Constitutional Legislation Committee Inquiry into *Security Legislation Amendment Bill 2002*, (May 2002) p. 33, Attorney-General's Department *Submission 383*, pp. 3-4.

¹²² Report of Senate Legal and Constitutional Legislation Committee Inquiry into *Security Legislation Amendment Bill 2002*, (May 2002) p. 24; Legal and Constitutional Legislation Committee Hansard, 19 April 2002, p. 166.

¹²³ Attorney-General's Department *Submission 383A* to the Senate Legal and Constitutional Affairs Committee Inquiry into *Security Legislation Amendment Bill 2002*, pp. 1-3.

3.2 Meaning of ‘terrorist act’

The Australian definition of ‘terrorist act’ is largely based on the definition contained in the *Terrorism Act 2000* (UK)¹²⁴ and is a central element of the terrorist related offences contained in Part 5.3 of the *Criminal Code*.

Section 100.1(1) of the *Criminal Code* provides that ‘terrorist act’ means ‘an action or threat of action where’:

- the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- the action is done or the threat is made with the intention of:
 - coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - intimidating the public or a section of the public.

Subsection 100.1(2) provides that action falls within the definition of ‘terrorist act’ if it:

- causes serious harm that is physical harm to a person; or
- causes serious damage to property; or
- causes a person's death; or
- endangers a person's life, other than the life of the person taking the action; or
- creates a serious risk to the health or safety of the public or a section of the public; or
- seriously interferes with, seriously disrupts, or destroys, an electronic system including:
 - an information system; or
 - a telecommunications system; or
 - a financial system; or
 - a system used for the delivery of essential government services; or
 - a system used for, or by, an essential public utility; or
 - a system used for, or by, a transport system.

Subsection 100.1(3) provides that action falls *outside* the definition of ‘terrorist act’ if it:

- is advocacy, protest, dissent or industrial action; and
- is not intended:

¹²⁴ The current UK definition of ‘terrorist act’ is contained in section 1 of the *Terrorist Act 2000* (UK).

- to cause serious harm that is physical harm to a person; or
- to cause a person's death; or
- to endanger the life of a person, other than the person taking the action; or
- to create a serious risk to the health or safety of the public or a section of the public.

3.2.1 Law Council Concerns

Since its introduction, the Law Council has considered the definition of 'terrorist act' to be problematic. This view has been shared by a number of national and international review bodies,¹²⁵ as well as by members of the judiciary writing extra-judicially.¹²⁶

International views on the definition of terrorism

There are a number of international conventions that have been developed by the UN to address terrorism.¹²⁷ Each of these conventions address particular activities associated with terrorism, including unlawful acts against the safety of civil aviation;¹²⁸ unlawful seizure of aircraft;¹²⁹ the taking of hostages;¹³⁰ the protection of nuclear material;¹³¹ terrorist bombings;¹³² financing of terrorism;¹³³ and nuclear terrorism.¹³⁴ There are 13 conventions that deal with terrorist related activities.¹³⁵ However, none of them contain a consistent definition of terrorism.

A number of resolutions have been passed by UN bodies in relation to terrorism including Resolution 1373¹³⁶ which was passed following the September 11 2001 terrorist attacks in

¹²⁵ For example, see Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006), [10]-[16] (Report of UN Special Rapporteur 2006'); PJCIS Review 2006 [5.30]

¹²⁶ For example see Justice Peter McClellan, *Terrorism and the Law* Twilight Seminar at the Supreme Court, 28 February 2008 at p. 9 available at http://www.judcom.nsw.gov.au/publications/selected_papers/terror.pdf

¹²⁷ See <http://www.un.org/terrorism/instruments.shtml>

¹²⁸ See United Nations, Convention for the suppression of unlawful acts against the safety of civil aviation, 23 September 1971, available from <http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf>

¹²⁹ See United Nations, Convention for the suppression of the unlawful seizure of aircraft, 16 December 1970, available from <http://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf>.

¹³⁰ United Nations, International Convention against the taking of hostages, 17 December 1979, available from <http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf>

¹³¹ United Nations, Convention on the physical protection of nuclear material, 26 October 1979, available from <http://treaties.un.org/doc/db/Terrorism/Conv6-english.pdf>

¹³² United Nations, International Convention for the suppression of terrorist bombings, A/52/49, available from <http://treaties.un.org/doc/db/Terrorism/english-18-9.pdf>

¹³³ United Nations, International Convention for the suppression of the financing of terrorism, 1999, available from <http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf>

¹³⁴ United Nations, International Convention for the suppression of acts of nuclear terrorism, 2005, available from <http://treaties.un.org/doc/db/Terrorism/english-18-15.pdf>

¹³⁵ See <http://www.un.org/terrorism/instruments.shtml>. See also United Nations Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism*, 2009, pp. 12-14. Available from http://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf

¹³⁶ United Nations Security Council, Resolution 1373, Adopted by the Security Council at its 4385th meeting on 28 September 2001, S/RES/1373, available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

the United States, and Security Council Resolution 1566¹³⁷ which was passed in 2004. However, none of these resolutions have included a consistent definition of terrorism.¹³⁸

Resolution 1566 outlines a series of acts that constitute offences under the conventions dealing with terrorism, and calls upon all States “to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”¹³⁹ The acts in question are described as follows:

“...criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism...”¹⁴⁰

Resolution 1373 does not define terrorist acts but imposes a range of obligations on States to ensure they prevent and suppress the financing of such acts.

There appear to be a number of reasons why the international community has been unable to agree on a definition of terrorism. Central to these have been concerns by some States about the extent to which ‘freedom fighters’ in national liberation movements could be classified as terrorists; whether international rules on terrorism should be based on an enhanced understanding of the underlying causes of such behaviour;¹⁴¹ a reluctance by some States to accept the guidance of international law;¹⁴² and concerns that a universally accepted definition of terrorism would place limitations on sovereign power, which would result in States no longer being able to define terrorism according to their own rationale.¹⁴³

The absence of a comprehensive UN definition of terrorism has resulted in several definitions being developed and implemented in legislation at the Member State level. A number of academics have analysed the definitions of terrorism around the world and have suggested that there is an established need for definitions of terrorism to be precise, not overly broad, and drafted consistently across comparable jurisdictions.¹⁴⁴

The former UN Special Rapporteur, Martin Scheinin, has expressed concern that “the absence of a universal and comprehensive definition of the term may give rise to adverse

¹³⁷ United Nations Security Council, Resolution 1566, Adopted by the Security Council at its 5053rd meeting, on 8 October 2004, S/RES/1566, available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement>

¹³⁸ See K. Hardy and G. Williams, ‘What is Terrorism? Assessing Domestic Legal Definitions,’ *University of New South Wales Faculty of Law Research Series 2013*, February 2013, Working Paper 16. Available from <http://law.bepress.com/unswlwrps13/16/>

¹³⁹ Resolution 1566, adopted by the Security Council at its 5053rd meeting on 8 October 2004, S/RES/1566, para 3. Available from <http://daccess-ods.un.org/TMP/4119834.89990234.html>

¹⁴⁰ Resolution 1566, adopted by the Security Council at its 5053rd meeting on 8 October 2004, S/RES/1566, para 3. Available from <http://daccess-ods.un.org/TMP/4119834.89990234.html>

¹⁴¹ A. Cassese, (2006). ‘The Multifaceted Criminal Notion of Terrorism in International Law’, *Journal of International Criminal Justice*, 4, p.935. DOI: 10.1093/jicj/mq1074

¹⁴² See E. Herschinger, (2013). ‘A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism,’ *Terrorism and Political Violence*, 25, p.186. DOI: 10.1080/09546553.2011.652318

¹⁴³ G. Fletcher, (2006). ‘The Indefinable Concept of Terrorism’, *Journal of International Criminal Justice*, 4, p.894.

¹⁴⁴ See for example, K. Hardy and G. Williams, ‘What is Terrorism? Assessing Domestic Legal Definitions,’ *University of New South Wales Faculty of Law Research Series 2013*, February 2013, Working Paper 16, p.80. Available from <http://law.bepress.com/unswlwrps13/16/>. See also, Martin Scheinin, *Report of the UN Special Rapporteur on the promotion a protection of human rights and fundamental freedoms while countering terrorism*, 28 December 2005, E/CN.4/2006/98, paras. 42 and 50. Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement>

consequences for human rights.”¹⁴⁵ He has noted the importance of ensuring that “[i]n the absence of a universally agreed upon, comprehensive and concise definition of terrorism, counter-terrorism laws and policies must be limited to the countering of offences that correspond to the characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566...”¹⁴⁶

An issue with respect to the Australian definition of terrorist act relates to the inclusion of “interference or destruction of electronic systems, systems to deliver essential Government services or used by essential public utilities, or transport systems.”¹⁴⁷ The Law Council has previously raised this issue and the inclusion of property damage in its concerns with the definition.¹⁴⁸ This issue was also considered by the Monitor in his 2012 Annual Report, where he specifically addressed the concerns that had been raised by the former UN Special Rapporteur previously in relation to the breadth of the Australian definition of terrorist act in this regard.

However, the Monitor has not shared the UN Special Rapporteur’s concerns in relation to the inclusion of serious impacts on electronic systems in the definition, finding the risk of any over-reach to be “mitigated by the link to subsection 100.1(3). This link excludes such action from being a terrorist act where it is done in the course of advocacy, protest, dissent or industrial action and is not intended to cause danger to life or limb.”

A similar view was expressed by the former Independent Reviewer of Terrorism Legislation in the UK, Lord Carlile of Berriew Q.C in his 2007 report on his review of the UK’s terrorism legislation. In finding that the inclusion of serious impacts on electronic systems in the definition of terrorism was justified, Lord Carlile stated that the inclusion in the definition of acts designed to seriously interfere with or disrupt an electronic system,

...has the potential to include internet service providers, financial exchanges computer systems, controls of national power and water, etc. The huge damage to the economy of the nation, and the potential for injury as a result, are self-evident. This category too should be included in the definition. I have concluded that the provision remains justified.¹⁴⁹

The Council of Europe Framework Decision on Combatting Terrorism takes a different approach to the inclusion of impacts on electronic systems; government services; public utilities and transport systems as terrorist acts by including them in the following forms in the list of acts defined as terrorist offences:

- *causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed*

¹⁴⁵ United Nations, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2005, E/C.4/2006/98, p.8. Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement>

¹⁴⁶ United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ten areas of best practice in countering terrorism*, 22 December 2010, A/HRC/16/51, p.14, available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/178/98/PDF/G1017898.pdf?OpenElement>

¹⁴⁷ Bret Walker SC, *Independent National Security Legislation Monitor Annual Report*, 16 December 2011, p.54. Available from http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf

¹⁴⁸ For example see Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills (April 2002); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, Anti-Terrorism Bill 2004 (26 April 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, Anti-Terrorism Bill (No. 2) 2004 (15 July 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010

¹⁴⁹ Lord Carlile of Berriew QC, *The Definition of Terrorism – A Report by Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation*, March 2007, para. 71, p.40. Available from <http://www.official-documents.gov.uk/document/cm70/7052/7052.pdf>.

platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

- *interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life.*¹⁵⁰

In the Law Council's view, such an approach is preferable to the current approach in section 100.1 as it involves a more direct nexus between the impact on the relevant electronic system and the effect on human life than reliance on subsection 100.1(3) to exempt the relevant act from definition as a terrorist act. A similar conclusion can be drawn in relation to the subsection 100.1(2) inclusion of serious damage to property as a terrorist act unless the relevant exemption applies. Therefore, the Law Council's preference is for a direct reference to dangers to life and limb even in the context of property or infrastructure damage.

.The definition includes threats of action

The definition of 'terrorist act' in section 100.1 is defined as an action or a *threat of action* which, amongst other things, causes serious physical harm, results in death, endangers life or causes serious property damage (see subsection 100.1(2)).

The problem with this definition is that it is almost impossible to conceive of how a mere threat of action, on its own and if not carried out, could cause serious harm, death, serious property damage or the like.¹⁵¹

As well as unnecessarily broadening the scope of the definition, the confusion created by the inclusion of a threat of action as sufficient to constitute a terrorist act is likely to hinder prosecutions and increase the difficulties members of the public have in understanding the legislation.¹⁵²

The Law Council has submitted that the reference to threat of action should be removed from the definition of terrorist act and threats to commit a terrorist act should be the subject of a separate offence provision. In that way, the peculiar fault elements of a threat offence could be properly addressed and an appropriate penalty set. A threat to commit an act is materially different from actually committing the act. So too, a threat to commit an act is different from an attempt, a conspiracy or an incitement to commit that act. Although it might be reprehensible, it is conduct of a different type that should be addressed separately.

Impact of definition on the Australian community

The Law Council is also concerned that the broad, ambiguous definition of 'terrorist act' – and the implications this has for the scope and application of the related terrorist act offences - has the potential to intensify the isolation and alienation experienced by certain members of the Australian community in the context of the 'war on terror'.

Although the Australian definition of terrorism is directed to all forms of terrorism, it has been the threat of 'Islamist terrorism', which has been the primary concern since 2001.¹⁵³ This has put Arab and Muslim Australians under significant pressure and led to incidences of discrimination and prejudice.¹⁵⁴ I The PJCIS has noted that the ambiguity and

¹⁵⁰ Council of Europe, Framework Decision on Combating Terrorism, 13 June 2002, 2002/475/JHA, Article 1, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0007:EN:PDF>

¹⁵¹ For further discussion of this point – see Sheller Review 2006 at [6.11], note 16.

¹⁵² This view was shared by the Sheller Committee, see Sheller Review 2006 at [6.12], note 16

¹⁵³ PJCIS Review 2006 at [2.2], note 16.

¹⁵⁴ PJCIS Review 2006 at [3.29], note 16.

uncertainty surrounding the definition of terrorism has generated confusion and contributed to this experience of fear and alienation.¹⁵⁵

In its 2008-2009 Annual Report, ASIO described the greatest global terrorism threat as stemming 'from the violent jihadist movement comprising core al-Qa'ida in Pakistan and Afghanistan, Sunni Islamic extremist groups allied or associated with al-Qa'ida, and individuals or groups motivated by the violent jihadist ideology ... the Lebanese Hizballah's External Security Organisation, also has global reach'.¹⁵⁶ Similarly, in its 2009-2010 Annual Report, ASIO stated that "Al-Qa'ida-affiliated groups and others inspired by similar ideology are likely to be the primary source of terrorism threat to western lives and interests for years to come".¹⁵⁷ In 2013, the Director-General of Security, David Irvine, stated that the "threat from home-grown, lone-actor terrorists or small localised groups, who are largely self-radicalised and see it as some sort of religious or political obligation to conduct an attack, is real. The fact al-Qa'ida and its associated anti-Western transnational terrorist partners continue to declare Australia to be a legitimate target of attack remains a concern."¹⁵⁸

The former Government in developing strategies to counter violent extremism in the Australian community is acknowledged that 'there is no such thing as a homogeneous 'Muslim community' in Australia' and recognised the need to engage with all levels of the community on both national security and social justice matters.¹⁵⁹

3.2.2. Proposed reforms to the definition of 'terrorist act'

There has been comment by a number of independent bodies regarding the need to reform the definition of 'terrorist act' contained in the *Criminal Code*. For example, the PJCIS recommended in its 2006 Review of Security and Counter-Terrorism Legislation that "*the 'threat' of terrorist act be removed from the definition of terrorism and be dealt with as a separate offence.*"¹⁶⁰

More recently the UNHRC also suggested that the definition required amendment in its Concluding Observations into Australia's human rights performance. Specifically, the UNHRC recommended that Australia "...*should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences.*"¹⁶¹

In the 2009 Discussion Paper on Proposed Amendments to National Security Legislation, the then Government proposed amending the definition of 'terrorist act' in two ways.¹⁶² Firstly by broadening the concept of harm in subparagraphs 100.1(2)(a) and 100.1(3)(b)(i) to include both physical and psychological harm. Secondly, by inserting the phrase 'or is likely to cause', 'or is likely to endanger', 'or is likely to create' etc. into the relevant subparagraphs of sub-section 100.1(2).

¹⁵⁵ PJCIS Review 2006 at [3.13], note 16.

¹⁵⁶ ASIO, Annual Report to Parliament 2008-09, Part One, at <http://www.asio.gov.au/img/files/ASIOsReportToParliament08-09.pdf>

¹⁵⁷ ASIO, Annual Report to Parliament 2009-2010, p.4, at <http://www.asio.gov.au/img/files/ASIOsReportToParliament09-10.pdf>

¹⁵⁸ Op. cit., Director-General of Security, 'Security and Freedom – Striking a Balance,' 26 June 2013.

¹⁵⁹ Attorney-General Hon Robert McClelland MP, Address to the Australian National University National Security College 'Community Resilience and National Security: An Agenda for the Future', Canberra, 13 July 2010, pp.6-7

¹⁶⁰ PJCIS Review 2006 Recommendation 10, note 16.

¹⁶¹ UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 19 February 2008, CCPR/C/AUS/5, available at: <http://www.unhcr.org/refworld/docid/48c7b1062.html> para [11].

¹⁶² Commonwealth Attorney-General's Department, *National Security Legislation - Discussion Paper on Proposed Amendments*, July 2009.

In the Law Council's view, neither of these proposed amendments would address the identified problems with the definition. In fact the proposed amendments would only serve to widen the definition even further.

Broadening the concept of harm to include serious psychological harm

The current definition of terrorist act in section 100.1 of the *Criminal Code* captures, among other things, an offending action or threat of action that causes serious harm *that is physical harm* to a person. The then Government proposed removing the reference to harm "that is physical" so that the definition would capture conduct that causes either or both serious physical or psychological harm.

It is standard throughout the *Criminal Code* that the definition of harm encompasses both physical and psychological harm. This reflects a broader policy which recognises that the impact of psychological harm on a person can be serious, debilitating and long-lasting and that, therefore, acts which are intended to cause psychological harm ought to be regarded with the same opprobrium as acts which are calculated to cause physical harm. The Law Council supports this broader policy.

However, in the Law Council's view terrorism offences are in many respects already approached differently from the average offence against the person and therefore the definition of terrorist act should not be amended simply in the name of consistency and uniformity.

The definition of 'terrorist act' in the *Criminal Code* is, in effect, the gateway to a series of serious offence provisions and the trigger for a range of exceptional executive powers which would, in all but emergency circumstances, be regarded as unjustified and unnecessary. Therefore, the definition must be drafted with great care and specificity. It must be possible to precisely determine the type of conduct that it captures, so that an assessment can be made of whether the measures available to prevent, investigate and prosecute that conduct are proportionate to the risk that is sought to be averted. It can not be a catch-all definition.

In the Law Council's view, if the term serious harm is no longer limited to harm that is physical – the type of conduct captured by the definition of terrorist act will be even harder to determine. It may, for example, encompass certain types of confronting advocacy and protest such as that employed by animal liberation or anti-abortion groups, even though the Law Council acknowledges that advocacy, protest and dissent are excluded from the definition in certain circumstances pursuant to sub-section 101.1 (3) .

For those reasons, the Law Council opposed this proposed amendment.

As at October 2013, this proposed amendment had not been pursued by the Government. It was not included in the *NSLA Bill*.

Inserting the phrase "is likely to cause" in subsection 100.1(2)

As noted above, the term "terrorist act" in section 100.1 is defined as an action or a *threat of action* which, amongst other things, causes serious physical harm, results in death, endangers life or causes serious property damage (see subsection 100.1(2)).

The problem with this definition is that it is almost impossible to conceive of how a threat of action on its own could cause serious harm, death, serious property damage or the like. For this reason the Government proposed amending the definition of terrorist act to

capture not only actions or threats of action which cause death, injury, property damage etc. but also actions or threats of action which *are likely* to cause these things.

The Law Council is of the view that that this proposed amendment would not overcome the problem it was designed to address and that as long as a 'threat of action' is included in section 100.1, the definition will remain, in part, unintelligible.

Just as a threat of action can not on its own cause the prescribed outcomes, similarly it can not be said that it 'is likely to cause' those outcomes, unless carried out.

The proposed amendment to include actions or threats of action *likely* to cause death, injury, property damage etc. was also not pursued in the *NSLA Bill*.

The Law Council has submitted that the reference to threat of action should be removed from the definition of terrorist act and threats to commit a terrorist act should be the subject of a separate offence provision. In that way, the peculiar fault elements of a threat offence could be properly addressed and an appropriate penalty set. A threat to commit an act is materially different from actually committing the act. So too, a threat to commit an act is different from an attempt, a conspiracy or an incitement to commit that act. Although it might be reprehensible, it is conduct of a different type that should be addressed separately.

In the Government's 2009 Discussion Paper it was argued that removing the threat of action from the definition of terrorist act would dilute the policy focus of criminalising threats of action within the offences in Division 101.

It is assumed that what was meant by this was that, if reference to the threat of action was removed from the definition of terrorist act, it would no longer be an offence to possess a thing or document, or to make a thing or document or to do any other act in preparation for merely making a threat to commit a terrorist act (rather than in preparation for actually committing a terrorist act).

In the Law Council's view it would be preferable to criminalise the making of the threat rather than having inchoate preparatory offences, which stretch the outer boundaries of criminal liability to new limits, are certainly not required to avert the risk of a mere threat of action.

3.2.3 Law Council Recommendations

In respect of the definition of 'terrorist act' in section 100.1 of the *Criminal Code* the Law Council recommends that the Government should:

- Review the definition of 'terrorist act' to provide a more direct reference to dangers to life and limb in relation to acts that cause serious damage to property or that interfere with telecommunications or financial systems; and
- Remove the reference to 'threat of action' and other references to 'threat' from the definition of 'terrorist act' in section 100.1(1).
- Not proceed with the proposal to expand the definition to include acts that cause psychological as opposed to physical harm or actions or threats of actions *likely* to cause death, injury, property damage or other consequences referred to in sub-section 100.1 (2).

3.3 Terrorist Offences

3.3.1 What measures were introduced?

As noted above, in 2002 the Commonwealth Parliament enacted the *Security Legislation Amendment (Terrorism) Act (SLAT Act)* which introduced a range of new terrorist-related offences into Part 5.3 of the *Criminal Code*. These offences rely on the definition of terrorist act described above.

In 2005 the *Anti-Terrorism (No 1) Act (Cth)* made a number of small but significant amendments to the offence provisions in sections 101.2, 101.4, 101.5, 101.6 and 103.1 of the *Criminal Code*. It removed the term 'the' before the term 'terrorist act' and replaced it with the term 'a', effectively removing the requirement for the prosecution to make a connection between the prohibited act and the existence of, or threat of, a *particular* terrorist act.¹⁶³

As a result, under Part 5.3 of the *Criminal Code* it is an offence to:

- engage in a terrorist act (s101.1 – penalty of life imprisonment);
- provide or receive training connected with a terrorist act (s101.2 – imprisonment for 15 years);
- possess things connected with terrorist acts (s101.4 – imprisonment for 15 years);
- collect or make documents likely to facilitate terrorist acts (s101.5 – imprisonment for 10 or 15 years, depending on knowledge);
- do another act in preparation for or planning a terrorist act (s101.6 – life imprisonment);
- finance a terrorist act (s103.1 – life imprisonment).

There are also a number of terrorist organisation offences in sections 102.2 to 102.8 of the *Criminal Code*, which are dealt with separately in section 4 of this paper.

3.3.2 Law Council Concerns

As with the definition of 'terrorist act' described above, these terrorism offences have been the subject of international and national criticism. The Law Council has made its concerns known on a number of occasions to both national and international bodies tasked with reviewing these laws.¹⁶⁴

¹⁶³ In a statement to the media, the former Prime Minister said that the purpose of this amendment was to:

'...clarify that, in a prosecution for a terrorism offence, it is not necessary to identify a particular terrorist act. The existing offences contain a subsection that provides that a person commits the offence even if 'the' terrorist act does not occur. When the offences were originally drafted, it was not the intention that the prosecution would be required to identify a 'particular' terrorist act. Similarly, item 10 clarifies that, when determining whether an organisation satisfies the definition of a terrorist organisation, it is not necessary to prove the organisation is preparing, planning, assisting in or fostering 'the' particular terrorist act. It will be sufficient if the prosecution can show the organisation is preparing, planning, assisting in or fostering a 'terrorist act' See John Howard, Prime Minister of Australia, 'Anti-Terrorism Bill' (Press Release, 2 November 2005).

¹⁶⁴ For example see Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill 2004* (26 April 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill (No. 2) 2004* (15 July 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010); Law

The Law Council's concerns with respect to the offences in section 101.1 to 101.6 are described below.

- The terrorism offences attempt to capture preparatory conduct at a very early stage and challenge conventional principles of criminal law.

The offences in Part 5.3 can be described as preparatory and preventative in nature. The offences rely on a broad definition of terrorist act and some offence provisions may be triggered before any criminal intent has crystallised into an attempt to carry out an act of violence.

Many of the offences relate to preliminary acts – such as ‘possessing a thing’ or ‘preparing a document’ – where the thing or document may in and of itself be innocuous. These preliminary acts become an offence where it is alleged that such acts are done in connection with or in preparation for a terrorist act, regardless of whether any terrorist act actually occurs.¹⁶⁵ In addition, since the amendments in 2005, these preliminary acts can become an offence regardless of whether they are related to any specific planned terrorist act.¹⁶⁶ For example, under section 101.4 a person commits an offence if they:

- possess a thing; and
- the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- the person knows of that connection.¹⁶⁷

A person will also be guilty of a lesser offence if they were reckless as to the existence of that connection.¹⁶⁸

This offence will be committed even if:

- a terrorist act does not occur; or
- the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
- the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.¹⁶⁹

These types of offences, which seek to impose criminal sanctions for actions performed before a person has formed a definite plan to commit a specific criminal act, represent a departure from common forms of criminal liability. As then Chief Justice Spigelman observed in *Lodhi*:

Council of Australia Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document* (29 August 2008).

¹⁶⁵ For example s101.4 of the *Criminal Code* makes it an offence to possess things connected with terrorist acts; s101.5 makes it an offence to collect or make documents likely to facilitate terrorist act and s101.6 makes it an offence to do another act in preparation for or planning a terrorist act.

¹⁶⁶ The *Anti-Terrorism (No 1) Act 2005* removed the term ‘the’ before the term ‘terrorist act’ and replaced it with the term ‘a’, effectively removing the requirement for the prosecution to make a connection between the prohibited act and the existence of, or threat of, a *particular* terrorist act in respect of the offences in ss 101.2, 101.4, 101.5, 101.6 and 103.1 of the *Criminal Code*.

¹⁶⁷ *Criminal Code Act 1995* (Cth) s101.4(1). Penalty for this offence is 15 years imprisonment.

¹⁶⁸ *Criminal Code Act 1995* (Cth) s101.4(2). Penalty for this offence is 10 years imprisonment.

¹⁶⁹ *Criminal Code Act 1995* (Cth) 101.4(3). Pursuant to s101.4(5) it is a defence, with an evidential burden placed on the defendant, if the possession of the thing or was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act’.

*Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier state than is usually the case for other kinds of criminal conduct ...*¹⁷⁰

- The broadly defined and purely preparatory nature of many of the terrorism offences renders it difficult to dissect and comprehend the precise elements of the offences.

The Law Council is concerned that the preparatory nature of the terrorism offences, coupled with the broad and ambiguously defined terms on which the offences are based, makes it difficult to determine the precise ambit of the terrorist act offences. This was demonstrated in the case of *Lodhi*¹⁷¹ where the offences received judicial attention.

In 2006 Faheem Lodhi was the first person to be convicted of a terrorist act offence under the *Criminal Code*.¹⁷² Mr Lodhi was charged with the following offences:

- one count pursuant to section 101.4(1) — possessing a thing (a document about how to make bombs) connected with a terrorist act, knowing of such a connection;
- two counts pursuant to section 101.5(1) — collecting or making documents (collecting maps of the electricity supply system and making aerial photos of Australian Defence Force establishments) connected with terrorist acts, knowing of such a connection; and
- one count pursuant to section 101.6 — doing an act (seeking information about the availability of materials that could be used to make bombs) in preparation or planning a terrorist act.

Lodhi was found guilty of three of the four charges (he was acquitted of the second count under section 101.5) and was sentenced to 20 years imprisonment in relation to the most serious offence (section 101.6) and ten years imprisonment for each of the other offences, with the sentences to be served concurrently.

Lodhi's case involved a number of complex issues and resulted in multiple rulings by both the trial judge and the NSW Court of Criminal Appeal. For example, prior to trial, Mr Lodhi brought an application in the NSW Supreme Court to quash counts 2, 3 and 4¹⁷³ on the grounds that they were bad for duplicity.¹⁷⁴ This provided the court with an opportunity to consider the elements of the terrorist offences in Part 5.3 and the interaction between the definition of 'terrorist act' and the offence provisions.

¹⁷⁰ *Lodhi v The Queen* [2006] NSWCCA 121 at [66], cited with approval by Bongiorno JA in *R v Kent* [2009] VSC 375

¹⁷¹ [2006] NSWSC 584 (Whealy J, 14 February 2006)

¹⁷² On 19 June 2006 Mr Lodhi was acquitted of one count of making a document connected with preparing for a terrorist act, but found guilty of possessing a thing connected with preparing for terrorism; collecting documents connected with preparing for terrorism; doing an act in preparation for a terrorist act; and, giving false or misleading answers to ASIO. Lodhi's appeal against both conviction and sentence was dismissed by the NSW Court of Appeal in December 2007, *Lodhi v R* [2007] NSWCCA 360.

¹⁷³ The first and third counts in the indictment alleged offences against s 101.5(1) of the *Criminal Code*. Count 2 of the indictment alleged an offence against 101.6. Count 4 alleged an offence against section 101.4.

¹⁷⁴ *R v Lodhi* [2006] NSWSC 584. Mr Lodhi's application also sought an order quashing counts 1 to 4 on the ground that they failed to specify all essential factual elements. In the alternative, Mr Lodhi sought an order that the Crown amend counts 1 to 4 and/or provide further and better particulars.

When considering the duplicity application, Whealy J described the elements of the offence of committing an act in preparation for a terrorist act as follows:

First, the Crown must prove that “an action or threat of action” (relevantly for the present offences a contemplated action) is to be done with the intention of advancing a political, religious or ideological cause. Pausing there, it is appropriate to make two observations. The first is that this may not necessarily be the intention of the person charged with the preliminary action connected with the preparation for a terrorist act. The second is to observe that the intention to be proved relates to the character of the terrorist act intended to be carried out. Of course, it may also be the intention of the accused and, in fact, the intention of those who are proposing to carry out the act of terrorism. The cause may well be political, religious and ideological but the section requires that it be at least one of these.

Secondly, the Crown must prove the action is done with the intention of coercing, or influencing by intimidation, the nominated governments; or it must be done with the intention of “intimidating the public or a section of the public”. Again, the expression “the action” in 100.1(c) is clearly a reference to the phrase “an action or threat of action” where appearing in the first line of the definition.

Thirdly, subs (2) of 100.1 lists the characteristics of “an action or threat of action”. Again, the Crown must prove this element beyond reasonable doubt. The matters that fall within the sub-section are of the broadest possible kind. “Action” falls within the sub-section, for example, if it causes serious harm (physical harm) to a person; or causes serious damage to a property. “Action” falls within the sub-section if it causes a person’s death; or endangers a person’s life; or creates a serious risk to the health or safety of the public or a section of the public; or seriously interferes with, seriously disrupts “or destroys an electronic system”. The systems enumerated include but are not limited to the widest possible range of public utilities and government services.

Finally, the Crown must prove that “the action” (again a reference to “an action or threat of action”) does not fall within sub-section 3. Again this is an element that must be proved beyond reasonable doubt.¹⁷⁵

Whealy J further noted:

In addition, it seems to me, it is not necessary that the terrorist act be capable of identification in terms of its ultimate target.¹⁷⁶

Whealy J observed that this analysis applied equally to the offences in sections 101.5 and 101.6, although His Honour noted that in section 101.6, there is no fault element specified.

These observations were quoted with approval when the matter was considered in the Court of Appeal.¹⁷⁷

The courts’ observations in *Lodhi* demonstrate the preparatory nature of the Part 5.3 offences, namely that the Crown is not required to prove that a particular terrorist act was planned or had occurred or that the defendant intended that a particular terrorist act be planned or occur. The observations also give some indication of the complexities faced

¹⁷⁵ *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [71]-[74].

¹⁷⁶ *ibid* at [84].

¹⁷⁷ See *R v Lodhi* [2006] NSWCCA 121 (Spigelman CJ with McClellan CJ at CL and Sully J agreeing) at [80], [90].

by a jury when determining whether each element of the offence has been proved beyond reasonable doubt.

- Preparatory and preliminary offences give rise to broad prosecutorial and enforcement discretion

This extension of criminal responsibility to cover preparatory acts requires prosecutorial and law enforcement authorities to exercise a considerable degree of discretion when determining whether an otherwise innocuous act should be subject to charge and prosecution on the basis that it has allegedly been undertaken in 'preparation for, the engagement of a person in, or assistance in a terrorist act'.

The broad prosecutorial and enforcement discretion arising from the preliminary nature of these offences is further extended by the ambiguity surrounding each of the key terms (such as 'thing', 'preparation' and 'assistance'), and the concerns raised above in respect of the definition of 'terrorist act'.

Some may argue that little harm is done by the creation of broad-based terrorism offences, as ultimately prosecutorial authorities are unlikely to lay terrorism charges without evidence of the existence of the most serious and dangerous plans. However, an unacceptable element of arbitrariness and unpredictability arises when the determination of whether or not a person is charged with a terrorist offence under Part 5.3 of the *Criminal Code* is left to the broad discretion of prosecutorial authorities.¹⁷⁸ This is particularly problematic given the fact that such a determination has profound implications in terms of the onus of proof, available defences, stigma of conviction and heaviness of penalties.

3.3.3 Proposal to introduce a new hoax offence

The *Criminal Code* currently contains offences for the commission of hoaxes that are made either via the post or a telecommunications network (sections 471.10 and 474.16 of the *Criminal Code*). However, if a terrorism-specific hoax is committed without the use of the post or a telecommunications network, it will not be captured by these existing offence provisions.

Given the potential for a terrorism-specific hoax to cause significant alarm to the community and to divert valuable law enforcement and emergency services, both the Sheller Committee and the PJCIS recommended that a separate terrorist hoax offence be created.¹⁷⁹

For this reason, in the 2009 Discussion Paper on Proposed Amendments to National Security Legislation, the then Government proposed the introduction of a new hoax offence into the *Criminal Code*.

The proposed offence provision would apply to a person who engages in conduct with the intention of inducing a false belief that a terrorist act has occurred, is occurring or is likely to occur. The provision would carry a maximum penalty of ten years imprisonment, which is consistent with the existing hoax offences in sections 474.16 and 471.10.

In its response to the Discussion Paper, the Law Council indicated that it was satisfied that, because of the fault element of the proposed offence, the new section would not capture the conduct of a person who acts or remarks in jest, not intending that he or she be taken seriously.

¹⁷⁸ This concern was shared by the PJCIS in its 2006 Review of the offence provisions at [2.34]-[2.35], note 16.

¹⁷⁹ PJCIS Review 2006, Recommendation 13 and Sheller Review 2006, Recommendation 20, note 16.

However, the Law Council expressed concern that because of the broad nature of the definition of 'terrorist act' and, particularly, the fact that it captures conduct engaged in both in Australia and abroad – the proposed hoax offence provision would extend too far, and may capture not only hoaxes, but material more commonly classified as propaganda.

The existing hoax provisions in the *Criminal Code* deal with very specific conduct which includes:

- Sending by post something which is designed to appear as though it consists of, encloses or contains an explosive or a dangerous or harmful substance or thing;(see s 471.10(1)(b)(i))
- Sending by post a message that a bomb or other dangerous or harmful substance or thing, has been or will be left in a particular place; (see s 471.10(1)(b)(ii)) and
- Using the phone, fax or email to communicate a message that a bomb or other dangerous or harmful substance or thing, has been or will be left in any place. (see s 474.16)

These existing hoax offences deal with conduct which is likely to induce fear, anxiety and/or panic and which is also likely to cause inconvenience to police and emergency services and may result in a costly waste of time and resources.

The Law Council expressed concern that the proposed new hoax offence went beyond this and would potentially capture the dissemination of misinformation and propaganda about events abroad. For example, it might capture false claims that Hamas¹⁸⁰ had captured and destroyed an Israeli tank, or that the PKK¹⁸¹ had shot and killed members of the Turkish security forces, or that dissident ethnic Uyghers¹⁸² had destroyed a police outpost in Xinjiang province, China.

While the dissemination of inaccurate information of this type ought to be discouraged, it is not the appropriate target of a hoax offence. It is unlikely to cause fear and alarm or to make demands on police or emergency service providers in any way.

For that reason, the Law Council submitted that the proposed offence provision should be narrowed by:

1. Limiting the provision to conduct designed to induce a false belief about a terrorist act which has been committed, is being committed or will be committed in Australia; and
2. Adding a further element to the offence which requires that a person must engage in the relevant conduct with the intention of inducing fear in another person or persons or with the intention of inducing a response from police or emergency services.

The Law Council submitted that amendments of this kind would focus the provision on the type of conduct sought to be discouraged, prevented and punished.

The hoax offence was not pursued in the *NSLA Bill*.

¹⁸⁰ Hamas is a Palestinian Islamist Resistance Movements, see <http://news.bbc.co.uk/2/hi/1654510.stm>

¹⁸¹ The PKK is the Kurdistan Workers Party, see <http://www.pkkonline.com/en/>

¹⁸² The Uyghers are an ethnic minority in China, who are seeking independence, see <http://uyghuraustralia.org/aboutuyghurs.html>

3.3.4 Law Council Recommendations

In addition to the above recommendations relating to the definition of terrorist act, the Law Council recommends that:

- the Government repeal Schedule 1 of the *Anti-Terrorism (No1) Act 2005* and reintroduce the preposition 'the' before 'terrorist act' in sections 101.2, 101.4, 101.5, 101.6 of the *Criminal Code*;
- the Monitor review the necessity and effectiveness of the offences in sections 101.2, 101.4, 101.5 and 101.6 of the *Criminal Code* and consider whether those offences should be repealed; and
- the Government not proceed with the new hoax offence proposed in the National Security Legislation Discussion Paper,

3.4 Financing Terrorism

3.4.1 What measures were introduced and why?

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

Schedule 1 of the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* (Cth) inserted Division 400 into the *Criminal Code*, replacing pre-existing money laundering offences in sections 81 and 82 of the *Proceeds of Crime Act 1987* (Cth). The Division 400 provisions were added to the *Criminal Code* to reflect the serious nature of money laundering offences and to implement the recommendations made by the ALRC in its report *Confiscation that Counts*.¹⁸³ The money laundering offences in Division 400 make it an offence for a person (whether an individual or corporation) to:

- receive, possess conceal or dispose of money or property;
- import into or export from Australia money or property;
- engage in banking transactions with any money or property;

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

The *Suppression of the Financing of Terrorism Act 2002* (Cth) (the *SFT Act*) was also enacted in 2002 to implement Australia's international legal obligations under the *International Convention on the Suppression of the Financing of Terrorism* and UN Security Council resolutions 1267 and 1373. It also responded to the international Financial Action Task Force (FATF) recommendations on terrorist financing.¹⁸⁴

The *SFT Act* amended the *Extradition Act 1988* (Cth), the *Financial Transaction Reports Act 1988* (Cth), the *Mutual Assistance in Criminal Matters Act 1987* (Cth), and the *UN Charter Act* and created a new offence in section 103.1 of the *Criminal Code* in relation to financing terrorism.

¹⁸³ Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (ALRC 87) (June 1999) available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/87/>

¹⁸⁴ See <http://www.fatf-gafi.org/>

In 2005 an additional 'financing a terrorist' offence was inserted into section 103.2 of the *Criminal Code*.¹⁸⁵ That same year, the term 'the terrorist act' was changed to 'a terrorist act', removing the requirement that the prosecution prove that the person was engaged in financing a specific terrorist act.¹⁸⁶

Under section 103 of the *Criminal Code* it is an offence to:¹⁸⁷

- provide or collect funds being reckless as to whether the funds will be used to facilitate or engage in a terrorist act (imprisonment for life) (section 103.1);¹⁸⁸
- intentionally make funds available to another person or collect funds for another person, whether directly or indirectly, being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act (imprisonment for life) (section 103.2).¹⁸⁹

A person will commit one of the above offences even if:

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

In 2006 the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (*AML/CTF Act*) was passed. This legislation is aimed at the financial sector, the gambling sector and bullion dealers, and any other professionals or businesses that provide particular 'designated services'.¹⁹⁰ This legislation represents the first stage of the Australian Government's anti-money laundering reform agenda. The *AML/CTF Act* imposes a number of obligations on businesses when they provide designated services. These obligations include:

- customer due diligence, including verification of identity and ongoing monitoring of transactions;
- reporting, including suspicious matters, threshold transactions and international funds transfer instructions; and
- record keeping.¹⁹¹

The *AML/CTF Act* sets out general principles and obligations. Details of how these obligations are to be carried out are set out in subordinate legislative instruments known as the *AML/CTF Rules*. These obligations are monitored and enforced by the Australian Transaction Reports and Analysis Centre (AUSTRAC).

¹⁸⁵ *Anti-Terrorism Act (No 2) 2005* (Cth).

¹⁸⁶ *Ibid.*

¹⁸⁷ Each offence applies the fault element of intention to the actual provision, collection, the making of funds available or collection of funds on behalf of another. The fault element that applies to the connection between the conduct to acts of terrorism is the lower threshold of 'recklessness'. Chapter 2 of the *Criminal Code* defines the fault elements of 'intention', 'knowledge', 'recklessness' and 'negligence'. Recklessness requires awareness of a substantial risk that the result will occur and, having regard to the circumstances known to the person, it is unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact.

¹⁸⁸ *Criminal Code Act 1995* (Cth) s103.1.

¹⁸⁹ *Criminal Code Act 1995* (Cth) s103.2.

¹⁹⁰ 'Designated services' is defined in *Anti-Money Laundering/Counter Terrorism Financing Act 2006* (Cth) s 6.

¹⁹¹ See for example *Anti-Money Laundering/Counter Terrorism Financing Act 2006* (Cth) Parts 2-4.

The second stage of the reforms (to be introduced at a later date) will apply to a range of designated services provided by accountants, lawyers, real estate agents, jewellers and trust and company service providers.

3.4.2 Law Council Concerns

For the purposes of this paper, the Law Council's concerns primarily relate to the financing terrorism offences introduced into section 103 of the *Criminal Code*.¹⁹²

When the *SFT Act* was introduced into Parliament the Law Council raised a number of concerns with the new offence provisions.¹⁹³ The Law Council's key concerns relate to the broad and imprecise nature of the offences and that they go further than what is required by the international instruments they were introduced to implement.

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

When introducing this new offence, the then Government stated that section 103.1 implements article 2 of the *Convention for the Suppression of the Financing of Terrorism* and paragraph 1(b) of United Nations Security Council resolution 1373, and draws on the language used in those international instruments.¹⁹⁴

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

Further, paragraph 1(b) of UN Security Council resolution 1373, provides that State parties shall:

*Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.*¹⁹⁵

¹⁹² It should be noted that the Law Council continues to engage in extensive advocacy in the area of anti-money laundering, however this advocacy is primarily directed at the impact of these reforms on the duties, obligations and practices of the legal profession. See for example Law Council of Australia Submission to Attorney-General's Department, *Anti-Money Laundering Law Reform Issues Paper 5: Legal Practitioners, Accountants and Company and Trust Service Providers* (19 March 2004); Law Council of Australia Submission to Minister for Justice and Customs, *Anti-Money Laundering and Counter-Terrorism Financing Exposure Draft Bill, Draft Rules and Guidelines and Supporting Information* (2 May 2006); Law Council of Australia Submission to Senate Legal and Constitutional Affairs Committee, *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* (17 November 2006); Law Council of Australia Submission to Attorney General's Department, *Tranche Two Anti-Money Laundering Legislation* (6 September 2007).

¹⁹³ See Submission by the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (April 2002).

¹⁹⁴ Explanatory Memorandum to the *Suppression of Financing of Terrorism Bill 2002* (Cth) available at http://www.austlii.edu.au/au/legis/cth/bill_em/sotfotb2002453/memo1.html.

¹⁹⁵ UN Security Council Resolution 1373 (2001) 28 September 2001 at para 1(b).

Accordingly, unlike the offence in section 103.1, both international instruments contain a clear requirement of specific intent.

The Law Council also expressed similar concern at the introduction of the 'financing a terrorist' offence in section 103.2 of the *Criminal Code* in 2005.¹⁹⁶ Under section 103.2 it is an offence to intentionally make funds available to another person or collect funds (whether directly or indirectly) for or on behalf of another person reckless as to whether the funds will be used by that person to facilitate or engage in a terrorist act. The offence is committed notwithstanding that no terrorist act occurs, that the funds will not be used for a specific terrorist act, or that they will be used for a number of terrorist acts.

There is a risk that confusion arising as a result of the scope and purpose of these provisions may adversely impact on charitable giving.

In its 2006 Report, the PJCIS expressed some concern with the current breadth of the offence in section 103 and recommended that:

- section 103.1(a) be amended by inserting 'intentionally' after 'the person';
- recklessness be replaced with knowledge in paragraph 103.1(b); and
- paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.¹⁹⁷

In its response to the recommendations contained in this report, the then Government indicated that it did not support these recommendations.¹⁹⁸

3.4.3 Law Council Recommendations

In respect of Division 103 of the *Criminal Code*, the Law Council recommends that the Government:

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

3.5 Terrorism Offences and Bail

Accompanying the introduction of new terrorism offences were moves to reform criminal procedure, in particular bail.

¹⁹⁶ See Law Council of Australia Submission to Independent National Security Legislation Monitor, *Financing Terrorism Offences*, 2 August 2013, available from http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2748 - Financing_Terrorism_Offences.pdf. See also, Law Council Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into Anti-Terrorism (No 2) Bill 2005* (11 November 2005).

¹⁹⁷ Parliamentary Joint Committee on Intelligence and Security. Review of Security and Counter-Terrorism Legislation (Tabled 4 December 2006) Recommendation 21, note 16.

¹⁹⁸ Australian Government response to PJCIS Review of Security and Counter-Terrorism Legislation - December 2008, Tabled 4 December 2006, available at:

<http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Government%20response%20to%20the%20review%20of%20security%20and%20counter-terrorism%20legislation.pdf>

In 2004 the *Anti Terrorism Bill 2004* (Cth) was introduced to provide 'important measures to improve Australia's counter-terrorism legal framework'.¹⁹⁹ This included amending the *Crimes Act* to 'provide a national solution to bail issues for persons charged with terrorism offences, and certain other offences that are relevant to terrorist activity'.²⁰⁰

In 2004 the *Anti-Terrorism Act 2004* (Cth) was passed, introducing s15AA into the *Crimes Act*.

Section 15AA of the *Crimes Act* provides that if a person is charged with a terrorist offence,²⁰¹ or a Commonwealth offence resulting in the death of a person,²⁰² a bail authority must not grant bail to the person charged unless the bail authority is satisfied that *exceptional circumstances* exist to justify bail.

Section 15AA runs counter to the long held presumption in Australian criminal law in favour of bail.²⁰³ In respect of most criminal charges, the person charged is entitled to be released on bail unless the police demonstrate to the court particular grounds on which bail should be refused.²⁰⁴

In November 2010, section 15AA was further amended by the *NSLA Act* to provide that, even where exceptional circumstances are established and bail is granted in a terrorism case, the grant of bail will be stayed for up to three days if the prosecution indicates an intention to appeal.

3.5.1 Law Council Concerns

- No justification for displacement of presumption in favour of bail

The Law Council's main concern with the introduction of section 15AA was the Government's failure to demonstrate why the reversal of the long held presumption in favour of bail was necessary to aid in the investigation or prosecution of terrorism related offences.

No evidence was put forward, for example, to suggest that persons charged with terrorism offences are more likely to abscond while on bail, re-offend, threaten or intimidate witnesses or otherwise interfere with the investigation

As noted, prior to the introduction of s15AA, the existing bail provisions already provided the court with the discretion to refuse bail on a range of grounds, and to take into account the seriousness of the offence in considering whether those grounds are made out. No reason was given as to why these existing provisions were inadequate to guard against any perceived risk to the community in terrorism cases. Rather, the new provision simply assumed that the restriction of liberty will be necessary when a person is charged with a terrorist-related offence.

¹⁹⁹ Australian Government, Australian National Security Website available at <http://www.nationalsecurity.gov.au/>

²⁰⁰ *ibid.*

²⁰¹ In this section 'terrorism offence' means a terrorism offence (other than an offence against section 102.8 of the Criminal Code).

²⁰² A relevant Commonwealth offence causing the death of a person is described in subsection 15AA(2)(b)-(d).

²⁰³ At common law an accused has a prima facie right to be at liberty until conviction, see *R v Light* [1954] VLR 152; *R v Wakefield* (1969) 89 WN Pt 1 (NSW).

²⁰⁴ For example, the *Bail Act 1978* (NSW) prescribes a general rule that persons have a right to release on bail for minor offences (see s8) and are entitled to a presumption in favour of bail for most offences (see s9), although there are a number of offences which are exceptions to this presumption. Generally, the court retains the discretion to refuse bail where the court is satisfied that detention of the accused is necessary to protect witnesses or preserve evidence, to protect the community from the commission of further offences or to ensure that the accused does not abscond prior to trial. See for example, *Bail Act 1978* (NSW) s32.

This unfounded assumption was reinforced by the comments of the former Attorney-General, the Hon Philip Ruddock MP in the Haneef case.²⁰⁵ The Haneef case involved an Indian born doctor, Mohamed Haneef, who was working in Australia on a temporary work visa when he was arrested and detained on suspicion of involvement in a series of failed terrorist attacks in London and Glasgow in 2007. Following 12 days in detention without charge, Dr Haneef was charged with providing support to a terrorist organisation. He immediately applied for and was granted bail.

Following Magistrate Payne's decision to grant Dr Haneef bail and another unrelated decision in which bail was granted in a terrorism case, the then Attorney-General suggested that there may be a need to tighten bail laws further.²⁰⁶

The then Attorney-General's position appeared to be that, if bail was granted in terrorism cases, the law was not being applied correctly or it was inadequate to fulfil its purpose. This position assumes that the only acceptable course is for all defendants in terrorism cases to be detained awaiting trial.

Such a view is entirely inconsistent with the presumption of innocence. It presumes that defendants in terrorism cases, regardless of their individual circumstances, must be, because of the nature of the accusation against them, likely to re-offend, likely to interfere with witnesses or other evidence, a threat to the community or a flight risk.

- Requirement to prove 'exceptional circumstances' undermines fair trial rights of the accused

The use of section 15AA to date illustrates the high hurdle applicants must overcome before bail is granted and the manner in which the reversal of the presumption in favour of bail can jeopardise the fair trial rights of the accused, including the right to be tried without undue delay.²⁰⁷

The issue of whether lengthy delay between arrest and trial can amount to exceptional circumstances has attracted particular judicial consideration. For example, in *R v Vinayagamoorthy & Yathavan*²⁰⁸ Bongiorno J found that the considerable delay experienced by the accused as a result of the lengthy investigation period, coupled with a number of other factors, amounted to exceptional circumstances. His Honour observed:

The investigation process has taken almost two years to date. Neither of the accused have done anything to hinder that process or that investigation. Indeed, the material before the Court would suggest that they have co-operated.

Taking these considerations together with the evidentiary and other difficulties which the Crown must face in proving at least some of the allegations against them, the inevitable delay which will be incurred in finalising this matter, the ties to the jurisdiction which these men have, the lack of any evidence to

²⁰⁵ Dr Haneef was charged with intentionally providing resources to a terrorist organization contrary to section 102.7 of the *Criminal Code*. The particulars of this charge were intentionally providing resources, namely a subscriber information module (SIM) card to a terrorist organisation consisting of a group of persons including Sabeel Ahmed and Kafeel Ahmed, being reckless as to whether the organisation was a terrorist organisation. In the Haneef application, Magistrate Payne considered the requirement of section 15AA and was satisfied that the cumulative effect of a number of factors meant that exceptional circumstances existed in favour of bail. On 16 July 2007 Dr Haneef was granted bail with sureties amounting to \$10,000.

²⁰⁶ ABC Television 'Ruddock hints at tougher anti-terrorism laws', *Lateline*, 18 July 2007. Available at: <http://www.abc.net.au/lateline/content/2007/s1982170.htm>

²⁰⁷ This right is protected by article 14(3)(c) of the *International Covenant of Civil and Political Rights* ('ICCPR').

²⁰⁸ Aruran Vinayagamoorthy and Sivarajah Yathavan were charged with three terrorist organisation offences under the *Criminal Code*. They were granted bail on the grounds that exceptional circumstance were shown. See *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* [2007] VSC 265 at [19]-[20].

*support any allegation that they may commit offences or interfere with witnesses (whoever those witnesses might be) and their previous good character, there are exceptional circumstances in this case which justify the making of an order admitting each of them to bail.*²⁰⁹

Similarly, in the case of *R v Kent*, it was argued that the time Mr Kent had already spent in custody and the delay he faced before re-trial was so considerable that it amounted to exceptional circumstances. Bongiorno J accepted this submission and granted bail.²¹⁰

However, in the case of *Ezzit Raad*, Bongiorno J was not convinced that considerable delay amounted to exceptional circumstances:

*It has been a long time since Raad was arrested and may still be many months before the case against him is concluded. But having regard to the complexities of it as they have now emerged it cannot be said that that circumstance is, in this case, exceptional. Terrorism cases are going to be, of their nature, long and involved. So much has become clear, even from the relatively little experience of such cases in this country to date. Nor does Mr Raad's health combined with the circumstances of his detention and the delay to which I have referred together make up the exceptional circumstances necessary to overcome the statutory presumption against bail.*²¹¹

Nor was the evidence before the court that the accused (and his co-accused) were being held in particularly harsh conditions of detention sufficient to amount to 'exceptional circumstances'. Bongiorno J observed:

*The court has heard and accepted evidence in other cases that the conditions in the Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.*²¹²

A similar result followed an application for bail by co-accused Shoue Hammoud²¹³ and Amer Haddara.²¹⁴

These cases suggest that significant delays between arrest and trial, even when coupled with particularly harsh conditions of detention, may not be enough to give rise to exceptional circumstances and justify a grant of bail pursuant to section 15AA.

The Law Council's concerns with section 15AA were shared by the UNHRC in its Concluding Observations on Australia's human rights performance. The UNHRC expressed particular concern that section 15AA operates to reverse the burden of proof contrary to the right to be presumed innocent and fails to define the "exceptional circumstances", required to rebut the presumption against bail. The UNHCR recommended that Australia ensure that its counter-terrorism legislation and practices are

²⁰⁹ *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* [2007] VSC 265 at [19]-[20].

²¹⁰ *Kent v R* [2008] VSC 431 at [14]

²¹¹ *Raad v DPP* [2007] VSC 330 at [13]. Mr Raad was one of 12 accused tried by jury in the Benbrika trials, described earlier in this paper.

²¹² *Ibid*, at [6].

²¹³ *Hammoud v DPP* [2006] VSC 516

²¹⁴ *Haddara v DPP* [2006] VSC 8.

in full conformity with the ICCPR and ensure that the notion of 'exceptional circumstances' does not create an automatic obstacle to release on bail.²¹⁵

- 72 hour stay of bail

Under sub-sections 15AA(3C) and (3D), even where a person charged with a terrorism offence is granted bail, he or she may be detained in custody for up to three days if the prosecution notifies an intention to appeal the bail decision.

In the Law Council's view, this provision to automatically stay a grant of bail for up to 72 hours does not approach the denial of a person's liberty with the requisite degree of seriousness. Detention should never be the default position.

If a person has successfully satisfied the bail authority that there are exceptional circumstances which warrant his or her release, he or she should not be denied the benefit of that decision, even for three days.

The Law Council has advocated that if the Government has concerns about the capacity of bail authorities at certain levels to hear and determine bail applications in terrorism cases, the appropriate response would be to amend the legislation to be more prescriptive about the level of judicial officer to whom a bail application may be made. The Government should not confer authority on an officer to make a bail decision, but then reserve the right to have it set aside if it notifies an intention to appeal.

3.5.2 Law Council Recommendations

In respect of section 15AA of the *Crimes Act 1914*, the Law Council recommends that:

- The presumption against the grant of bail in terrorism cases should be repealed; and
- There should be no provision for a grant of bail to be stayed if the prosecution notifies an intention to appeal.

3.6 Sedition Offences

3.6.1 What measures were introduced and why?

Sedition is a political crime that punishes writing or behaviour intended to encourage rebellion or resistance against the established political and legal order. Traditional sedition crimes were enshrined in Australian laws before federation and inserted into the *Crimes Act* in 1920.²¹⁶ For example, the *Crimes Act* criminalised seditious behaviour that intended to: (i) bring the government into hatred or contempt; (ii) excite disaffection against the government, constitution, UK parliament and King's Dominions; and (iii) bring about change to those institutions unlawfully.²¹⁷

²¹⁵ UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 19 February 2008, CCPR/C/AUS/5, [11].

²¹⁶ *War Precautions Act 1914* (Cth).

²¹⁷ *Crimes Act 1914* (Cth) ss 24C and 24D. The *Crimes Act* was further amended in 1926 to prohibit 'unlawful associations' that advocated or encouraged the doing of any act purporting to have as an object the carrying out of a seditious intention. The *Anti-Terrorism Act (No 2) 2005* repealed the old sedition offence in s 24A of the *Crimes Act* and replaced it with five new offences, now found in s 80.2 of the *Criminal Code* (Cth).

In recent times, many have argued that sedition offences are 'archaic' and 'defunct', and unnecessary in a modern political democracy.²¹⁸ However, following the terrorist attacks in the US on 11 September 2001, Bali on 12 October 2002, Madrid on 11 March 2004 and London on 7 July 2005 the need to criminalise sedition was reconsidered.²¹⁹

Following a Special Meeting of the Council of Australian Governments (COAG), convened on 27 September 2005 by former Prime Minister John Howard to discuss the risks of a terrorist attack occurring in Australia, the Commonwealth, State and Territory leaders agreed in principle to cooperate in matters of counter-terrorism and to introduce a common package of legislative measures.²²⁰ State and Territory leaders agreed with the Commonwealth that the *Criminal Code* should be amended in a number of respects, including in the area of sedition.

Following this COAG agreement, the *Anti-Terrorism Bill (No 2) 2005* (Cth) was introduced into Parliament on 3 November 2005. Among other significant reforms,²²¹ Schedule 7 of the Bill included the modernisation of sedition offences by replacing them with a suite of five offences built around the basic concept of prohibiting a person from 'urging' others to use 'force or violence' in a number of prescribed contexts—and with a specific defence of 'good faith'.

In his Second Reading Speech, the then Attorney-General said that the 'updated sedition offence would address problems with those who incite violence directly against other groups within our community'.²²² The Attorney also said that the sedition amendments were modernising the language of the provisions and were not a wholesale revision of the sedition offence'.²²³

On 3 November 2005, the Senate referred the provisions of the *Anti-Terrorism Bill (No 2) 2005* (Cth) to the Senate Legal and Constitutional Legislation Committee for inquiry. The Committee's report made 51 recommendations for amendments to the Bill, with a final recommendation to pass the Bill if the Committee's recommendations were taken up by the Government.²²⁴

²¹⁸ For example in 1991, the Committee of Review of Commonwealth Criminal Law chaired by former Chief Justice Sir Harry Gibbs (the Gibbs Committee) considered the sedition provisions in the *Crimes Act*. The Gibbs Committee expressed the view that those provisions were couched in archaic language and required modernisation and simplification—but should then be retained in the *Crimes Act*. The Gibbs Committee also recognised Australia's international obligations under art 20 of the *International Covenant on Civil and Political Rights 1966* and art 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* to prohibit incitement to national, racial and religious hatred. See H Gibbs, R Watson and A Menzies, Review of Commonwealth Criminal Law: Offences Relating to the Security and Defence of the Commonwealth, Discussion Paper No 8 (1988); H Gibbs, R Watson and A Menzies, Review of Commonwealth Criminal Law: Fifth Interim Report (1991). For a short history of the law of sedition in Australia see Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104) delivered to the Attorney-General on 31 July 2006 and tabled in federal Parliament on 13 September 2006 (ALRC Sedition Report) at [1.1] – [1.20].

²¹⁹ ALRC Sedition Report at [1.9], note 181.

²²⁰ At the end of the meeting a communiqué was issued setting out the agreed outcomes of the discussions. See Council of Australian Governments (COAG) Communiqué, Special Meeting on Counter-Terrorism (27 September 2005) http://www.immi.gov.au/media/publications/multicultural/pdf_doc/coag270905.pdf. Apart from the inherent desirability of developing an integrated, national approach to counter-terrorism, one of the underlying reasons for convening the Special Meeting of COAG was that inter-jurisdictional cooperation was needed because most aspects of criminal law and police powers fall to the states and territories under the Australian Constitution. For example, because of constitutional constraints, the Commonwealth could not itself enact such measures as: (a) preventative detention of suspected terrorists; and (b) stop, question and search powers in areas such as transport hubs and places of mass gatherings.

²²¹ For example the expansion of the grounds for the proscription of terrorist organisations to include organisations that 'advocate' terrorism (Schedule 1); a new offence of financing terrorism (Schedule 3); a new regime to allow for the imposition of 'control orders' that place restrictions on the movements and associations of a person suspected of involvement in terrorist activity, (Schedule 4); and a new preventative detention regime to allow police to detain a person without charge (Schedule 4).

²²² Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, (Attorney-General), at p.103.

²²³ *Ibid*

²²⁴ Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [2.7]. Most recommendations had substantial cross-party support, although a dissenting report was filed by Greens Senators

In relation to the proposed sedition laws, the Committee recommended that Schedule 7 (which introduced the new sedition offences into division 80 of the *Criminal Code* be removed from the Bill in its entirety.²²⁵

While the Government accepted a number of the recommendations in the Committee's report, the Government did not remove the offence provisions in Schedule 7 from the Bill. Instead, some recommended changes were made to the wording of the offences and the defence in Schedule 7, and the provisions, with acknowledged flaws, were passed in November 2005 with a commitment to review them post-enactment.²²⁶

Accordingly, just three months later, the newly introduced sedition provisions were referred to the ALRC for review.²²⁷ Unsurprisingly, the ALRC's report identified a number of concerns with the provisions as passed, similar to those identified in the Senate Committee's original report. For example, the ALRC stated that 'the offences in section 80.2(7)–(8) were inappropriately broad' and recommended that they be repealed.²²⁸

It was not until November 2010, however, with the passage of the *NSLA Bill*, that the provisions were amended to address some of the concerns identified by the ALRC.

3.6.2 The Urging Violence Offences

Following the passage of the *NSLA Act*, Division 80 of the *Criminal Code* now provides for the following sedition offences, renamed 'urging violence' offences:

- Intentionally urging another person to overthrow, by force or violence, the *Australian Constitution*, the Government of the Commonwealth, a State or a Territory, or the lawful authority of the Commonwealth Government, with the intention that force or violence will occur;
- Intentionally urging another person to interfere by force or violence, with lawful processes for an election of a member or members of a House of the Parliament, or a referendum, with the intention that force or violence will occur;
- Intentionally urging another person or group to use force or violence against a group distinguished by race, religion, nationality, ethnic origin or political opinion, with the intention that force or violence will occur and the use of force or violence would threaten the peace, order and good government of the Commonwealth;
- Intentionally urging another person or group to use force or violence against a group distinguished by race, religion, nationality, ethnic origin or political opinion, with the intention that force or violence will occur;
- Intentionally urging another person or group to use force or violence against a targeted person because of a belief that the targeted person is a member of a group distinguished by race, religion, nationality, national or ethnic origin, or

Bob Brown and Kerry Nettle. Additional comments were supplied by Labor Senator Linda Kirk and additional comments and a partial dissent were supplied by Australian Democrats Senator Natasha Stott Despoja.

²²⁵ Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), Recommendation No 25.

²²⁶ Second Reading Speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (P Ruddock—Attorney-General), 103. On 1 March 2006, the Attorney-General signed Terms of Reference asking the ALRC to conduct a review of the operation of Schedule 7 of the *Anti-Terrorism Act (No 2) 2005 (Cth)* and Part IIA of the Crimes Act, with respect to the recently amended provisions dealing with the offence of sedition and related matters, and to report by 30 May 2006.

²²⁷ ALRC Sedition Report, note 181.

²²⁸ ALRC Sedition Report at [3.29], note 181.

political opinion, intending that force or violence will occur and the use of force or violence would threaten the peace, order and good government of the Commonwealth;

- Intentionally urging another person or group to use force or violence against a targeted person because of a belief that the targeted person is a member of a group distinguished by race, religion, nationality, national or ethnic origin, or political opinion, intending that force or violence will occur.

Section 80.3 of the *Criminal Code* provides for specific defences to these offences where the acts in question were done in 'good faith'. Under section 80.3, comments made in good faith, such as comments that point out mistakes in government policy, or urge people lawfully to change laws or policies, will not constitute an offence under the urging violence provisions. Section 80.3(1)(f) also allows the publication in good faith of a report or commentary about a matter of public interest.

In deciding whether an act was done in good faith, the court may look to matters such as whether the act was done with a purpose intended to be prejudicial to the safety or defence of the Commonwealth, to assist an enemy of Australia, or with the intention of causing violence or creating public disorder or a public disturbance.²²⁹

The maximum penalty for an offence under Division 80 is seven years imprisonment.

3.6.3 Law Council Concerns

The introduction of the *Anti-Terrorism Act (No 2) 2005* (Cth) generated considerable community debate critical of the introduction of the new sedition offences. The Law Council made its concerns with the new offences known to both the Senate Committee and the ALRC and engaged in extensive advocacy on this issue.²³⁰

The subsequent amendments made to the sedition offences by the *NSLA Act* greatly assisted in narrowing and clarifying the scope of the provisions, for example by:

- Inserting a new requirement in subsections 80.2(1) and (3) that in order to trigger the offence provision a person must have *intentionally* urged the relevant conduct – e.g. the overthrow of the Government by force/violence; the interference with elections by force/violence; or the use of force/violence against a targeted group or member of that group.
- Repealing subsections 80.2(7) and 80.2(8) which previously made it an offence to urge a person to engage in conduct which would assist an enemy at war with Australia or a country or organisation engaged in hostilities with Australia. The Law Council had submitted that these provisions lacked appropriate precision and were redundant in view of the treason provisions.
- The repeal of section 80.5 which previously provided that a prosecution could not be commenced without the consent of the Attorney-General.

²²⁹ *Criminal Code Act 1995 (Cth)* s 80.3

²³⁰ For example see Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism (No. 2) Bill 2005* (11 November 2005); Law Council of Australia Media Release, 'Legal Profession Opposes Anti-Terror Bill' (2 November 2005); Law Council of Australia Submission to the Australian Law Reform Commission, *Review of Sedition Laws* (19 July 2006). A number of the Law Council's constituent bodies also engaged in advocacy on this issue, see for example Law Institute of Victoria Submission, *Australian Law Reform Commission Review of Sedition Laws* (28 June 2006).

Nonetheless, despite these reforms the Law Council has ongoing concerns about the urging violence offences in Division 80 of the *Criminal Code*. These concerns can be summarised as follows:

- The offences in Division 80 are unnecessary.

The Law Council is of the view that the urging violence offences in Division 80 of the *Criminal Code* are unnecessary and should ultimately have been repealed rather than reformulated. The type of conduct sought to be targeted is already adequately covered by the ancillary offences set out in Part 2.4, Division 11 of the *Criminal Code* which deals with inciting, conspiring, aiding, abetting, counselling and procuring an offence.

For example, under subsection 11.4(1) of the *Criminal Code* a person who urges the commission of an offence, such as a person who urges another to commit or prepare for a terrorist act, is guilty of the offence of incitement.

To date no one has been prosecuted for an offence under Division 80 of the *Criminal Code*. This lack of use indicates that the provisions may be unnecessary.

- The offences have a corrosive impact on free speech and expression in Australia

The Law Council is also concerned that, in addition to being unnecessary, the urging violence offences, by their very nature, have the potential to unduly burden freedom of expression and may have the effect of chilling legitimate political debate.

The mere existence of the urging violence offences has the effect of making people cautious about publishing material that may potentially be regarded as 'urging violence', even where there is no attempt to prosecute or no successful prosecution. This chilling effect not only encourages self-censorship on the part of writers, artists and others, but may inspire editors, publishers, curators, sponsors and funding bodies to withdraw the support necessary for artists and writers to gain exposure for their endeavours.²³¹

The existence of the 'good faith defence' does little to appease these concerns. The fact that a court may exercise its discretion to find that a particular act that attracted a charge of urging violence falls within the limited 'good faith' exception after the fact, does not dilute the fear of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the urging violence offences.

- The anti-vilification offences in sections 80.2A and 80.2B do not belong in Division 80 of the Criminal Code.

With the insertion of sections 80.2A and 80.2B, the *NSLA Act* introduced four new offences into the *Criminal Code*. These offences relate to the urging of violence against a group which is distinguished by race, religion, nationality, national or ethnic origin or political opinion or against an individual based on a belief that he or she is a member of such a group. The new offences replaced a similar, but narrower offence, in subsection 80.2(5) of the *Criminal Code*.

The Law Council opposed the introduction of these new offence provisions on the basis that they should not be co-located in the *Criminal Code* with the treason and urging violence offences.

²³¹ This view was shared by the Senate Legal and Constitutional Legislation Committee, see Report of the Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005* at [5.169].

The offences in 80.2A and 80.2B are of a different character and do not relate to political dissent or acts of violence directed towards the Government and its institutions. Unlike the offence they replaced, the new offences are not even focused on intergroup violence but may involve the urging of violence by one individual against another. Further, two of the new offences do not require that “the use of force or violence would threaten the peace, order and good government of the Commonwealth”. In those respects, these offences are even harder to categorise as ‘public order offences’ than the offence they replaced.

In the Law Council’s view, if these offences are to be included in the *Criminal Code* they should be in a separate Division dealing with anti-vilification laws.

Currently, because these offences have not been directly formulated as anti-vilification laws and have instead been designed to fit, however unsuccessfully, in Division 80, they contain a strange mix of elements, some of which are inappropriate for anti-vilification offences.

For example, the Law Council submits that the requirement that “the use of force or violence would threaten the peace, order and good government of the Commonwealth” should not be an element of an anti-vilification offence and would create an unnecessary additional hurdle to successful prosecution.

Further, it is arguable that it is inappropriate for these offences to cover the targeting of a group or a member of a group that is distinguished by political opinion. Protection of groups defined by political opinion is beyond the scope of traditional anti-vilification laws.

Finally, the Law Council questions whether it is appropriate that a good faith defence should be available for these offences. It is difficult to envisage what type of good faith justification could legitimately exist for conduct undertaken with the *specific intent* of urging a person to use force or violence against another person with the further intention that such force or violence will occur.

Essentially, it is the Law Council’s view that a separate and more detailed review of these provisions is required outside of the national security legislation framework. The proper content and scope of federal anti-vilification laws, particularly in light of Australia’s international obligations under the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and the ICCPR, is not a matter which can be properly addressed as a side issue to the broader anti-terror law debate.

3.6.4 Law Council Recommendations

In relation to Part 5.1, Division 80 of the *Criminal Code* (urging violence offences), the Law Council recommends that the Government should:

- Repeal the urging violence offences in Division 80.
- If the recommendation is not adopted, that the Government:
 - Amend section 80.2 to require knowledge to be proven in relation to the physical elements of the offences in section 80.2.
 - Provide an exemption to the offences in section 80.2 for statements made for journalistic, educational, artistic, scientific, religious or public interest purposes.
 - Place sections 80.2A and 80.2B in a separate Division dealing with anti-vilification laws.
 - Subject the urging violence offences in Division 80 to regular, independent review.

4. Terrorist Organisations

4.1 What measures were introduced and why?

Following the terrorist attacks in the US in September 2001, nation States found themselves under growing international pressure to take action to combat terrorism, including taking action to combat terrorist organisations.²³²

On 18 December 2001, the then Attorney-General announced that, following an interagency review established in September 2001, Cabinet agreed that new counter-terrorism legislation and enhanced Commonwealth powers were needed to combat terrorism.²³³ As part of that new legislation, specific terrorism offences were created, as was a procedure for proscribing terrorist organisations.

The *SLAT Bill* and related Bills were subsequently introduced. The terrorist organisation provisions introduced by the *SLAT Bill* were said to be necessary to fill a gap in the existing legislative framework, (in particular the lack of criminal laws dealing with groups with religious or ideological motivations)²³⁴ despite the existence of laws outlawing specific associations in Part IIA of the *Crimes Act*.²³⁵

Like the other provisions introduced by the *SLAT Act*, the proscription of terrorist organisation provisions attracted considerable debate and aroused 'vehement opposition'.²³⁶ When it reviewed the relevant provisions of the *SLAT Bill* the Senate Committee on Legal and Constitutional Affairs recommended that the proscription provisions in Division 102 should not be enacted.²³⁷

This recommendation was not adopted and in 2002 the Bill was enacted, introducing a new Division 102 into the *Criminal Code* which included a definition of 'terrorist organisation', a system for proscribing organisations as terrorist organisations; and a range of related offences; including being a member of, recruiting for, or providing support for a terrorist organisation.

Since 2002 there have been several changes in the scope of the proscription power and the procedures that govern its exercise.²³⁸ In 2003 it was provided that a regulation proscribing an organisation would come into effect on the date it is lodged, rather than the day after the disallowance period, usually 15 days.²³⁹

In 2004 the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth):

²³² In addition to UN Security Council Resolution 1373, the UN Security Council passed a number of other resolutions particularly relevant to terrorist organisations. For example Resolution 1214 demands that the Taliban 'stop providing sanctuary and training for international terrorists and their organizations', United Nations. Security Council, Resolution 1214 (1998), S/RES/1214 (1998). Similarly, Resolution 1267 requires states to 'freeze funds and other financial resources including funds derived or generated from property owned or controlled directly or indirectly by the Taliban', United Nations. Security Council Resolution 1267 (1999), S/RES/1267 (1999).

²³³ Attorney-General "Upgrading Australia's Counter-Terrorism Capabilities" News Release, 18 December 2001.

²³⁴ Report of Senate Legal and Constitutional Legislation Committee, *Inquiry into Security Legislation Amendment Bill 2002*, (May 2002) p. 26 ; Attorney-General's Department Submission 383A, pp. 1-3.

²³⁵ See for example the Director General of Security's evidence to the Senate and Legal Constitutional Legislation Committee, Report of Senate Legal and Constitutional Legislation Committee *Inquiry into Security Legislation Amendment Bill 2002*, (May 2002) p. 25 ; Legal and Constitutional Legislation Committee Hansard, 19 April 2002, p. 166.

²³⁶ *Ibid* at pp.59-60.

²³⁷ *ibid*

²³⁸ For further discussion see Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the terrorist organisation listing provisions of the Criminal Code Act 1995* (20 September 2007) at [2.27]-[2.31].

²³⁹ See *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

- introduced a system whereby the Parliamentary Joint Committee on ASIO, ASIS (the Australian Security and Intelligence Service) and the DSD (the Defence Signals Directorate) (the PJCAAD, later renamed as the PJCIS) could review the making of any such regulation and report to each House of Parliament within the 'applicable disallowance period', thus enabling the report to inform the disallowance process;
- removed the requirement for the UN Security Council to have identified an organisation as a terrorist organisation before the Governor-General could make a regulation specifying the organisation as a 'terrorist organisation' in Australia.²⁴⁰ Instead, subsection 102.1(2) of the *Criminal Code* now provides that before the Governor-General can make such a regulation, the Minister must be satisfied 'on reasonable grounds' that the organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)';
- required the Minister to arrange a briefing for the Leader of the Opposition on any proposed regulation; and
- required the Minister to de-list an organisation if the Minister ceased to be satisfied that the entity met the statutory definition.

In 2005 the *Anti Terrorism Act (No.2) 2005* (Cth) extended the power to proscribe an entity to include organisations that 'advocate the doing of a terrorist act'. A definition of "advocates" was also inserted which included "directly praising the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act."

The 2005 Act also introduced a new offence into Division 102 making it illegal to associate with a terrorist organisation. At the time section 102.8 was introduced into the *Criminal Code*, the then Government considered the association offence to be necessary to address what was said to be the:

*...deplorability of the organisation itself by making associating with such organisations in a manner which assists the continued existence or expansion of the organisation illegal.*²⁴¹

In 2006, Division 102 was reviewed by the PJCIS which made a number of recommendations for reform. These included:

- that 'advocacy' as a basis for listing an organisation as a terrorist organisation be subject to further review;
- that the definition of "advocates" be amended so that only praise of terrorist activity that carried a *substantial* risk (rather than just any risk) of leading another to carry out a terrorist act would be captured.
- that the Government consider replacing the membership offence in s.102.3 with an offence of participation in a terrorist organisation, and consider whether participation should be expressly linked to the purpose of furthering the aims of the organisation;

²⁴⁰ Prior to the Security Legislation Amendment (Terrorism) Act 2003, before the Governor General could make a regulation specifying an organisation to be a terrorist organisation, the Minister was required to be satisfied that the Security Council of the UN had made a decision that a particular organisation was a terrorist organisation.

²⁴¹ See Explanatory Memorandum to the *Anti-Terrorism Bill (No 2) 2004*.

- that the training offence in s. 102.5 be redrafted to define more carefully the type of training targeted by the offence. Alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act;
- that it be a defence to the offence of receiving funds from a terrorist organisation in s. 102.6 that those funds were received solely for the purpose of the provision of representation in legal proceedings, and that the legal burden be reduced to an evidential burden;
- that the offence of providing support to a terrorist organisation in s.102.7 be amended to 'material support' to remove ambiguity; and
- that strict liability provisions applied to serious criminal offences that attract the penalty of imprisonment be reduced to an evidential burden.

The Law Council was disappointed that very few of the PJCIS recommendations were included in the *NSLA Act* in 2010. In fact, the only PJCIS recommendation that was adopted by the Government in relation to Division 102 was the insertion of 'substantial' before the word 'risk' in s. 102.1(1A)(c), so that an organisation may now only be listed as a terrorist organisation if it directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that it might have the effect of leading a person (regardless of his or her age or any mental impairment that he or she might suffer) to engage in a terrorist act.

In an attempt to explain the Government's decision not to implement more of the PJCIS's recommendations regarding Division 102, the then Attorney-General, the Hon Robert McClelland MP, stated that amendments to Division 102 of the *Criminal Code* were on hold because they would "*require the states to amend their legislation which referred power to the Commonwealth.*" The Government committed to "*continue to work closely with the states to progress these measures.*"²⁴² The Law Council expressed considerable doubt as to whether such amendments would require the prior amendment of the state referral legislation.²⁴³ Indeed, it was pointed out by the Gilbert + Tobin Centre of Public Law that:

- Prior to the enactment of the *Anti-Terrorism Act (No. 2) 2005* (Cth), the States were not required to amend their referral legislation so as to allow the Commonwealth to insert Division 104 (which establishes the control orders regime) into the *Criminal Code*;
- Section 100.8 of the *Criminal Code* establishes a mechanism for State approval of 'express amendments' to the anti-terror provisions of the Code which does not involve legislative action by the States but merely Executive assent;

²⁴² National Security Legislation Amendment Bill 2010, Second Reading Speech, House of Representatives, 18 March 2010 (the Hon Robert McClelland MP), available from <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-03-18%2F0039%22>

²⁴³ See Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010), p.10, available from <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2200-2299/2270%20National%20Security%20Legislation%20Amendment%20Bill%202010%20and%20Parliamentary%20Joint%20Committee%20on%20Law%20Enforcement%20Bill%202010.pdf>

- The relevant State referral legislation recognises that the Commonwealth may make amendments to the initial text using those legislative powers it holds aside from the State references; and
- The decision of the High Court in *Thomas v Mowbray*²⁴⁴ confirmed that the Commonwealth possesses substantial power under s.51(vi) of the Constitution (the defence power) to legislate with respect to terrorism and there is every reason to suspect that the proposed amendments to the anti-terror provisions of the *Criminal Code* would fall within the scope of this power, rendering resort to the referrals power unnecessary in any case.

Regardless of whether the Government's claims about the need for prior State legislative reforms are legally accurate, the fact remains that a number of key recommendations regarding required amendments to Division 102 remain outstanding and unaddressed.

4.2 Proscribing Terrorist Organisations

Terrorist organisations are defined and regulated under Division 102 of the *Criminal Code*.²⁴⁵

A 'terrorist organisation' is relevantly defined in section 102.1(1) of the *Criminal Code* as:

- (a) *an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or*
- (b) *an organisation that is specified by the regulations for the purposes of this paragraph*

This means that pursuant to Division 102 of the *Criminal Code* there are two ways for an organisation to be identified as a 'terrorist organisation'. Either an organisation may be found to be such an organisation by a court as part of the prosecution for a terrorist offence, or it may be specified in regulations, known as 'listing'.

The Law Council's concerns lie primarily with the process of proscription by regulation.

4.2.1 Proscription by Regulation

According to section 102.1(2), before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition above, the Attorney-General must be satisfied on reasonable grounds that the organisation to be listed:

- (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).*

An organisation 'advocates' the doing of a terrorist act if:

²⁴⁴ (2007) 233 CLR 307

²⁴⁵ Division 102 of the *Criminal Code* was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). It was subsequently amended in 2003 and 2004 by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) and the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

- (a) *the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*
- (b) *the organisation directly or indirectly provides instructions 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 substantial 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 s 7.3) that the person might suffer) to engage in a terrorist act.*

There are currently 18 organisations officially listed as ‘terrorist organisations’.²⁴⁶

The listing of an organisation ceases to have effect three years after listing, or if the Minister ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act, whichever occurs first.²⁴⁷

There are three main avenues of appeal available to an organisation listed by regulation under Division 102:

- Once listed an entity may apply to the Attorney-General for delisting, ‘on the grounds that there is no basis for the Minister to be satisfied that the listed organisation is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act.’²⁴⁸
- If de-listing is denied by the Minister, the entity has the opportunity, under the *Administrative Decisions (Judicial Review) Act 1977* (the *ADJR Act*), to have this decision reviewed. (It should be noted however that this review involves testing the legality of the decision rather than its merits.)²⁴⁹
- Each regulation may be reviewed by the PJCIS. The PJCIS may review a regulation proscribing an organisation within 15 sitting days of the regulation being laid before the House and make recommendations to Parliament about disallowing the regulation.²⁵⁰

Review of listed organisations by the PJCIS has occurred numerous times, providing an important form of external scrutiny of the Minister’s decision to list an organisation as a terrorist organisation.

²⁴⁶ For an up-to-date list of listed terrorist organisations, including when the organisations were listed and re-listed as terrorist organisations and for details as to their key objectives and activities, see the Australian Government’s National Security website at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>

²⁴⁷ *Criminal Code Act 1995* ss102.1(3), 102.1(4). The listing period was originally 2 years. However, s. 102.1(3) was amended by the National Security Legislation Amendment Act in 2010 to increase the period from 2 to 3 years

²⁴⁸ *Criminal Code Act 1995* s102.1(4).

²⁴⁹ ASIO has also advised the PJCIS that ‘the making of the regulation is subject to judicial review under section 75(v) of the Australian Constitution, and section 39B of the *Judiciary Act 1903*.’ However, this is not an avenue for merit review. See Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004, (16 June 2004). p. 9.

²⁵⁰ Section 102.1A of the *Criminal Code*. As part of its review the PJCIS may seek submissions from Australian members of the relevant organisation and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister’s decision was based. See for example Parliamentary Joint Committee on ASIO ASIS and DSD, ‘Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the *Criminal Code Amendment Act 2004*’, Tabled 16 June 2004.

Although the PJCIS has never recommended that Parliament disallow a regulation proscribing an organisation as a terrorist organisation, or relisting an organisation as a terrorist organisation, it has questioned the process undertaken by the key agencies involved in the proscription process.²⁵¹

4.2.2 Law Council Concerns

When the provisions were first introduced, the Law Council queried whether they were necessary to meet the objectives espoused by the Government, namely to protect the community from organised terrorist activities.²⁵² The Law Council submitted and continues to assert that such activities are already criminalised by existing offences such as, murder, assault, abduction, damage to property and conspiracy - not to mention the other terrorist act offences described above - and that there is no demonstrable need for these provisions.

As will be discussed later in this paper, many of the Law Council's concerns were, and continue to be, directed at the terrorist organisation offences which rely on the proscription regime in section 102.1. The Law Council's concerns with the proscription regime have been raised in a number of forums²⁵³ and are summarised below.

- Broad executive discretion to proscribe terrorist organisations

Pursuant to s 102.1(2) the Minister enjoys a broad power to outlaw an organisation and expose to criminal liability those individuals associated with the organisation.

On the basis of the broad definition contained in section 102.1(2), a considerable number of organisations across the globe are therefore potentially eligible for proscription under the regulations. Nonetheless, as noted above, only a modest number of organisations have been listed to date.²⁵⁴ The rationale behind how and why those organisations in particular have been chosen and the order in which their proscription has been pursued is difficult to discern. Likewise, information is not publicly available about other organisations which have been considered for proscription, but ultimately not listed, or about organisations which are currently under consideration for listing.

²⁵¹ The most critical review conducted by the PJCIS related to the listing of the Kurdistan Workers' Party (PKK) in 2006. During this review, the majority of the Committee issued a strong warning to the Government to keep the matter under 'active consideration'. This Review also contained a minority report prepared by the Hon Duncan Kerr SC MP and Senator John Faulkner which recommended that the Government reassess the listing of the PKK. See Parliamentary Joint Committee on Intelligence and Security *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006). Furthermore in a June 2009 review, the PJCIS stressed the need for new information to be provided when considering whether or not to re-list a terrorist organisation, see Parliamentary Joint Committee on Intelligence and Security, 'Review of the Re-listing of Hizballah's External Security Organisation under the *Criminal Code Act 1995*', June 2009, p6-7. In their August 2011 report, the PJCIS acknowledged the importance of reviewing the listings of organisations in accordance with the most current information available about those organisations. See Parliamentary Joint Committee on Intelligence and Security, *Review of the Listing of Al-Qa'ida in the Arab Peninsula (AQAP) and the re-listing of 6 Terrorist Organisations*, 22 August 2011, p. 10. Available from http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=pjcis/aqap_6%20terrorist%20orgs/report.htm

²⁵² This view, along with a number of the concerns listed below, was also separately advanced by a number of the Law Council's constituent bodies, see for example Law Institute of Victoria Submission, *UN Special Rapporteur Report on Australia's human rights compliance while countering terrorism* (03 May 2007); Law Institute of Victoria Submission, *Parliamentary Joint Committee on Intelligence and Security's Security Legislation Review* (05 July 2006).

²⁵³ For example see Law Council of Australia Submission to the Independent National Security Legislation Monitor on Financing Terrorism Offences, 2 August 2013, available from http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2748 - Financing_Terrorism_Offenses.pdf. See also Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002); Law Council of Australia Submission to the Attorney-General, House of Representatives, *Criminal Code Amendment (Terrorist Organisation) Bill* (3 March 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010)

²⁵⁴ For an up-to-date list of listed terrorist organisations see the Australian Government's National Security website at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>.

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

- Absence of binding criteria for listing an organisation as a terrorist organisation

The absence of publicly available, binding criteria to be applied to the listing of organisations as terrorist organisations exacerbates the lack of transparency and accountability flowing from the broad exercises of executive discretion described above.

When reviewing the listing of terrorist organisations, the PJCIS has repeatedly called for ASIO and the Attorney-General's department to provide a statement of the criteria it applies to the listing process, and to adhere to those criteria when listing (or re-listing) organisations in the future.²⁵⁵

During its 2005 review of the listing of six terrorist organisations²⁵⁶ the then PJCAAD, which later became the PJCIS, received from the Director-General of ASIO a summary of ASIO's evaluation process in selecting entities for proscription under the Criminal Code. Factors included:²⁵⁷

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

The PJCAAD recommended that ASIO and the Attorney General specifically address each of the six criteria referred above in all future statements of reasons particularly for new listings.²⁵⁸

However, when reviewing the listing of the Kurdistan Workers' Party (PKK) the PJCIS was subsequently informed that 'the criteria are a guide only and that they are applied flexibly, and that not all elements of the criteria are necessary before a decision might be taken to list an organisation'.²⁵⁹

For that reason, where the criteria have been departed from in the past, ASIO and the Attorney-General's Department have not considered it necessary to advance evidence of special overriding circumstances which justified the listing of the organisation, notwithstanding the fact that the criteria were not met.²⁶⁰ The result is that while both the

²⁵⁵ For example see PJCIS, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code Act 1995* (16 October 2006); Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD'), *Review of the listing of six terrorist organisations*, (5 September 2005) at [2.36].

²⁵⁶ *ibid*

²⁵⁷ *ibid*

²⁵⁸ PJCAAD *Review of the listing of six terrorist organisations* (5 September 2005, Recommendation 2.

²⁵⁹ PJCIS, *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006) [2.3].

²⁶⁰ Minority Report of PJCIS, *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006) at p. 36.

Attorney-General's Department and ASIO have acknowledged that it is neither possible nor desirable to list every organisation in existence which meets the broad definition of a 'terrorist organisation' under the *Criminal Code*, neither agency has been willing to promulgate binding criteria for singling out particular organisations for listing under the *Code*.

The absence of binding criteria has inevitably made it difficult to allay public fears that the proscription power might be utilised for politically convenient ends rather than to address law enforcement imperatives.

While these criteria have now been included in a *Protocol for Listing terrorist organisations under the Criminal Code*, which is published on a Government website,²⁶¹ this protocol notes that in providing advice to the Attorney-General, ASIO may have regard to these criteria but that a lack of information about one or more of these criteria will not preclude an organisation from being considered for listing.

While these criteria also appear to be addressed in the unclassified Statement of Reasons generally included in the relevant regulation,²⁶² the protocol also notes that where there is insufficient unclassified information, ASIO may provide a classified briefing to the Attorney-General which is not available to the public.

Although there is additional public information accompanying the relevant regulations in the form of a statement of compatibility with human rights pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), this is insufficient to allay concerns about the lack of binding, transparent criteria applicable to the listing process.

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

*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*²⁶³

The Law Council notes that in its December 2008 response to the recommendations made by the PJCIS, the then Government indicated that it supported the recommendation that ASIO and the Attorney-General's Department 'develop an unclassified protocol which

²⁶¹ See

[http://www.nationalsecurity.gov.au/aqd/WWW/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29~LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf/\\$file/LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf](http://www.nationalsecurity.gov.au/aqd/WWW/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29~LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf/$file/LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf)

²⁶² For example, see *Criminal Code (Terrorist Organisation – Al'Qaida in the Lands of the Islamic Mahgreb Regulation 2013* at <http://www.comlaw.gov.au/Details/F2013L01354/Explanatory%20Statement/Text>

²⁶³ Submission to the Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) by The Australian Muslim Civil Rights Advocacy Network.

outlines the key indicators which are taken into consideration when determining whether an organisation meets the statutory test for proscription'.²⁶⁴ At present, the criteria that the PJCIS uses in order to gain an understanding of why particular organisations are selected for listing are those that were enunciated by the Director-General of ASIO during the PJCAAD's 2005 review²⁶⁵ as outlined above.

- Attribution of characteristics to a group

A further problem with the proscription process is that, in the absence of a constitution, corporate plan or some other statement of an organisation's goals and mandate, it necessarily involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group.

For example, one of the grounds on which the Attorney-General may list an organisation as a terrorist organisation is if the organisation *advocates* the doing of a terrorist act.²⁶⁶

Section 102.1(1A) of the *Criminal Code* defines what advocacy means in this context,²⁶⁷ but does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole.

'Advocacy' is intended to include "all types of communications, commentary and conduct,"²⁶⁸ however, s.102.1(1A) fails to precisely identify:

- The form in which the 'advocacy' must be published;
- The extent to which the 'advocacy' must be publicly distributed;
- Whether or not an individual who 'advocates' must be specifically identified as a member of the organisation; or
- Whether or not the relevant individual must be the group's leader.

The result is that, under the *Criminal Code*, a person who is a member of an organisation could be prosecuted for a criminal offence if another member of that group 'praises' a terrorist act, even when the person who praised the terrorist act is not the leader of the group, or when the statement is not accepted by other members as representing the views of the group.²⁶⁹

As the Law Council has often pointed out, the issue of attribution is significant because the members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although possibly formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in

²⁶⁴ See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code, available at <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Government%20response%20to%20the%20inquiry%20into%20the%20terrorist%20organisation%20listing%20provisions%20of%20the%20Criminal%20Code%20Act%201995.pdf>

²⁶⁵ PJCAAD Review of the listing of six terrorist organisations (5 September 2005)

²⁶⁶ *Criminal Code Act 1995* (Cth), s 102.1(2).

²⁶⁷ An organisation 'advocates' the doing of a terrorist act if:

the organisation directly or indirectly counsels or urges the doing of a terrorist act; or

the organisation directly or indirectly provides instructions on the doing of a terrorist act; or

the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of s 7.3) that the person might suffer) to engage in a terrorist act.

²⁶⁸ Explanatory Memorandum for Anti-Terrorism Bill (No.2) 2005, p. 7. Available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2469_ems_59e71bb2-3256-491d-b843-d42e1cb3186c/upload_pdf/75082.pdf;fileType=application%2Fpdf

²⁶⁹ Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.10].

which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members. The result is likely to be the legitimisation of a process of guilt by association.

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

As outlined above, following amendments made to the Criminal Code in 2005, an organisation can be listed as a terrorist organisation on the basis that it "advocates" the doing of a terrorist act, whether or not a terrorist act has occurred or will occur, (section 102.1(2)(b)). A definition of what it means to advocate the doing of a terrorist act is set out in section 102.1(1A).

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

The Law Council is not opposed to laws which criminalise incitement to violence or other criminal acts. However, the Law Council submits that s102.1(2)(b) and s102.1(1A) extend well beyond criminalising incitement.

Without paragraph 102.1(2)(b), the Government is already empowered to proscribe any organisation which is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

In the Law Council's view, if it can not be demonstrated that an organisation's activities fall under this very broad umbrella then the organisation should not be proscribed as a terrorist organisation and its members exposed to serious criminal penalties.

As noted, the *NSLA Act* amended section 102.1(1A) so that an organisation may now only be listed as a terrorist organisation if it directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that it might have the effect of leading a person (regardless of his or her age or any mental impairment that he or she might suffer) to engage in a terrorist act.

Whilst the Law Council supported this amendment,²⁷⁰ in the Law Council's view this minor amendment is insufficient to remedy the problem with the section.

The Government justified its inclusion of advocacy as a basis for proscription by arguing that it is necessary for "early intervention and prevention of terrorism."²⁷¹ The Law Council believes that disproportionate restraints on freedom of association and speech do not achieve this aim and, in fact, are likely to prove counter-productive.

Similarly problematic terms in the section dealing with the basis for proscription include 'indirectly fostering' the doing of a terrorist act by an organisation. Indirectly fostering the development of a terrorist act becomes even more uncertain if the terrorist act is a 'threat

²⁷⁰ Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010), p.9, available from <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2200-2299/2270%20National%20Security%20Legislation%20Amendment%20Bill%202010%20and%20Parliamentary%20Joint%20Committee%20on%20Law%20Enforcement%20Bill%202010.pdf>

²⁷¹ Australian Government submission to the Parliamentary Joint Committee on Intelligence and Security review of security and counter-terrorism legislation, Dec 2006, p.6, available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/subs.htm

of action'. This definition lacks legal certainty and introduces unclear terminology that may encompass a very wide spectrum of acts or representations.²⁷²

Denial of natural justice

The current process of proscribing terrorist organisations set out in Division 102 does not afford affected parties the opportunity to be heard *prior to an organisation* being listed or to effectively challenge the listing of an organisation after the fact, without exposing themselves to prosecution.

If an organisation is proscribed by regulation as a terrorist organisation there is no opportunity for the members of the community who might be affected by the listing to make a case against the listing *before* the regulation comes into effect.

This concern was noted by the PJCIS who, when reviewing the listing of terrorist organisations, has repeatedly requested that the key government agencies engage in public consultation before listing organisations in an effort to ensure the community was aware of the proposed listing before it took place. For example, in its review of the listing of the al-Zarqawi network in 2005 the PJCAAD suggested that it would be most beneficial if community consultation occurred prior to the listing.²⁷³

The Law Council notes that in December 2008 the then Government responded to a number of recommendations for reform to the proscription process made by the PJCIS in its 2007 Report. One of the recommendations made by the PJCIS was that the Government give consideration to reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period had expired.²⁷⁴

In its response, the then Government indicated that it:

Supports this recommendation and will adopt the practice of giving consideration to delaying the commencement of a listing regulation (when an organisation is listed for the first time) until after the Parliamentary disallowance period has expired.

As recognised by the PJCIS, flexibility must be maintained within this approach so in circumstances where the Attorney-General considers that a listing should commence immediately (for example for security reasons), there remains scope for a regulation to commence when it is lodged with the Federal Register of Legislative Instruments (FRLI).²⁷⁵

²⁷² Dina Yehia, NSW Public Defender, *Anti Terror Legislation Consideration of Areas of Legal And Practical Difficulties*, Presentation at Federal Criminal Law Conference, Sydney, 5 September 2008 p. 12-13.

²⁷³ Parliamentary Joint Committee on ASIO, ASIS and DSD *Review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a Terrorist Organisation* (25 May 2005) Recommendation 1, available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/al_zarqawi/report.htm

²⁷⁴ See PJCIS Report of the Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code 1995, Recommendation 4, available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/proscription/report.htm

²⁷⁵ See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Government%20response%20to%20the%20inquiry%20into%20the%20terrorist%20organisation%20listing%20provisions%20of%20the%20Criminal%20Code%20Act%201995.pdf>.

The Government appears to have adopted this recommendation in its approach to the listings of at least two terrorist organisations since the 2007 PJCIS report.²⁷⁶

Inadequacies of Existing Review Processes

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

- Review by the PJCIS

Section 102.1A of the *Criminal Code* stipulates that the PJCIS *may* review a regulation proscribing an organisation within 15 sitting days of the regulation being laid before the House.²⁷⁷

Although the Parliament is likely to rely upon the judgement of the PJCIS in deciding whether to disallow the proscribing regulation, particularly where classified material is involved, the primary problem with PJCIS review is that it is not mandatory and it takes place after a decision to proscribe an organisation has been made and comes into effect.

Notwithstanding the fact that the PJCIS has been diligent in reviewing listings, robust in its questioning of relevant government officers, and critical of some aspects of the current listing process, it has not succeeded in forcing the Government to commit to a fixed set of criteria for selecting organisations for listing or to address its reasons for listing according to those criteria. The Law Council notes that in its December 2008 response to the recommendations made by the PJCIS, the then Government indicated that it supported the recommendation that ASIO and the Attorney-General's Department 'develop an unclassified protocol which outlines the key indicators which are taken into consideration when determining whether an organisation meets the statutory test for proscription'.²⁷⁸ At present the only criteria that the PJCIS is able to use in order to gain an understanding of why particular organisations are selected for listing are those that were enunciated by the Director-General of ASIO during the PJCAAD's 2005 review of the listing of six terrorist organizations.²⁷⁹ While these criteria have now been included in a *Protocol for Listing terrorist organisations under the Criminal Code*, which is published on a Government

²⁷⁶ Al Shabaab was listed on 26 October 2009 with the relevant regulation taking effect the day after registration 'for security reasons'. The PJCIS in its review of the listing stated that it was comfortable with this approach, see http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/al%20shabaab/report.htm. The listing of Al Quaida in the Arabian Peninsula came into effect after the disallowance period for the relevant regulation, see the PJCIS report on the review of the listing at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/aqap_6%20terrorist%20orgs/report.htm

²⁷⁷ The PJCIS has noted that 'since Parliament is able to disallow a regulation, the Parliament should have the clearest and most comprehensive information upon which to make any decision on the matter.' Accordingly, as part of its review the PJCIS may seek submissions from Australian members of the relevant organisation and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister's decision was based. See Parliamentary Joint Committee on ASIO ASIS and DSD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, (16 June 2004).

²⁷⁸ See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Government%20response%20to%20the%20inquiry%20into%20the%20terrorist%20organisation%20listing%20provisions%20of%20the%20Criminal%20Code%20Act%201995.pdf>.

²⁷⁹ PJCAAD *Review of the listing of six terrorist organisations* 2005, available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/terrorist_listingsa/report.htm

website,²⁸⁰ this protocol notes that in providing advice to the Attorney-General, ASIO *may* have regard to these criteria but that a lack of information about one or more of these criteria will not preclude an organisation from being considered for listing.

- Consultation with States and Territories

Mandatory consultation on a proposed new listing with State and Territory leaders, pursuant to the Inter-Governmental Agreement on Counter-Terrorism laws,²⁸¹ has provided only doubtful additional accountability. Indeed, as has been noted by some commentators:

“The Intergovernmental Agreement on Counter-Terrorism Laws provides that the Attorney-General will not make a regulation if a majority of the States and Territories object. However, a frequent complaint made by the leaders of the States and Territories is that they are given insufficient time by the Attorney-General to fully reflect upon the impact of a regulation, and therefore a considered objection to the making of a regulation is practically impossible.”²⁸²

The PJCIS and its predecessor, the PJCAAD have also commented on the short periods of time that have been provided for consultation with States and Territories in relation to listing decisions. For example, in its 2005 report on the ‘Review of the listing of six terrorist organisations’, the PJCAAD described the period of consultation as “so short that it rendered it impossible for the States and Territories to make any response, let alone object to a listing, as is their right.”²⁸³

The PJCIS made a similar observation in its 2007 report of its inquiry into the proscription of ‘terrorist organisations’ under the Criminal Code, finding that:

“In fifty per cent of cases the parties have been given five days or less in which to consider and comment on a proposed listing. The large majority of cases involve re-listings, and consultation has in practice become a form of notification. However, in the case of a new listing, for example, the listing of the PKK, the period was also extremely short with only three working days provided for the Premiers to take advice and respond.”²⁸⁴

It is difficult to accept that consultation of this type acts as a genuine safeguard.

Further, there is no basis for the assumption that governments at the State and Territory level are concerned with policing the misuse or unnecessary use of executive power at the federal level, except to the extent that it involves a Commonwealth incursion into State matters.

²⁸⁰ See

[http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29-LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf/\\$file/LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf](http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29-LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf/$file/LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf)

²⁸¹ The first Inter-Governmental Agreement on Counter-Terrorism laws was signed by the Prime Minister, Premiers and Chief Ministers on 24 October 2002. A second Agreement, outlining the obligations of the Commonwealth Government to consult with State and Territory leaders on proposed new listings was signed on 25 June 2004. The text of the agreement is available at

<http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/InterGovernmentalAgreementonCounterTerrorismLaw.pdf>

²⁸² See A. Lynch, N. McGarrity and G. Williams, (2009). ‘The Proscription of Terrorist Organisations in Australia,’ *Federal Law Review*, Vol. 37, p.7.

²⁸³ See PJCAAD, *Review of the listing of six terrorist organisations*, March 2005, para. 3.52. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/terrorist_listingsa/report.htm

²⁸⁴ PJCIS, *Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code*, para. 6.12. Available from

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/proscription/report.htm

- Judicial Review

While there is the opportunity for judicial review of a decision to proscribe an organisation, it extends only to the legality of the decision and not its merits.

International criticism of listing or proscription schemes

Listing or proscription regimes relating to terrorist organisations have also been developed by international organisations and other countries. However, many of these schemes (including that of the UN) have been the subject of criticism by a number of commentators.²⁸⁵

This criticism has largely related to the lack of due process afforded to entities that are proscribed or listed; the absence of transparency; the broad discretion that is provided to the executive; and the absence of effective safeguards (such as judicial review) of listing decisions.²⁸⁶ Indeed, as noted by the report of the International Commission of Jurists' (ICJ) Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, the decision to list an organisation or individual is usually carried out in an arbitrary way by the executive, "either alone, or in conjunction with the legislature, but with no judicial involvement."²⁸⁷

A similar observation has been made in relation to the Australian process for listing and de-listing terrorist organisations insofar as the process carries "an unnecessarily high potential for the generation of arbitrary and overly-politicised decisions."²⁸⁸

The proscription regime in the United Kingdom (UK) has also been criticised by some commentators due to its potential to "severely restrict the rights of speech, association and assembly in respect of any group against which the power is used."²⁸⁹

In his 2012 report, the UK's Independent Reviewer of Terrorism Legislation, David Anderson QC, considered the UK's proscription regime in detail and made a number of recommendations for improvement, such as making all proscription decisions expire after a period of two years.²⁹⁰

The UN's listing, or sanctions regime, commenced in 1999 with the UN Security Council's passage of Resolution 1267.²⁹¹ This resolution established a UN Sanctions Committee (the UN Committee) and also imposed obligations on States to take certain actions in relation to any individual or entity that is designated by the UN Committee as being

²⁸⁵ See Independent National Security Legislation Monitor, Bret Walker SC, *Annual Report 2011*, 16 December 2011, pp.38-39, available from http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf

²⁸⁶ See A. Lynch, N. McGarrity and G. Williams, (2009). 'The Proscription of Terrorist Organisations in Australia,' *Federal Law Review*, Vol. 37, p.3. See also M. Pieth, (2006). 'Criminalizing the Financing of Terrorism,' *Journal of International Criminal Justice*, Vol. 4, p.1086; and International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, 2009, p.115, available from <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-of-the-Eminent-Jurists-Panel-on-terrorism-couter-terrorism-Annual-Report-2009.pdf>

²⁸⁷ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, 2009, p.114, available from <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-of-the-Eminent-Jurists-Panel-on-terrorism-couter-terrorism-Annual-Report-2009.pdf>

²⁸⁸ See A. Lynch, N. McGarrity and G. Williams, (2009). 'The Proscription of Terrorist Organisations in Australia,' *Federal Law Review*, Vol. 37, p.12.

²⁸⁹ See S. Marques da Silva and C. Murphy, *Proscription of Organisations in UK Counter-Terrorism Law* (October 8, 2012). *Legal Aspects of EU Sanctions*, Cameron, ed, Intersentia, 2012, p.1. Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064048

²⁹⁰ David Anderson QC, Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2011*, June 2012, pp.56-57. Available from <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/report-terrorism-acts-2011.pdf>.

²⁹¹ See UN Security Council, *Resolution 1267 adopted by the Security Council at its 4051st meeting on 15 October 1999*, 15 October 1999, S/RES/1267, available from http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267%281999%29.

associated with Al-Qaida. For example, States must freeze the funds and other financial assets or economic resources of designated individuals and entities; prevent designated individuals from entering into or passing through their territories; and prevent the direct or indirect supply, sale and transfer of arms and military equipment to any designated individual or entity.²⁹²

The UN Committee maintains a list of designated individuals and entities known as the 'Al-Qaida Sanctions List'.²⁹³ It adds individuals and entities to this list at the request of States. It also considers requests from States to remove people/entities from the list, as well as petitions that are provided to the Office of the Ombudsperson which was established following the passage of Resolution 1904.²⁹⁴

The UN Commissioner for Human Rights has also expressed concern about the listing of entities and the freezing of assets under the UN regime. Indeed, she has suggested that institutional changes to the sanctions regime have become necessary.²⁹⁵

Another criticism of the UN's sanctions regime is the fact that the responsibility to designate individuals and entities lies with the UN Committee, as opposed to an independent adjudicator.²⁹⁶ To address this criticism, a number of reforms were introduced in 2009 and 2010, including the appointment of an Ombudsperson to handle requests from individuals and entities seeking to be removed from the list;²⁹⁷ and the introduction of the requirement for the UN Committee to provide reasons for rejecting de-listing requests.

Despite these reforms, in 2010, the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Special Rapporteur), Martin Scheinin expressed concern about the procedures for de-listing, asserting that they failed to "meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law."²⁹⁸

Further reforms were introduced in 2011 to increase the Ombudsperson's powers. These included Resolution 1989,²⁹⁹ which provided the Ombudsperson with the mandate to make consequential recommendations in relation to delisting requests, and removed the requirement that the UN Committee must reach a consensus for an entity to be delisted.³⁰⁰ An Ombudsperson's de-listing recommendation now takes effect 60 days after

²⁹² Ibid.

²⁹³ A copy of this list is available from <http://www.un.org/sc/committees/1267/pdf/AQList.pdf>.

²⁹⁴ UN Security Council, *Resolution 1904 adopted by the Security Council at its 6247th meeting on 17 December 2009*, 17 December 2009, S/RES/1904, available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>

²⁹⁵ Office of the UN Commissioner for Human Rights, *Report on the protection of human rights and fundamental freedoms while countering terrorism*, 2 September 2009, A/HRC/12/22, para 40, available from <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.22.pdf>

²⁹⁶ See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson QC, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 26 September 2012, A/67/396. Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/522/54/PDF/N1252254.pdf?OpenElement>

²⁹⁷ See <http://www.un.org/News/Press/docs/2010/sc9947.doc.htm>

²⁹⁸ See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 6 August 2010, A/65/258, p.18. Available from http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.65.258_en_UNcompliance.pdf

²⁹⁹ UN Security Council, *Resolution 1989, adopted by the Security Council at its 6557th meeting on 17 June 2011*, 17 June 2011, S/RES/1989. Available from http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1989%20%282011%29

³⁰⁰ See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson QC, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 26 September 2012, A/67/396, para. 29. Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/522/54/PDF/N1252254.pdf?OpenElement>

the UN Committee has finished considering it unless the Committee decides otherwise by consensus.³⁰¹

The current UN Special Rapporteur, Ben Emmerson QC, has also commented on the UN listing regime, stating that despite the significant improvements made by resolution 1989, “the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the Committee.”³⁰² He made a number of recommendations to improve the due process standards.³⁰³

The Law Council considers that these observations and recommendations at the international level reinforce the need for consideration of reforms to improve due process, transparency and accountability in the listing process in Australia.

4.2.3 Law Council Recommendations

In respect of section 102.1, the Law Council recommends that the Government:

- Repeal the current procedure for proscribing organisations as terrorist organisations by regulation pursuant to section 102.1(1).
- Introduce a fairer and more transparent process for proscribing an organisation as a terrorist organisation. Such a process should have the following features:
 - a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected parties and a hearing in open court;
 - clear and publicly stated criteria for proscription;
 - detailed procedures for revocation, including giving the right to a proscribed organisation to apply for review of a decision not to revoke a listing; and
 - that once an organisation has been proscribed, that fact should be publicised widely, notifying any person connected to the organisation of the possible risk of criminal prosecution.

In the alternative, the Law Council recommends that paragraph 102.1 (2)(b) relating to proscribing organisations which ‘advocate’ the doing of terrorist acts and subsection 102.1(1A) relating to the definition of ‘advocates’ should be repealed.

4.3 Terrorist Organisation Offences

4.3.1 What measures were introduced?

As noted above, the purpose of proscribing terrorist organisations is to impose criminal liability on the members of those organisations, and the individuals who support, fund or associate with those organisations.

³⁰¹ Ibid

³⁰² Ibid, para. 35

³⁰³ Ibid, para. 59

Division 102 of the *Criminal Code*, which was introduced by the *SLAT Act* and later amended in 2003³⁰⁴ and 2004,³⁰⁵ contains a number of ‘terrorist organisation offences’.

These offences relate to the conduct of a person who is in some way connected or associated with a ‘terrorist organisation’. Under Division 102 it is an offence to:

- direct the activities of a terrorist organisation (s 102.2)
- be a member of a terrorist organisation (s 102.3)
- recruit a person to join or participate in the activities of a terrorist organisation (s 102.4)
- receive or provide training to a terrorist organisation (s 102.5)
- receive funds from or make funds available to a terrorist organisation (s 102.6)
- provide support or resources that would help a terrorist organisation engage in, plan, assist or foster the doing of a terrorist act (s 102.7)
- on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. (s 102.8)

Since the introduction of the terrorist organisation offences a modest number of people have been charged with offences under Division 102 of the *Criminal Code*. However, to date, an even smaller number have been convicted.³⁰⁶

4.3.2 Law Council Concerns

The offence provisions in Division 102 of the *Criminal Code* have attracted considerable criticism, including from the Law Council.³⁰⁷

The Law Council's concerns relate to a shift in the focus of criminal liability from a person's conduct to their associations. In particular, the terrorist organisation offences unduly burden freedom of association and have a disproportionately harsh effect on certain sections of the community who, simply because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.

The breadth of the key terms upon which the terrorist organisation offences are based, and the uncertainty this creates as to how they will be applied, feeds ignorance and

³⁰⁴ See *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

³⁰⁵ See *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

³⁰⁶ See Director-General of Security, David Irvine, Address to the Sydney Institute, 24 January 2012, available from <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/24-Jan-2012-Sydney-Institute.html>; see also Director-General of Security, David Irvine, speech to the Biennial Conference of the District and County Court Judges (of Australia and New Zealand, ‘*Security and Freedom – Striking a Balance*’, 26 June 2013, available from <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/DGs-Speech-June-26th.html>. See also Robert McClelland, former Attorney General, Address to the Australian National University National Security College Senior Executive Development Course Dinner, Canberra, 10 March 2011, available from http://www.securitymanagement.com.au/content/file/110310_National%20Security%20College%20Dinner.pdf?asm=f0fac6d5e87ca3e82620e381db14788b. It should be noted that a number of those persons who were charged with terrorism offences under the *Criminal Code* were eventually convicted of other offences, for example *Director of Public Prosecutions (Cth) v Aruran Vinayagmoorthy* [2010] VSC 148, *R v Mallah* [2005] NSWSC 317 and *R v Thomas* [2008] VSC 620

³⁰⁷ See Law Council's Submissions to the Senate Legal and Constitutional Affairs Committee on the *National Security Legislation Amendment Bill 2010* & *Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010) and to the PJClS Inquiry into the *Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (16 April 2002).

prejudice within the Australian community and generates confusion, fear and alienation, particularly among some Arabic and Islamic Australians.³⁰⁸

In the context of the terrorist organisation offences, the Government has often been quick to point out that before a person could be found guilty of the majority of offences under Division 102 of the *Criminal Code*, the prosecution would have to prove beyond reasonable doubt that the accused person either knew or was reckless as to whether the relevant organisation that he or she had somehow interacted with was a terrorist organisation. Therefore, according to the Government, no sanction can follow from innocent interaction and association.

However, the danger with the terrorist organisation offences, many of which have never led to a successful prosecution, is not just that they potentially expose a person to criminal sanction, but that they are available to serve as a hook for the exercise of a wide range of law enforcement and intelligence gathering powers.

For example, without more, innocent interaction and association with a suspected member of a suspected terrorist organisation may not result in conviction and punishment,³⁰⁹ but it may generate sufficient interest on the part of police to lead to a search warrant, a telephone interception warrant, other surveillance measures and even arrest and detention.

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

The Law Council's concerns with the following particular organisation offences are outlined below: membership of a terrorist organisation; association with a terrorist organisation; funding a terrorist organisation; providing support to a terrorist organisation; and providing training to or receiving training from a terrorist organisation.

- Criminalisation of membership

Section 102.3 of the *Criminal Code* makes membership of a terrorist organisation an offence carrying a penalty of ten years imprisonment. In order to prove this offence, the prosecution must establish beyond reasonable doubt that the person *knew* that the organisation was a terrorist organisation.

Membership of an organisation is defined in section 102.1 as including:

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

³⁰⁸ PJCIS Review 2006 [3.13]. See also Wheeler, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81 *Australian Law Journal* 743 at 744.

³⁰⁹ For example there was no conviction for the offence of receiving funds from a terrorist organisation in the case of Jack Thomas, see 2006] VSC 120. See also R v Thomas (No 3) (2006) 14 VR 512.

The membership offence 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.

The Law Council has a number of concerns with this membership offence.

Firstly, criminalising membership of a group assumes the existence of a formal membership process whereby it can be clearly determined, at any particular point in time, whether or not a specific person is a member of that group or organisation. Such formal membership structures may not exist in terrorist or criminal groups. As Bongiorno J commented in the *Benbrika* case:

*Because of the complexity of the statutory definitions involved in the concept of a terrorist organisation as proscribed in Pt 5.3 of the Code, there are many forms in which such an organisation could exist.*³¹⁰

As a result of the broad nature of the definition of a terrorist organisation, which includes groups that may be ad hoc and transient, the potential class of persons that fall within the definition of 'member' is indeterminately wide.

The scope of persons falling within the 'membership' category is further extended by the broad definition of a 'member' which includes 'informal members' and any person who has taken 'steps to become a member'. These terms potentially capture any person tangentially connected with the organisation.

Secondly, the difficulty in determining with precision who is a member of a group and when membership begins or ends, has significant implications for those persons seeking to rely on the defence to the membership offence set out in sub-paragraph 102.2(2). That sub-paragraph provides a defence where:

the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

Discharging this burden is likely to prove very difficult in circumstances where there is no formal resignation process and no membership or subscription fees which can be cancelled. 'Ceasing to be a member' may equate to little more than subtly withdrawing and removing oneself from the group's activities – without announcement or fanfare of any sort. Such subtle withdrawal may be difficult to prove. This view was also expressed by the Sheller Committee when it reviewed the terrorist organisation offences in 2006.³¹¹

Judicial commentary has provided some guidance as to how these complex provisions should be applied.

In *Benbrika* those convicted of offences under Pt 5.3 of the Code gave the bayat, which is an Islamic word for allegiance and is akin to making an oath, to Abdul Nacer Benbrika, who was found to have directed the terrorist organisation. Bongiorno J acknowledged the significance of the bayat in determining membership in the case of Amer Haddara:

Haddara became a member of the terrorist organisation at a specific time on 17 September 2005. In a conversation on that day Benbrika spent a considerable time instructing Haddara and another man on the principles and rules of jihad. He referred to various religious texts and the opinions of sheiks whose opinions he

³¹⁰ *R v Benbrika* [2009] VSC 21 at para [11]

³¹¹ Security Legislation Review Committee, Report of the Security Legislation Review Committee, (2006), at [10.20], n 16.

clearly respected. Matters on which he instructed Haddara included the religiously legitimate ways around "the permissibility of killing the innocents", "the decree about killing the Moslems who were at the World Trade Center", martyrdom operations, the difference between living under the rules of a nation of kuffar and living under an Islamic religious leader and many other topics in similar vein. There was a significant passage during the conversation in which Benbrika expounded the jihadi rules about killing women and the elderly. The conversation continued for about an hour, towards the end of which time Haddara gave the bayat or pledge of allegiance to Benbrika. Benbrika explained that by giving the bayat he was pledging absolute obedience to him.³¹²

While the time at which Amer Haddara's membership of the terrorist organisation commenced may have been clear, this will not be the case every time. For Ezzit Raad, membership was determined based upon recordings of conversations he had with other members as well as the activities that he was involved in:

*'Proof of Ezzit Raad's membership of the terrorist organisation was provided by statements he made at various times concerning violent jihad whilst with other members of the group and his participation, albeit initially reluctantly, in the car stealing exercise which was discussed in his garage at about 11.30 pm on 10 September 2004 -- the so-called "garage conversation.'*³¹³

The variability of factors that determine whether or not a person is a member of a terrorist organisation illustrates some of the difficulties in interpreting Part 5.3. While membership can be formalised in the manner of a pledge, it may also be determined through statements or acts. There is no definition within the *Criminal Code* which provides assistance in clarifying the steps that are required to determine membership or to indicate rescinding membership, let alone what an 'organisation' is.

It was for these reasons that in its submission to the Attorney-General's Department on the National Security Legislation Discussion Paper, the Law Council recommended that the membership offence in section 102.3 be repealed, or, at the very least, the definition of 'member' in section 102.1 of the *Criminal Code* be amended so as to limit the concept of membership to formal members of the organisation who are directly participating in the activities of the organisation.

This submission was consistent with an earlier recommendation of the PJCIS that the Government consider replacing the membership offence in s.102.3 with an offence of participation in a terrorist organisation, and consider whether participation should be expressly linked to the purpose of furthering the aims of the organisation.

Despite these submissions and recommendations, the Government has not given any indication that it is considering amending the membership offence.

Criminalisation of association

The association offence in section 102.8 of the *Criminal Code* magnifies the objectionable features of the membership offence described above.

Under this provision, it is an offence to, on two or more occasions, associate with a member of a listed terrorist organisation or a person who promotes or directs the activities of a listed terrorist organisation in circumstances where that association will provide

³¹² *R v Benbrika* [2009] VSC 21 at para [230].

³¹³ *Ibid.*, at para [217].

support to the organisation and is intended to help the organisation expand or continue to exist.³¹⁴ This offence attracts a penalty of 3 years imprisonment.

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

Like the other terrorist organisation offences, the association offence casts the net of criminal liability too widely by criminalising a person's associations, as opposed to their individual conduct.

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

In addition, the Law Council has questioned the claimed efficacy of the association offences in deterring the conception or continued existence of terrorist organisations.³¹⁵

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

Moreover, given that the elements of the association offence are so difficult to define and the scope of the offence so broad, it potentially applies indiscriminately to large sections of the community without any clear justification. This gives rise to the risk that the association offence will capture a range of legitimate activities, such as some social and religious festivals and gatherings.³¹⁶

The existence of the exemptions in sub-sections 102.8(4) and 102.8(6) do little to allay these concerns. For example, the 'assurance' offered by 102.8(6) that the offence does not apply to the extent (if any) that it would infringe the constitutional doctrine of freedom of political communication, offers little practical guidance as to the limits of the offence. The sub-section appears to suggest that the offence provision could be applied in a manner which breaches the implied freedom and that the actual ambit of the offence can only be determined by challenging its constitutionality.

Funding offences may capture legal practitioners

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

³¹⁴ *Criminal Code (Cth)* s102.8(2).

³¹⁵ See Explanatory Memorandum to the *Anti-Terrorism Bill (No 2) 2004*.

³¹⁶ This view was shared by the Security Legislation Review Committee, see Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) at para [10.75], note 16.

The Law Council is particularly concerned about subsection 102.6 (2) which merely requires that a person receiving funds from or making funds available to an organisation or collecting funds for or on behalf of an organisation is reckless as to whether it is a terrorist organisation. The Law Council considers that there should at least be a requirement of knowledge. While recklessness requires proof of consciousness of a substantial risk, it falls short of the requirement of knowledge.

The Law Council is also concerned that neither subsection 102.6 (1) or 102.6 (2) require that the person make the funds available with the intention that they be used by a terrorist organisation to assist it to engage in a terrorist act.

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

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

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

This means that if a legal practitioner is charged with receiving funds from a terrorist organisation, he or she must establish on the balance of probabilities that the funds were received for the purpose of the providing legal assistance in relation to proceedings under Division 102 or in relation to some other form of regulatory compliance.

Communications between a legal adviser and their client made for the purpose of obtaining or giving legal advice are generally subject to client legal privilege. This makes it very difficult, if not impossible, for the legal practitioner to prove that the services, for which he or she received funding from a terrorist organisation, fall within the 102.6(3) exception. In order to exonerate him or herself from a section 106.2 offence, the legal practitioner must gain their client's consent to waive professional privilege so that evidence can be adduced about the nature of the legal assistance rendered. Where privilege is not waived, the documents subject to client legal privilege cannot be produced even if they will establish the innocence of the legal adviser charged with a crime. If a legal adviser cannot prove that the services they provided to a terrorist organisation fall within the legal representation exception, they face up to 25 years imprisonment.

The Law Council, like the PJCIS, the Sheller Committee and the COAG Review, considers that the legal burden in subsection 102.6 (3) should at least be reduced to an evidential burden.³¹⁷

Offence of "providing support" is unduly complicated

The Clarke Inquiry considered the interpretation of the offence of providing support for a terrorist organisation in section 102.7 of the *Criminal Code* and noted that it was highly confusing.³¹⁸ Mr Clarke expressed particular concern at the difficulties which would be encountered when attempting to direct juries as to the correct physical and mental elements of the offence and recommended that section 102.7 of the *Criminal Code* be

³¹⁷ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, p.74. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report.htm; Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 120; . COAG Counter-Terrorism Review Committee, Council of Australian Governments Review of Counter-Terrorism Legislation, 14 May 2013, available from <http://www.coagctreview.gov.au/Report/Documents/Final%20Report.PDF>

³¹⁸ *Ibid* , p.260.

amended to remove these uncertainties.³¹⁹ This could be achieved, by amending section 102.7 to require knowledge rather than recklessness as to whether the organisation was a terrorist organisation.

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

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

The Law Council expressed support for these proposed amendments. However, unfortunately, they were not pursued in the *NSLA Act*. This is despite the fact that the Act was said by the Government to provide a response to the Clarke Inquiry, amongst other reviews.

As noted above, the then Government's explanation for this omission was that it would need to confer with the States and Territories before making amendments to clarify the fault element of any of the terrorist offences.³²⁰

As also noted above, there is some doubt as to whether this assertion is legally correct.

At any rate, in the Law Council's view, sufficient time has now elapsed to allow for such consultation and the changes should be made.

Training Offence captures provision of training unconnected with terrorist activity and is unduly complicated

Under section 102.5 of the *Criminal Code* it is an offence to provide training to or receive training from a terrorist organisation. As the Sheller committee noted, the type of training received or provided and whether or not it has any relevance to terrorist activity is not material to establishing the offence. In this way section 102.5 can catch innocent training and the mere teaching of people who may be members of a terrorist organisation.³²¹

In light of this observation, the Sheller Committee made the following recommendations:

- That the 'training a terrorist organisation or receiving training from a terrorist organisation' provisions in s.102.5 be redrafted as a matter of urgency,³²²
- That s.102.5 should be redrafted to 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",³²³

³¹⁹ Ibid.

³²⁰ Ibid .

³²¹ Security Legislation Review Committee Report, note 16 [at](#), p.117

³²² Ibid. p.12

³²³ Ibid.

- That the scope of the offence should be extended to cover participation in training;³²⁴ and
- That neither the offence nor any element of it should be of strict liability.³²⁵

The PJCIS made similar observations and recommendations in relation to s.102.5, noting in particular that “the excessive complexity of the provisions has contributed further to the uncertainty about the scope and application of the offence”,³²⁶ and that unless amendments were made to s.102.5, there would be no guarantee that legitimate activities (such as those provided by aid organisations and other humanitarian groups) would not be captured by this provision.³²⁷

The PJCIS recommended that s.102.5 should be “redrafted to define more carefully the type of training targeted by the offence, or alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act”.³²⁸

The then Government’s responses to the recommendations of both the PJCIS and Sheller Committees were outlined in the National Security Legislation Discussion Paper. Whilst it indicated that it supported the recommendations of both committees in principle, it ultimately proposed the establishment of a Ministerial authorisation scheme “which would allow legitimate and reputable humanitarian aid organisations to be exempt, in limited circumstances, from the offence of providing training to a terrorist organisation.”³²⁹

Whilst the Law Council did not object *per se* to the then Government’s proposed amendments due to the increased certainty and peace of mind that they may have offered to those organisations able to obtain a declaration, the Law Council did raise a number of concerns about the proposed amendments in its submission on the National Security Legislation Discussion Paper. These concerns can be summarised as follows:

- That the proposed amendments were fundamentally flawed due to the failure of the amendments to distinguish between training which may assist an organisation in preparing for and carrying out a terrorist act and training which is otherwise benign.³³⁰
- That legitimate activities should not be subject to criminal sanctions simply because it is easier for the Government to place a blanket prohibition on certain conduct rather than to have to properly investigate and prosecute the specific misconduct it actually seeks to target.³³¹
- That a further subsection should be added to section 102.5 to ensure that no inference in relation to any element of the offence may be drawn either

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, p.74. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report.htm,

³²⁷ Ibid,

³²⁸ Ibid., p.75.

³²⁹ Commonwealth Attorney-General’s Department, *National Security Legislation - Discussion Paper on Proposed Amendments*, July 2009,, p.67

³³⁰ Law Council of Australia, Submission on the *National Security Legislation Discussion Paper*, October 2009, p.16. Available from <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2100-2199/2189%20National%20Security%20Legislation%20Discussion%20Paper%20October%202009%20LCA%20Submission.pdf>

³³¹ Ibid.

because an organisation has not elected to seek a declaration from the Minister or has sought a declaration and been refused.³³²

Unfortunately, these proposed amendments were not included in the NSLA Bill.

4.4.3 Law Council Recommendations

The Law Council recommends that the Government should:

- (a) repeal the terrorist organisation offences in Division 102, or in the alternative, repeal the association offence in section 102.8 of the *Criminal Code*;
- (b) repeal the membership offence in section 102.3 or, at the very least, amend the definition of 'member' in section 102.1 of the *Criminal Code* to limit membership to formal members of the organisation who are directly participating in the activities of the organisation;
- (c) amend the offence provisions in sections 102.2 (2), 102.5 (1), 102.6 (2) and 102.7 (2) to require *knowledge* rather than *recklessness* as to whether the organisation was a terrorist organisation;
- (d) Amend the exception in sub-section 102.6 (3) to facilitate the ability of legal practitioners to rely on the exception in the ordinary course of legal practice;
- (e) Amend the offences in s 102.6 so that the person receiving funds or making funds available to or collecting funds for or on behalf of a terrorist organisation must do so with the intention to assist it to engage in a terrorist act;
- (f) amend the providing support offence in section 102.7 so that:
 - (i) the support provided must be *material* support; and
 - (ii) a person must provide the resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.
- (g) Amend the providing training offence in section 102.5 so that the type of training targeted is better defined.

5. Investigation Powers of Law Enforcement and Intelligence Agencies

5.1 What measures were introduced and why?

Prior to September 2001, law enforcement and intelligence agencies already had a broad range of criminal offences and a considerable framework of laws to use in order to investigate and prosecute acts connected with terrorism. Some of these agencies had the power to engage in telecommunications interception,³³³ use listening and tracking

³³² Ibid.

³³³ *Telecommunications (Interception) Act 1979* (Cth).

devices, gain access to computers³³⁴ and engage in undercover operations.³³⁵ Furthermore, a National Crime Authority existed with power to investigate and combat serious and organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence to law enforcement agencies.³³⁶

Despite this extensive framework of existing laws, the then Government identified gaps in its laws and policies that it said reduced its ability to fully protect the Australian community from the threat of terrorism. It was in an effort to fix these perceived gaps that it set about introducing a range of new legislative measures to increase the powers of law enforcement and intelligence agencies.

5.1.1 Measures introduced in 2002 and 2003

The *SLAT Bill* and related Bills³³⁷ comprised the first package of legislation to be introduced that considerably expanded the powers of law enforcement and intelligence agencies to investigate terrorist related activity. In addition to introducing a range of new terrorist offences, the package of legislation provided increased powers for customs officials and changes to telecommunications interception laws.³³⁸ The package extended telecommunication interception powers to the investigation of terrorism offences and extended the purpose for which intercepted information could be communicated.³³⁹

This expansion of investigation powers was said to be necessary to address identified inadequacies in existing legislation and address terrorism 'comprehensively rather than relying on a myriad of other laws which may apply'.³⁴⁰ The AFP told the Senate Committee who inquired into the *SLAT Bill* in 2002 that:

*...the overall package of bills will allow law enforcement to meet the increased expectations of government and the community who want to see those responsible for terrorist activity brought to justice.*³⁴¹

In 2003, significant amendments were made to Part III Division 3 of the *ASIO Act*.³⁴² The purpose of these amendments was to expand the special powers available to ASIO to deal with terrorism. Specifically the amendments:

- included the definition of a 'terrorism offence' in the *ASIO Act*;
- provided a power to detain, search and question persons before a prescribed authority; and
- permitted personal searches to be authorised in conjunction with detention warrants.

³³⁴ *Australian Security and Intelligence Organisation Act 1979* (Cth).

³³⁵ *Crimes Act 1914* (Cth).

³³⁶ *National Crime Authority Act 1984* (Cth).

³³⁷ *Telecommunications Interception Legislation Amendment Bill 2002; Suppression of the Financing of Terrorism Bill 2002; the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; and the Border Security Legislation Amendment Bill 2002.*

³³⁸ *Telecommunications Interception Legislation Amendment Act 2002*

³³⁹ Australian law enforcement and intelligence agencies have long had the power to intercept telecommunications when investigating serious criminal offences or when necessary for the protection of national security (see for example, *Telecommunications (Interception) Act 1979* (Cth)).

³⁴⁰ Attorney-General's Department *Submission 383A* to Senate Legal and Constitutional Affairs, *Inquiry into Security Legislation Amendment (Terrorism) Bill 2002 and Related Bills* (May 2002) at, pp. 1-3.

³⁴¹ Senate Legal and Constitutional Affairs, *Inquiry into Security Legislation Amendment (Terrorism) Bill 2002 and Related Bills* (May 2002) p. 25 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 191.

³⁴² *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

5.1.2 Measures introduced in 2004

The next significant package of legislation was introduced in 2004. This included the *Surveillance Devices Act 2004* (Cth) (the *SDA*) and the *Anti-Terrorism Act 2004* (Cth) .

The *SDA* empowered police officers³⁴³ to obtain warrants, emergency authorisations and tracking device authorisations for the installation and use of surveillance devices in relation to Commonwealth criminal investigations.³⁴⁴ The *SDA* also allowed police officers to use listening devices, optical surveillance devices, tracking devices and data surveillance devices, and permitted police to exercise the necessary powers to install, maintain and retrieve surveillance devices without a warrant in some circumstances.³⁴⁵

The *Anti-Terrorism Act 2004* (Cth) was introduced to improve Australia's counter-terrorism legal framework by making amendments to:

- Part 1C of the *Crimes Act* to extend the fixed investigation period applying to terrorism offences, and to permit authorities to reasonably suspend or delay questioning of a person to make inquiries in overseas locations that are in different time zones (the 'dead time' provisions);
- the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) to enhance the foreign incursions offences, particularly in situations where terrorist organisations are operating as part of the armed forces of a state;
- the *Criminal Code* to strengthen the counter-terrorism legislation relating to membership of terrorist organisations and the offence of providing training to or receiving training from a terrorist organisation; and
- the *Proceeds of Crime Act 2002* (Cth) to improve restrictions on any commercial exploitation by a person who had committed foreign indictable offences.

5.1.3 Measures introduced in 2005

A further significant expansion of law enforcement powers occurred in 2005 when the *Anti-Terrorism Act (No 2) 2005* (Cth) introduced Part 1AA, Division 3A into the *Crimes Act* and Divisions 104 and 105 into the *Criminal Code*. The Explanatory Memorandum to the *Anti-Terrorism Act (No 2) 2005* (Cth) described its purpose as follows:

The Bill improves the existing strong federal regime of offences and powers targeting terrorist acts and terrorist organisations. The Bill is the result of a comprehensive review of existing federal legislation that criminalises terrorist

³⁴³ This includes officers of the AFP, the Australian Crime Commission or a State or Territory police force investigating a Commonwealth offence.

³⁴⁴ Under the Act, a warrant for use or retrieval of a surveillance device may be issued by an eligible Judge or by a nominated Administrative Appeals Tribunal member. A law enforcement officer may only apply for the issue of a warrant if they suspect, on reasonable grounds, that a relevant offence/s has been, is being, is about to be or is likely to be committed and that an investigation into that offence/s is being, will be or is likely to be conducted. There must also be reasonable grounds to believe that the use of the surveillance device is required for the conduct of the investigation for evidence-gathering purposes in relation to the relevant offence or offences or the identity or location of the offender.

³⁴⁵ The Law Council has previously raised a number of concerns with this Act, in particular that its provisions effectively allow police officers to monitor covertly a citizen's communications and activities with (on some occasions) only retrospective court approval. For further discussion see Law Council of Australia Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into Surveillance Devices Bill 2004* (10 May 2004), available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2002-04/surveillance/submissions/sublist.htm.

*activity and confers powers on law enforcement and intelligence agencies to effectively prevent and investigate terrorism.*³⁴⁶

Key features of this Act included:

- the expansion of the grounds for the proscription of terrorist organisations to include organisations that 'advocate' terrorism (Schedule 1 of the Act);
- a new offence of financing terrorism (Schedule 3);
- a new regime to allow for 'control orders' to authorise the overt close monitoring of terrorist suspects (Schedule 4);
- a new police preventative detention regime to allow detention without charge to prevent a terrorist act or to preserve evidence of such an act (schedule 4);
- wider police powers for warrantless search and seizure in Commonwealth places and in 'prescribed security zones' (Schedule 5);
- police powers to compel disclosure of commercial and personal information (Schedule 6);
- updated sedition offences (Schedule 7);
- increased financial transaction reporting obligations on individuals and businesses (Schedule 9); and
- the expansion of information and intelligence gathering powers available to the police and ASIO (Schedules 8 and 10).

The Act was passed following an agreement between the Commonwealth, State and Territory Governments adopted at the COAG Terrorism Summit held in Canberra on 27 September 2005.³⁴⁷ Under the COAG Agreement, State Premiers and the Northern Territory and ACT Chief Ministers agreed to introduce complementary legislation for the purpose of introducing preventative detention for a period of up to 14 days and to also introduce increased search powers.³⁴⁸

In 2010, the Government further expanded law enforcement powers through the insertion of section 3UEA into the *Crimes Act* by the *NSLA Act*. This provision essentially gave police the power to enter and search premises, and to seize property without the occupier's consent in certain circumstances.

5.2 Law Council's Concerns

The significant expansion of law enforcement and intelligence gathering powers has not gone unnoticed by the Australian community and has attracted the criticism of a number of independent national and international review bodies, including the Sheller Committee,

³⁴⁶ Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005*

³⁴⁷ A copy of the COAG agreement is available at http://archive.coag.gov.au/coag_meeting_outcomes/2005-09-27/docs/attachments.cfm

³⁴⁸ See *Terrorism (Community Protection) (Amendment) Bill 2005* (Vic); *Terrorism (Preventative Detention) Bill 2005* (SA); *Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005* (NSW); *Terrorism (Preventative Detention) Bill 2005* (Qld); *Terrorism (Extraordinary Powers) Bill 2005* (WA); *Terrorism (Preventative Detention) Bill 2005* (Tas); *Terrorism (Extraordinary Temporary Powers) Bill 2005* (ACT); *Terrorism (Extraordinary Powers) Bill 2005* (NT).

the PJCIS, the UN HRC, the UN Committee Against Torture (CAT Committee) and the then Special Rapporteur on Human Rights and Terrorism.³⁴⁹

For example, in its concluding observations on Australia in 2008, the CAT Committee expressed concern over the limitations on judicial review and the character of secrecy surrounding the imposition of preventative detention and control orders.³⁵⁰ The Committee recommended that Australia:

*Guarantee that both preventative detention and control orders are imposed in a manner that is consistent with the State party's human rights obligations, including the right to a fair trial including procedural guarantees.*³⁵¹

The CAT Committee also expressed concern about the increased powers provided to ASIO, including the ability to detain a person for renewable periods of seven days for questioning. The Committee noted that this power poses difficulties especially due to the lack of a right to a lawyer of choice to be present during the questioning and the limited ability to seek a judicial review of the validity of the detention.³⁵²

The Law Council shares these concerns, which echo concerns previously expressed by independent review bodies within Australia.³⁵³

The Law Council has long argued that the persistent expansion of law enforcement and intelligence agencies' powers in the name of the war on terror has increased the risk of unnecessary infringements of fundamental rights.

However, as the *Haneef* and *UI-Haque* cases demonstrate,³⁵⁴ these expanded powers, while draconian in many respects and certainly worthy of continued opposition, are only part of the problem. The real source of danger is not confined to what our anti-terror laws say but extends as well to what people, including law enforcement and intelligence officers, think they say.

The application of Australia's anti-terror laws by the AFP and other agencies in the *Haneef* case suggests a significant misunderstanding had developed within those agencies about what they were lawfully authorised to do when protecting the community from the threat of terrorism.³⁵⁵

As noted above, Dr Haneef was arrested while working in Australia on suspicion of involvement in a number of failed terrorist attacks in the UK. Dr Haneef was arrested and originally detained under section 3W of the *Crimes Act*, a regular, non-terrorist specific provision of the criminal law.³⁵⁶ To lawfully arrest Dr Haneef under this section, the AFP

³⁴⁹ For example, Sheller Review 2006 at Chapters 5-18; PJCIS Review 2006 at p. 5-21; UN Special Rapporteur Report 2006 at p. 12-18; Committee Against Torture, *Concluding Observations – Australia*, CAT/C/AUS/CO/1, 15 May 2008, [10].

³⁵⁰ Committee Against Torture, *Concluding Observations – Australia*, CAT/C/AUS/CO/1, 15 May 2008 at [10].

³⁵¹ *ibid.*

³⁵² *ibid.*

³⁵³ ASIO's questioning and detention powers have been subject to review by the Senate Legal and Constitutional Review Committee (SLCRC) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS). Both Committees have noted the controversial nature of the powers, with the SLCRC observing the legislation introducing the powers was the 'most controversial piece of legislation ever reviewed by the Committee'. See Senate Legal and Constitutional Review Committee, *Report on the ASIO Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002 and PJCIS, *Report on ASIO's Questioning and Detention Powers*, November 2005.

³⁵⁴ See the Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008 (Clarke Report); *R v UI Huque* [2007] NSWSC 1251

³⁵⁵ For further discussion of the Law Council's concerns in respect of the Haneef case see Law Council of Australia Submission to the Hon Mr Clarke QC, *Clarke Inquiry into the case of Dr Mohamed Haneef* (16 May 2008), See also the report of the Clarke Inquiry into the Handling of the Haneef Case.

³⁵⁶ There are provisions in Commonwealth and state laws which allow for a period of preventative detention in order to thwart an imminent terrorist act or to preserve evidence of, or relating to, a recent terrorist act, see discussion below on Divisions 104 and 105 of the *Criminal Code*. However, in Dr Haneef's case police did not rely on those laws.

officers concerned needed to believe on reasonable grounds that Dr Haneef had committed a particular offence. To continue to lawfully hold him without charge, they needed to maintain that belief throughout the period of his detention.

Even then, Dr Haneef's arrest and detention without charge would still have fallen foul of the *Crimes Act* if, at the time of his arrest and throughout his period of detention, the AFP did not believe –on reasonable grounds – that his detention was necessary to preserve or obtain evidence or to complete the investigation.

Dr Haneef's arrest and detention should have been, in theory at least, governed throughout by the ordinary, basic principles of criminal procedure. Instead, it appeared that throughout the *Haneef* case, police were operating in the general shadow of Australia's anti-terror laws, guided more by a vague notion that those laws authorised a different and extraordinary approach than by the precise content of the actual laws pursuant to which they were exercising their powers.

As observed by former Human Rights and Equal Opportunities Commission (HREOC) President the Hon John von Doussa:

A persistent feature of counter-terrorism legislation has been the expansion of executive power to make decisions which have the potential to infringe fundamental human rights without corresponding checks and balances.

*From a human rights perspective, it is not always the text of the law that is the problem but how the powers which the laws create are exercised in a given case. This is why it is vital that executive decision-making powers are subject to review to check that an exercise of power is proportionate and necessary in the particular circumstances.*³⁵⁷

The *Haneef* case, demonstrates the pervasive impact the expansion of intelligence and law enforcement powers has had on the investigation and prosecution of criminal offences in Australia.

The Clarke inquiry revealed a number of shortcomings in the handling of the case by government agencies, including that:³⁵⁸

- many of the officers involved did not fully understand or have sufficient experience in exercising their statutory obligations. This was particularly evident in relation to Part 1C of the *Crimes Act* (the provisions that permitted the detention of Dr Haneef without charge);
- the large scale, expensive investigation into Dr Haneef took much longer than it should have. The 'dead time' provisions in the *Crimes Act* removed or diminished the sense of urgency that should have been brought to the task of determining whether to charge or release. The deficiencies in the system of judicial oversight became obvious;
- the advice given by Commonwealth Director of Public Prosecutions (CDPP) to the AFP that there was sufficient evidence to charge Dr Haneef was 'obviously wrong and should never have been given'; and
- certain police officers had become suspicious about Dr Haneef and had lost objectivity.

³⁵⁷ Speech by the Hon John von Doussa, President, Human Rights and Equal Opportunity Commission 'Human Rights and Human Security' Amnesty International Australia AGM Dinner (1 July 2006).

³⁵⁸ Op.cit., Clarke Report.

While no illegal or improper conduct was found, the findings and recommendations made in the Haneef report confirm the Law Council's concerns that it is not just the content of Australia's anti-terrorism laws that can lead to an erosion of individual rights, but also the way these laws are understood and applied by law enforcement and intelligence officers. The Law Council's particular concerns and recommendations in respect of the expanded investigation powers invested in intelligence and law enforcement agencies are outlined below.

5.3 Police Search and Seizure Powers

A number of new provisions relating to police search and seizure powers have been inserted into Australia's anti-terrorism and national security legislation in recent years.

Firstly, the *Anti-Terrorism Act (No 2) 2005* (Cth) introduced Part 1AA, Division 3A into the *Crimes Act*. When first introduced, this new Part was said to provide 'a new regime of stop, question, search and seize powers that will be exercisable at airports and other Commonwealth places to prevent or respond to terrorism.'³⁵⁹

Part 1AA Division 3A of the *Crimes Act* contains powers in relation to terrorist acts and terrorism offences. Sections 3C360 and 3D361 of the Act are relevant to the interpretation and application of Part 1 AA Division 3A

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

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

Division 3A empowers police officers³⁶² to request a person to provide an officer with the following details:³⁶³

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

³⁵⁹ Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005*.

³⁶⁰ Section 3C is the interpretative provision for Part IAA of the *Crimes Act* which contains search, information gathering, arrest and related powers. It contains definitions of key terms, for example, it defines what constitutes an 'emergency situation' and which officers constitute executing officers for the purpose of executing a warrant. It also outlines which offences are covered by this Part of the *Crimes Act*.

³⁶¹ Section 3D of the *Crimes Act* concerns the application of Part IAA. It provides that Part 1AA is not intended to limit or exclude the operation of another law of the Commonwealth or of a Territory that provides search and arrest powers in respect of Commonwealth or Territory offences. It explains that the powers contained in Part 1AA are intended to be available *in addition to* other similar powers under other laws. It also provides that the application of Part 1AA in relation to State offences that have a federal aspect is not intended to limit or exclude the concurrent operation of any law of a State or of the Australian Capital Territory

³⁶² Pursuant to s3UA of the *Crimes Act* 'police officer' means:

- (a) a member of the Australian Federal Police (within the meaning of the Australian Federal Police Act 1979); or
- (b) a special member (within the meaning of that Act); or
- (c) a member, however described, of a police force of a State or Territory.

³⁶³ *Crimes Act 1914* (Cth) s 3UC

If a person fails to comply with this request, the person may be guilty of an offence.³⁶⁴

Under Division 3A, police officers are also empowered to stop and detain the person for the purpose of conducting a search; and conduct one of the following searches for a terrorism related item.³⁶⁵

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

If, in the course of such a search, the police officer finds a terrorism related item or a serious offence related item, that item may be seized.³⁶⁶

These powers apply when a person is in a Commonwealth place and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorism act; or if the person is in a prescribed security zone.³⁶⁷

An area can be prescribed as a security zone on the application of a police officer to the Minister.³⁶⁸

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

The Minister must revoke the declaration where he or she is satisfied that there is no longer a terrorism threat that justifies the declaration being continued or that the declaration is no longer required to respond to a terrorism act that has occurred.³⁶⁹ Otherwise the declaration would remain in force for 28 days.

If a declaration of a Commonwealth place as a prescribed security zone under this section is made or revoked, the Minister must arrange for a statement about the declaration to be made public, for example by a television or radio broadcast or publishing the details on the internet.³⁷⁰

Secondly and more recently, the *NSLA Act* introduced section 3UEA into the *Crimes Act* to enable a member of the AFP to enter premises without a warrant where he or she reasonably suspects that:

- a thing is on the premises;
- it is necessary to search the premises for the thing and seize it in order to prevent the thing from being used in connection with a terrorism offence; and

³⁶⁴ *ibid.*

³⁶⁵ *Crimes Act 1914* (Cth) s 3UD. Subsection 3UD(2)-(4) sets out the conditions which apply to the conduct of a search.

³⁶⁶ *Crimes Act 1914* (Cth) s 3UE. See also section 3UF-3UG which regulates how seized things are to be dealt with.

³⁶⁷ *Crimes Act 1914* (Cth) s 3UB Pursuant to s3UA 'prescribed security zone' means a zone in respect of which a declaration under section 3UJ is in force.

³⁶⁸ *Crimes Act 1914* (Cth) s 3UI.

³⁶⁹ *Crimes Act 1914* (Cth) ss 3UJ(3)-(4).

³⁷⁰ Section 3UJ(5) *Crimes Act 1914* (Cth). A declaration ceases to have effect at the end of 28 days after it is made, unless the declaration is revoked by the Minister before then.

- it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

If the member of the AFP finds any other thing relevant to an indictable or summary offence, he or she must secure the premises and then obtain a search warrant.³⁷¹

According to the then Attorney-General, the purpose of introducing these provisions was to "enable police to render a premises safe and specifically to address some explosive device or material or another dangerous substance such as a dangerous chemical."³⁷²

As with the amendments introduced by the *Anti-Terrorism Act (No.2) 2005* (Cth), the Law Council expressed considerable concern about the necessity of these increased police search and seizure powers. These concerns are outlined below.

5.3.1 Law Council Concerns

With respect to the amendments made by the *Anti-Terrorism Act (No.2) 2005* (Cth), the Law Council shared concerns raised by two of its constituent bodies, the Law Institute of Victoria³⁷³ and the New South Wales Bar Association.³⁷⁴ These concerns related to the powers invested in police officers by Division 3A to conduct random searches in declared 'specified security zones'.

Under Division 3A the Attorney-General has the power to prescribe a security zone where everyone in the zone is subject to police stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. The Minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.

This broad power of the Minister to declare an area to be a 'specified security zone' and thus to invoke the special search and seizure powers has the potential to impact upon the liberty and security of individuals.

Random detentions and searches merely because an individual is present in a particular geographical location would appear to be in contravention of article 9 of the ICCPR which specifically prohibits arbitrary arrests and detention.³⁷⁵

Moreover, the potential for a declaration to remain in force for 28 days prior to the Minister considering whether a terrorist threat continues to exist or whether such a declaration continues to be necessary may lead to situations where the liberty of an individual is compromised.³⁷⁶

³⁷¹ *Crimes Act 1914*, s. 3UEA(3)

³⁷² 7:30 Report, Australian Broadcasting Commission, 12 August 2009. Available from <http://www.abc.net.au/7.30/content/2009/s2654109.htm>.

³⁷³ See for example, Law Institute of Victoria Submission, *UN Special Rapporteur Report on Australia's human rights compliance while countering terrorism* (03 May 2007).

³⁷⁴ For further information on the New South Bar Association, including their Human Rights Committee which has undertaken work in respect of Australia's anti-terrorism laws, visit their website at <http://www.nswbar.asn.au/>.

³⁷⁵ Article 9(1) of the *International Covenant on Civil and Political Rights* provides: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

³⁷⁶ Pursuant to section 3UJ(3) of the *Crimes Act 1914* (Cth) a declaration ceases to have effect at the end of 28 days after it is made, unless the declaration is revoked by the Minister before then. Pursuant to subsection 3UJ(4), the Minister must revoke a declaration, if he or she is satisfied that either (a) there is no longer a terrorism threat that justifies the declaration being continued; or (b) that declaration is no longer required. However, there is no requirement for the Minister to consider the factors in subsection 3UJ(4) prior to the 28 day expiry of the declaration.

In the absence of mechanisms requiring the Attorney-General to consciously decide whether to revoke or extend a declaration, the period imposes a potentially unnecessary or disproportionate intervention upon liberty and security.³⁷⁷

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

In addition to the concerns raised above, the Law Council also expressed concern about the insertion of s.3UEA into the *Crimes Act* by the *NSLA Act* .

Firstly, the power to enter and search premises, and seize property without the occupier's consent, is a breach of privacy. Accordingly, the Law Council submitted that this power should be carefully confined and subject to strictly enforced conditions. The warrant system ensures that police search and seizure powers are subject to independent and external supervision and may only be exercised where prescribed statutory criteria are satisfied. Allowing police to enter and search premises without a warrant and under their own authority increases the risk that such powers will be misused. Moreover, it increases the risk that individual's privacy rights will be breached in circumstances not justified by the necessary pursuit of a legitimate law enforcement imperative.³⁷⁸

The Law Council submitted that the then Government should have demonstrated why the introduction of this extraordinary power was required. It did not discharge that onus and accordingly, the necessity for this power was not demonstrated, particularly given the ability to obtain a warrant by telephone or fax in exigent circumstances.³⁷⁹ If these existing measures did not operate effectively in emergency situations, the Law Council submitted that consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before introducing a warrantless entry power.

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

The Law Council notes that the COAG Review shared a number of its concerns about section 3UEA and recommended that police authorities exercising power under this section should report annually to Parliament on the use of the power.

5.3.2 Law Council Recommendations

The Law Council recommends that:

- Division 3A of Part 1AA of the *Crimes Act* be repealed.
- If this recommendation is not adopted, amend Division 3A to:
 - Publish reasons for declaring a prescribed security zone;
 - Require the Minister to regularly (such as daily or weekly) consider whether to revoke a declaration of a prescribed security zone made under section 3UJ.

³⁷⁷ Report of the Special Rapporteur 2006 at [10]-[16], note 108.

³⁷⁸ Law Council Submission on *National Security Legislation Discussion Paper*, October 2009, p. 21, available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2100-2199/2189%20National%20Security%20Legislation%20Discussion%20Paper%20October%202009%20LCA%20Submission.pdf>

³⁷⁹ *Crimes Act 1914*, s. 3R

- Require a member of the AFP who conducts a search under s.3UEA to go before a magistrate or judge after the search has been conducted to obtain an ex post facto search warrant;
- Provide that if an ex post facto search warrant is not granted, any evidence identified by the member of the AFP during the course of the search may be ruled inadmissible in future court proceedings; and
- Require the AFP to report annually to the Commonwealth Parliament on the exercise of powers under s 3UEA. In particular, reports should be made of any instances in which an ex post facto search warrant has not been granted..

5.4 Dead time provisions in Part IC *Crimes Act*

5.4.1 What provisions were introduced?

The *Anti-Terrorism Act 2004* (Cth) introduced section 23CA into Part IC of the *Crimes Act*. Amongst other things, this section governed for how long and for what purposes a person may be detained without charge, upon arrest for a terrorism offence. The provision was amended and renumbered by the *NSLA Act*.

As a result of the amendments introduced by the *NSLA Act*, the relevant provisions in the *Crimes Act* are now sections 23D, 23DA and 23DB to 23DF. These sections provide that:

- A police officer is only able to make an application to extend the investigation period or an application to exclude certain time from the calculation of the investigation period (i.e. a dead time application) if he or she has the prior approval of a senior officer (Commissioner, Deputy Commissioner or Superintendent);
- An application to have certain time excluded as dead time may only be made to a magistrate, and not to a justice of the peace or a bail justice;
- A maximum cap of seven days has been placed on the period of dead time that may be authorised by a magistrate;
- An application for an extension of the investigation period or a dead time application is not required to include information which, if disclosed, is likely to prejudice national security; to be protected by public interest immunity; to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community;
- If an application for an extension of the investigation period or dead time application does contain information which, if disclosed, is likely to prejudice national security; to be protected by public interest immunity; to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, this information may be removed from the copy of the application that is given to the arrested person or his or her legal representative; and
- The instrument which sets out a magistrate's reasons for granting an extension of the investigation period or for allowing a period of dead time need not include information relied upon which if disclosed, is likely to

prejudice national security; to be protected by public interest immunity; to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community.

5.4.2 Why were the dead time provisions introduced?

When first introduced into Parliament, the dead time provisions were said to be needed to take account of time zone differences and the impact different time zones have on the length of investigation periods of terrorism-related offences in Australia.³⁸⁰

For that reason, sub-paragraph 23CA(8)(m) (now sub-paragraph 23DC(4)(e)(iii)) as first drafted and introduced to Parliament, excluded from the calculation of the 'investigation period':

...any reasonable period during which the questioning of the person is reasonably suspended or delayed in order to allow the investigating official to obtain information relevant to the investigation from a place outside Australia that is in a different time zone, being a period that does not exceed the amount of the time zone difference. (Emphasis added.)

At the time, the then Government claimed that capping the maximum allowable period of dead time based on the time zone difference would provide a safeguard to ensure that dead time would not be used to dramatically extend the investigation period.³⁸¹

However, many groups expressed concern that, even with this cap, the dead time allowed might amount to a period of up to and possibly in excess of 24 hours to be excluded from the calculation of the investigation period.

The then Government strongly dismissed such concerns. For example, the Attorney-General's Department told a Senate inquiry that it would be 'extraordinarily surprised' if the dead time allowed to take account of time zone differences was anything like a couple of days. It was noted that, in other jurisdictions, 16 hours had been regarded as 'reasonable'.³⁸²

Notwithstanding the then Government's assurances, the Senate Legal and Constitutional Affairs Committee recommended that if police wanted to take account of dead time arising from time zone differences they should have to apply to a judicial officer for prior approval.³⁸³

The Government purported to adopt this recommendation but in fact substantially altered the legislation.

A degree of judicial supervision was introduced, but this was also accompanied by the complete removal of any cap on the maximum allowable dead time and a significant expansion of the grounds on which dead time might be claimed.

³⁸⁰ Explanatory Memorandum to the *Anti-Terrorism Bill 2004*, available at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1_nsf/0/0FB770363CE89F1CA256F720031198A/\\$file/04052em.rtf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1_nsf/0/0FB770363CE89F1CA256F720031198A/$file/04052em.rtf).

³⁸¹ See Second Reading Speech for *Anti-Terrorism Bill 2004*, accessed at : http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/index.htm

³⁸² See Report of Senate Legal and Constitutional Affairs *Inquiry into the provisions of the Anti-Terrorism Bill 2004*, p. 17, available at : http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/index.htm

³⁸³ *ibid*, Recommendation 1.

The amended sub-paragraph 23CA(8)(m) did not accurately reflect the Senate Committee's recommendation. It was never subject to public comment or review, nor were any policy reasons advanced to explain why it was necessary.

As mentioned above, the *NSLA Act* ultimately repealed section 23CA of the *Crimes Act*, and replaced it with new provisions in Part 1C. The amended provisions do place a cap on the maximum period of judicially authorised dead time, but have not materially altered the broad list of grounds on which dead time may be claimed.

5.4.3 Law Council Concerns

The Clarke inquiry confirmed a number of the Law Council's concerns with Part 1C of the *Crimes Act*. In particular, the fact that Dr Haneef was detained without charge for 12 days confirmed that the provisions in Part 1C ran counter to the established principles of the Australian criminal justice system and could result in a denial of fundamental rights.

In the wake of the Clarke inquiry some improvements were made to the relevant provisions of Part 1C. For example:

- The insertion of the requirement that a police officer can only make a dead time application with the prior approval of a senior officer (Commissioner, Deputy Commissioner or Superintendent). The Law Council agreed that this amendment would deliver a greater degree of oversight and accountability within law enforcement agencies about how and when an extension of the investigation period and/or maximum period of detention is sought.
 - The introduction of the cap on the maximum period of dead time which is allowed under sub-paragraph 23DB (9)(m).

However, notwithstanding these improvements, the Law Council still has the following concerns with the investigation period provisions in Part 1C:

- Allowing for up to seven days dead time to be excluded from the calculation of the investigation period in terrorism cases is unjustified. This may result in a possible period of detention without charge for up to eight days, possibly more.³⁸⁴ This is considerably longer than the period of pre-charge detention permitted under the *Crimes Act* in non-terrorism cases.

The Law Council argued that before an extended period of detention without charge was allowed for in terrorism investigations, evidence justifying the operational need for such an extraordinary measure must be presented.

It is not enough to assert that terrorism investigations are more time consuming because they may involve police from several countries. There are many offences, such as people smuggling and the production and distribution of child pornography, which also involve investigations which range across countries and police forces.

The Law Council does not oppose per se provision for a judicially supervised and capped period of extended pre-charge detention in terrorism cases if it can be demonstrated that it is required by the unique and challenging circumstances of terrorism investigations. However, the Law Council believes that no attempt had

³⁸⁴ This would allow for a maximum investigation period of 24 hours plus seven days dead-time under s.23DB(9)(m). In fact the length of permissible detention could be longer if additional periods of dead-time are taken into account under other sub-paragraphs of 23DB(9) before a successful application is made under section 23DC or after a period of dead time allowed under s.23DB(9)(m) has expired.

been made by the Government in relevant parliamentary debates to demonstrate such a need in any detail and accordingly, attempting to determine an appropriate dead time cap has to date been an arbitrary exercise.

This being the case, the Law Council has previously submitted that a cautious approach is warranted and that the dead time cap should be no more than 48 hours unless sufficient justification can be provided by relevant agencies for the cap to be longer. Specifically, the Law Council argued, in response to the *NSLA Bill*, that it was preferable that the cap be set low and then reviewed by the Monitor, rather than being set at seven days.³⁸⁵

- The provisions which allow a suspect and his or her legal representative to be denied access to information on which an application for dead time or an extended investigation period are based, are too broadly drafted and could render meaningless the right to be heard and make submissions in opposition to the application.

Whilst the Law Council accepts that in the context of a sensitive, ongoing investigation, an application for dead time or an extended investigation period may require the presiding judicial officer to consider classified information in the absence of the person under arrest or his or her legal representative, the provisions as currently drafted give the investigating official and not the judicial officer the complete discretion to determine what information in the application is disclosed to the arrested person and their legal representative.

Furthermore, no provision is made for the judicial officer to order that the relevant information be disclosed to the arrested person's legal representative on the basis of an undertaking that it will not be further disclosed – either to the arrested person or any other third party.

The Law Council acknowledges that it is a matter for the investigating official to determine what information they choose to rely on in the application for dead time or an extended investigation period. However, once a decision is taken to include certain information in the application and to seek to rely on it to the detriment of the arrested person, it should not remain the exclusive prerogative of the investigating official to determine that the information cannot be disclosed because it is likely to be protected by public interest immunity; or if disclosed, is likely to prejudice national security; to put at risk ongoing operations; or put at risk the safety of the community.

Accordingly, the Law Council recommends that the relevant provisions should be redrafted to give the judicial officer the discretion to determine what information should be disclosed, to whom and in what form.³⁸⁶

- According to s.23DB (9)(h), the time taken to make and dispose of a dead time application automatically further extends the dead time. Therefore, if the judicial officer hearing a dead time application fails to make a decision on the spot, and instead adjourns the matter, even for a period of days, then this time itself counts as dead time. An adjournment, by default, becomes an extension of the investigation period. This is what occurred in the Haneef case between 11 July and 13 July 2007.

³⁸⁵ Law Council Submission on National Security Legislation Discussion Paper, October 2009, available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2100-2199/2189%20National%20Security%20Legislation%20Discussion%20Paper%20October%202009%20LCA%20Submission.pdf>

³⁸⁶ Ibid.

This creates the real risk that detained suspects or their legal representatives may be deterred from raising points of law or challenging evidence on the basis that it may delay the presiding judicial officer's pronouncement on the application. For this reason the Law Council has recommended that section 23DD of the *Crimes Act* be amended to preclude a judicial officer from adjourning an application made under s.23DC for more than a specified number of hours, or alternatively, that sub-paragraph 23DB(9)(h) be amended to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must be included in the calculation of the investigation period.

Although sub-paragraph 23DF (2)(e) requires the judicial officer to be satisfied that the person, or his or her legal representative, has had the opportunity to make representations about the application, this right may be susceptible to being circumvented in practice. A person who is not yet legally represented, for example, may not fully appreciate the significance such an application has for his or her liberty. The Law Council is of the view that when an application under section 23DE (1) is made there should be a requirement for the police to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.

5.4.4 Law Council Recommendations

The Law Council recommends that the Government should:

- Amend the dead time cap in s.23DB of the *Crimes Act* so that it is no more than 48 hours unless sufficient justification can be provided by relevant agencies for the cap to be longer. It is preferable that the cap be set low and then reviewed by the Independent National Security Legislation Monitor, rather than being set at seven days.
- Amend provisions such as s 23DC (5) and s 23DD(4) so that the judicial officer has the discretion to determine what information should be disclosed, to whom and in what form.
- Amend section 23DD to preclude a judicial officer from adjourning an application made under s.23DC for more than a specified number of hours, or alternatively, that s 23DB (9)(h) be amended to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must be included in the calculation of the investigation period.
- Amend the *Crimes Act* so that when an application under section 23DE (1) is made there is a requirement for the police to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.

5.5 Control orders and Preventative Detention Orders

The *Anti-Terrorism (No 2) Act 2005* (Cth) introduced a system of preventative detention and control orders into the *Criminal Code* (Division 105 and 104 respectively). Under Divisions 104 and 105, a person's liberty can be controlled or restricted *without* the person being charged or convicted of or even suspected of committing a criminal offence.

When introducing these exceptional measures, the then Government took the view that these restrictions on the right to liberty were necessary to empower police to act to prevent terrorist related activity from occurring.³⁸⁷ However, despite the bipartisan support at the time of their introduction, these powers have attracted considerable controversy and a High Court challenge as to their constitutional validity.³⁸⁸

5.5.1 Control Orders

Control orders allow for a person's liberty, freedom of movement and freedom of association to be limited in the following ways:³⁸⁹

- a prohibition or restriction on the person being at specified areas or places;
- a prohibition or restriction on the person leaving Australia;
- a requirement that the person remain at specified premises between specified times each day, or on specified days;
- a requirement that the person wear a tracking device;
- a prohibition or restriction on the person communicating or associating with specified individuals;
- a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
- a prohibition or restriction on the person possessing or using specified articles or substances;
- a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- a requirement that the person report to specified persons at specified times and places;
- a requirement that the person allow himself or herself to be photographed;
- a requirement that the person allow impressions of his or her fingerprints to be taken; and
- a requirement that the person participate in specified counselling or education.

These restrictions may be imposed on a person for up to 12 months (with the possibility of renewal).³⁹⁰

A control order is made by an issuing court (for example, the Federal Magistrates Court).³⁹¹ Before making an order, the court must be satisfied either:³⁹²

³⁸⁷ See Hon. J. Howard (Prime Minister), *Counter-Terrorism Laws Strengthened*, media release, Canberra, 8 September 2005; Hon. J. Howard (Prime Minister), *Anti-Terrorism Bill*, media release, Canberra, 2 November 2005. See further Patrick Walters, 'Radical youths in fear of arrest as law passed', *The Australian*, 4 November 2005.

³⁸⁸ See later discussion re *Thomas v Mowbray* [2007] HCA 33.

³⁸⁹ *Criminal Code Act 1995* (Cth) s104.5(3).

³⁹⁰ *ibid.*

³⁹¹ An issuing court is defined in s101.1 *Criminal Code Act 1995* (Cth) to include the Federal Court, the Family Court or the Federal Magistrates Court.

³⁹² *Criminal Code Act 1995* (Cth) s104.4 (interim order); s104.16 (confirmed order).

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

Interim control orders are obtained on application by an AFP officer after obtaining the consent of the Attorney-General.³⁹³ The application may be made without having to notify the person concerned of the application.³⁹⁴ If the AFP officer applies to confirm the order, the person subject to the order must be notified, and may appear and give evidence before the issuing court.³⁹⁵ The issuing court may then revoke, confirm or vary the interim control order.³⁹⁶

If confirming the order, the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.³⁹⁷

5.5.2 Preventative Detention Orders

A preventative detention order enables a person to be taken into custody and detained by the AFP in a State or Territory prison or remand centre for an initial period of up to 24 hours, with an option to have the order continued for a total period not exceeding 48 hours.³⁹⁸

Preventative detention orders can be issued where there are reasonable grounds to suspect that the person will engage in a terrorist act or engage in the preparation or planning of a terrorist act.³⁹⁹

There are two types of preventative detention orders: (1) initial preventative detention orders issued by senior members of the AFP⁴⁰⁰ and (2) continued preventative detention orders and extensions of continued preventative detention orders, issued by an 'issuing authority' (such as a judge, federal magistrate or tribunal member) on application by an AFP officer.⁴⁰¹

Continued preventative detention may last for a further period that is not more than 48 hours from the time the person was first taken into custody.⁴⁰² Before making a continued preventative detention order, an issuing authority must be satisfied that:

- there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing that is connected with the preparation for, or the engagement of a person in a terrorist act; or has done an act in preparation for or planning a terrorist act; and
- making the order will substantially assist in preventing a terrorist act occurring; and

³⁹³ *Criminal Code Act 1995* (Cth) 104.2.

³⁹⁴ *Criminal Code Act 1995* (Cth) 104.3.

³⁹⁵ *Criminal Code Act 1995* (Cth) s104.12.

³⁹⁶ *Criminal Code Act 1995* (Cth) s104.14.

³⁹⁷ *Criminal Code Act 1995* (Cth) s104.4 (interim order); s104.16 (confirmed order).

³⁹⁸ *Criminal Code Act 1995* (Cth) ss 105.8 and 105.12

³⁹⁹ *Criminal Code Act 1995* (Cth) s105.4.

⁴⁰⁰ *Criminal Code Act 1995* (Cth) s 105.8(1).

⁴⁰¹ A Judge, Federal Magistrate, Administrative Appeals Tribunal member or retired judge.

⁴⁰² *Criminal Code Act 1995* (Cth) s 105.14.

- detaining the subject for the period of the order is reasonably necessary.

In respect of both forms of preventative detention orders, the individual has no right to appear personally or through legal representation so as to challenge the issuing of an order.⁴⁰³

The preventative detention order provisions of the *Criminal Code* interact with State and Territory provisions which also allow preventative detention for a maximum period of up to 14 days.⁴⁰⁴

5.5.3. When have control orders and preventive detention orders been used?

Reporting requirements apply to both control orders and preventative detention orders. Pursuant to sections 104.29 and 105.47 of the *Criminal Code* the AFP is required to report annually to the Attorney-General and provide information on a number of matters including the number and type of orders made, whether they were confirmed and the particulars of any complaints made to the Ombudsman.⁴⁰⁵ Since their introduction in 2005, no preventative detention orders have been made. Control orders have only been issued on two occasions, once in the case of Jack Thomas following his successful appeal against conviction and sentence,⁴⁰⁶ and once in the case of David Hicks,⁴⁰⁷ following his release from prison.

5.5.4 Law Council Concerns

Although the High Court has ruled that the control order regime contained in Division 104 of the *Criminal Code* is constitutionally valid and does not invest the judiciary with powers contrary to Chapter III of the *Constitution*,⁴⁰⁸ the Law Council continues to hold serious concerns about the operation of the control order and preventive detention regime. The Law Council has made these concerns known at a number of forums, and made a number

⁴⁰³ *Criminal Code Act 1995* (Cth) ss 105.8, 105.12 and 105.18.

⁴⁰⁴ See Part 2A of *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) (Amendment) Act 2006* (Vic); *Terrorism (Preventative Detention) Act 2005* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Part 2B of Terrorism (Emergency Powers) Act* (NT).

⁴⁰⁵ An example of such a report can be found at the AFP website, see <http://www.afp.gov.au/~media/afp/pdf/p/preventative-control-06-07.ashx>

⁴⁰⁶ *R v Thomas* [2006] VSCA 165 (18 August 2006). See also *Thomas v Mowbray* [2007] HCA 33.

⁴⁰⁷ David Hicks is an Australian citizen who undertook combat training in al Qaeda-linked camps and served with the Taliban regime in Afghanistan in 2001. Mr Hicks was apprehended and detained by the US Government in Guantanamo Bay until 2007. In 2007 Mr Hicks pleaded guilty to a US charge of "providing material support for terrorism" and was returned to Australia to serve the remaining nine months of a suspended seven-year sentence. When Mr Hicks was released from prison in December 2007, he was placed under an interim control order. The order was issued on the basis that Mr Hicks, having allegedly trained with a terrorist organisation and once expressed support for a violent ideology, represented an unacceptable risk to the community. The interim control order was confirmed (with some changes to the conditions of the order) by a Federal Magistrate on 19 February 2008. See *Jabbour v Hicks* [2007] FMCA 2139.

⁴⁰⁸ In *Thomas v Mowbray* [2007] HCA 33, Mr Thomas challenged the constitutional validity of the control order regime in two key respects. First, he argued that the Commonwealth Parliament did not have legislative power to enact the control order regime because it was not connected to any of the subjects that the Commonwealth Parliament is permitted to legislate on. Secondly he contended that the regime required the judiciary to exercise a type of decision making power, (namely the power to decide whether restrictions should be imposed on the liberty of a person who has not been convicted of a criminal offence), that is inconsistent with the exercise of judicial power. Under the *Australian Constitution*, except where it is incidental to and consistent with the exercise of their judicial functions, it is considered a violation of the separation of powers doctrine for non-judicial functions to be conferred on federal judges. The majority of the High Court upheld the validity of the control order regime. It found that the legislation was supported by power to make laws with respect to the defence of Australia, and that this included the power to make laws in response to international terrorism. The majority also found that the type of power the control orders regime vested in the judiciary was not contrary to the *Australian Constitution*.

of recommendations for reform, before and after the constitutional challenge.⁴⁰⁹ Its concerns can be summarised as follows:

- No demonstrated necessity for such extraordinary powers

At the time the control order and preventative detention order provisions were introduced no fewer than thirty one Commonwealth Acts had provisions which provided for the prevention and prosecution of terrorist acts. For example, under the *Criminal Code* it is an offence to attempt, procure, incite or conspire to commit any offence, including terrorist related offences,⁴¹⁰ and such offences incur the same penalties as the completed offence. Each of these offences allows police to take pre-emptive action to prevent the commission of a terrorist act. However, unlike the control order and preventative detention order regimes they require police to establish a connection between a suspect and the planned commission of a particular offence before action can be taken to arrest and charge a person.

- Restriction of liberty based on suspicion rather than charge

The control order and preventative detention order regimes are not based on the fact that a person is suspected to have committed or is alleged to have committed or has been proven to have committed a particular offence, but rather on the basis that they *might* commit or facilitate the commission of an offence.

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

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

This form of suspicion based detention runs counter to the long standing common law principle that orders restricting liberty should only be made following an independent and impartial trial by a judge and jury. As Professors Andrew Lynch and George Williams explain:

Both schemes represent an attempt to avoid the accepted judicial procedures for testing and challenging evidence in criminal trials that are normally applied before a person is deprived of their liberty. This is clearly so in respect of the preventative detention orders, which may be issued by an individual officer simply on the basis of reasonable suspicion, but also applies to the use of a

⁴⁰⁹ See for example Law Council of Australia, Submission and Supplementary Submission to Independent National Security Legislation Monitor's Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention Orders, 10 September 2012, and 10 December 2012 available from <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2645%20-%20Inquiry%20into%20questioning%20and%20detention%20warrants.%20control%20orders%20and%20preventative%20detention%20orders.pdf> and http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/submissions/2761_Supp_sub_control_orders.pdf See also Law Council of Australia, Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism (No. 2) Bill 2005* (11 November 2005); Law Council of Australia Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document* (29 August 2008); Law Council of Australia Submission to the Attorney-General's Department, Australia's response to the concluding observations of the UN Committee against torture (1 September 2008). A number of the Law Council's constituent bodies have also engaged in advocacy on this issue, see for example Law Institute of Victoria Submission *Anti-Terrorism Bill* (No.2) 2005 (Vic) (09 November 2005).

⁴¹⁰ Part 2.4 of the *Criminal Code Act 1995* (Cth).

*lower standard of proof by courts charged with issuing control orders. The broad scope of the latter – as well as their longer duration – makes this concern particularly strong.*⁴¹¹

As can be seen from the two occasions in which control orders have been issued in Australia, such orders effectively provide the executive government with a 'second chance' to restrict the liberty of persons of interest where there is insufficient evidence to convict them of a criminal offence.

For example, when former Guantanamo Bay prisoner, David Hicks, was released from prison, he was placed under a control order. The order was issued on the basis that Mr Hicks, having allegedly trained with a terrorist organisation and once expressed support for a violent ideology, represents an unacceptable risk to the community. All the evidence relied upon to establish that risk was more than six years old. Mr Hicks' long period of incarceration at Guantanamo Bay, his willingness to assist police and other authorities during his detention, and his purported change of views did not dissuade the authorities from applying for a control order.

- Undermines safeguards of criminal justice system

Under the control orders and preventative detention orders regime, a person's liberty may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge that restriction of liberty. For example:

- Control orders remove the right to be presumed innocent until proved guilty according to law.⁴¹²
- Control orders limit the right of the person subject to the order to challenge the legality of the order by restricting access to relevant information. The ability of the person subject to a control order to challenge the confirmation of the order is limited by their restricted access to information. In circumstances where it is claimed that the release of information might prejudice national security, the person subject to the order may be excluded from accessing information relied upon by police to support the control order application. The person subject to the order is only entitled to a summary of the grounds upon which the interim order was made. This restriction applies to an appeal against, or reviews of, a decision made at a confirmation hearing.
- Although a person subject to a preventative detention order is able to access legal advice and representation,⁴¹³ the application for either an initial or continued preventative detention order is made ex parte by members of the AFP.⁴¹⁴ In relation to continued preventative detention orders, the AFP member making the application must put before the issuing authority 'any material in relation to the application' that the person the subject of the order has given the AFP member. However, the person subject to the order has no right to appear personally or through legal representation at the hearing of the application for the preventative detention order.
- Preventative detention orders also restrict detainees' rights to legal representation by only allowing detainees access to legal representation for

⁴¹¹ Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006).

⁴¹² *Criminal Code Act 1995* (Cth) s104.5(3).

⁴¹³ *Criminal Code Act 1995* (Cth) s 105.37

⁴¹⁴ *Criminal Code Act 1995* (Cth) ss 105.7 and 105.11.

the limited purpose of obtaining advice or giving instructions regarding the issue of the order or treatment while in detention.⁴¹⁵ Contact with a lawyer for any other purpose is not permitted. In addition, both the content and the meaning of communication between a lawyer and a detained person can be monitored.

- Both regimes allow a person to be subject to severe restrictions of their liberty on the basis of evidence only established 'on the balance of probabilities'.
- The absence of independent review

The Law Council is concerned that despite the extraordinary nature of the control order and preventative detention order regime, these powers exist without adequate structures for independent review.

Decisions made under section 104.2 or Division 105 of the *Criminal Code* are excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1997 (ADJR Act)*.⁴¹⁶ This, coupled with inadequate access to information and limited access to legal representation, makes it very difficult for persons subject to a control order or a preventative detention order to ascertain the true basis for the order being made, challenge the legality of the order, or challenge the conditions of their detention.

To address this lack of independent review the Law Council has submitted that the Government should:

- ensure that the exercise of executive powers under Divisions 104 and 105 of the *Criminal Code* are subject to full judicial review under the *ADJR Act*;
- appoint a Public Interest Monitor or other independent body to monitor and report on the use of control orders and preventative detention orders and to appear before decision-making authorities where decisions would otherwise be made ex parte, to represent the public interest and to assist the court in its scrutiny of evidence placed before it. Such a model already exists in the UK.⁴¹⁷

The Monitor has a broad mandate to review Australia's anti-terrorism laws, including those relating to control orders and preventative detention orders, however he does not perform the function of a Public Interest Monitor or the UK Independent Reviewer of Terrorism Laws in respect of applications for and the making of control orders (now Terrorism Investigation and Prevention Measures (TPims)) or preventative detention orders.

Significant changes to the UK control order regime were recently made as a result of a review of UK counter-terrorism powers. Central to these changes is the replacement of control orders with Terrorism Investigation and Prevention Measures (TPims). TPims commenced operation in January 2012.

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

⁴¹⁵ *Criminal Code Act 1995* (Cth) s105.37.

⁴¹⁶ *Administrative Decisions (Judicial Review) Act 1997* (Cth) Schedule 1 s3 (dab), (dac).

⁴¹⁷ See the *Terrorism Act 2000* (UK) s126, *Prevention of Terrorism Act 2005* (UK) s4(3). For further information see Law Council of Australia Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (15 September 2008).

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

As mentioned above, the Monitor's 2012 Annual Report contained a number of conclusions and recommendations about control orders and preventative detention orders that aligned with those advanced by the Law Council.⁴¹⁸ For example, the Monitor concluded that control orders in their present form are not effective, not appropriate and not necessary and recommended that they be repealed. The Monitor suggested that consideration be given to the use of alternative provisions that could be used to restrict the movements or other activities of persons already convicted of terrorist offences whose dangerousness at the expiry of their sentences of imprisonment can be shown. The Monitor also concluded that preventative detention orders are not effective, not appropriate and not necessary and recommended that they be abolished.

The COAG Committee also made a number of recommendations for reform that aligned with those made by the Law Council in its report of its review of Australia's counter-terrorism legislation. For example, the Committee recommended that the Commonwealth, State and Territory 'preventative detention' legislation be repealed.

While the COAG Committee supported the continuation of the control order regime, it made a number of recommendations to improve safeguards and oversight mechanisms within the existing regime. For example it recommended that:

- consideration be given to amending the legislation to provide for the introduction of a nationwide system of 'Special Advocates' to participate in control order proceedings;
- minimum standards be introduced concerning the extent of the information to be given to a person the subject of an application for a control order; and
- the *Criminal Code* be amended to ensure that, whenever a control order is imposed, any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person's liberty, privacy or freedom of movement that is necessary in all the circumstances.

5.5.5 Law Council Recommendations

The Law Council recommends that the Government:

- Repeal the control order and preventative detention order regime in Divisions 104 and 105 of the *Criminal Code*.

If the provisions are to remain, ensure that amendments are made to:

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

⁴¹⁸ B. Walker SC, Independent National Security Legislation Monitor 2012 Annual Report, 20 December 2013, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf

- ensure a person who is the subject of a control order or a preventative detention order is provided with all the information and evidence that forms the basis of the application for such an order, or at the very least, that the court should be empowered to exercise discretion in this regard;
- ensure a person subject to a preventative detention order is entitled to attend an application hearing and present his or her case;
- require a relevant prior conviction and evidence of unsatisfactory rehabilitation for the making of control orders or preventative detention orders;
- repeal section 105.38, that provides that any contact between a detained person and his or her lawyer must be monitored. At the very least, the courts should be given discretion to determine whether such monitoring is required;
- subject the exercise of powers under Divisions 104 and 105 of the *Criminal Code* to full judicial review under the *Administrative Decisions (Judicial Review) Act 1977*;
- appoint an independent body such as a Public Interest Monitor with access to all material upon which an application for control orders and/or preventative detention orders is based.

5.6 Questioning and Detention powers of ASIO

5.6.1 What measures were introduced and why?

In 2002 the Government introduced the *SLAT Bill* and related Bills into Parliament, including the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth). The purpose of the Bill was to amend the *ASIO Act* by expanding the special powers available to ASIO to deal with terrorism.

When enacted the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth) amended the *ASIO Act* from which ASIO derives its authority. The 2002 Act:

- included the definition of a 'terrorism offence' in the *ASIO Act*;
- allowed ASIO to apply for warrants to question, or detain and question, persons as detailed below; and
- permitted personal searches to be authorised in conjunction with detention warrants.

The *ASIO Legislation Amendment Act 2003* (Cth) also introduced secrecy provisions into the legislation which prohibited:

- disclosure of the existence of a warrant and any fact relating to the content of a warrant or to the questioning or detention of a person under a warrant while it is in force (up to 28 days); and
- disclosure of any ASIO operational information acquired as a direct or indirect result of the issue of a warrant while it is in force and during the period of two years after the expiry of the warrant, unless the disclosure is permitted under another provision.

5.6.2 Questioning and Detention Warrants

The 2002 amendments gave ASIO the power to obtain a warrant to:

- require a specified person to appear before a prescribed authority (such as a Judge or Administrative Appeals Tribunal (AAT) member) for questioning (known as a 'questioning warrant');
- authorise a specified person to be taken into custody by a police officer, be brought before a prescribed authority immediately for questioning and be detained under arrangements made by a police officer (known as a 'questioning and detention warrant').⁴¹⁹

The person subject to a questioning or questioning and detention warrant does not need to be charged with or even suspected of committing a criminal offence.

Questioning warrants and questioning and detention warrants are issued by a Federal Magistrate or Judge.⁴²⁰ Before applying for such a warrant, ASIO must first obtain the consent of the Minister.⁴²¹

The Minister may authorise the Director-General of ASIO to seek a questioning warrant when he or she is satisfied that:⁴²²

- there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence; and
- relying on other methods of collecting that intelligence would be ineffective.

The Minister may authorise the Director-General of ASIO to seek a questioning and detention warrant when he or she is satisfied that:⁴²³

- there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence; and
- relying on other methods of collecting that intelligence would be ineffective; and
- there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
 - may alert a person involved in a terrorism offence that the offence is being investigated; or
 - may not appear before the prescribed authority; or
 - may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

⁴¹⁹ *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34E, 34G.

⁴²⁰ See *Australian Security and Intelligence Organisation Act 1979* (Cth) s34AB.

⁴²¹ *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34D, 34F.

⁴²² *Australian Security and Intelligence Organisation Act 1979* (Cth) s34D.

⁴²³ *Australian Security and Intelligence Organisation Act 1979* (Cth) s34F.

Once the Minister's consent has been given and an application for a warrant made to an issuing authority for either a questioning or a questioning and detention warrant, in order to issue the warrant the issuing authority need only be satisfied that there are 'reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence'.⁴²⁴

The issuing authority is not required to consider whether other methods are available for gathering the information, for example, or whether it is necessary to detain the person in order to question them. These are matters which are only considered by the Minister.

Once before the prescribed authority for questioning, the person can be required to provide information or produce records that are "... relevant to intelligence that is important in relation to a terrorism offence." The person's ability to contact other people is limited. However, the person may access a single lawyer of their choice and an interpreter, along with other prescribed persons.

Questioning under a questioning warrant or a questioning and detention warrant may not exceed eight hours without the permission of the prescribed authority, who can grant permission for the questioning to be continued for an additional eight hours at a time, up to a maximum of 24 hours (48 hours when an interpreter is used). Permission to extend the time for questioning on other grounds can only be granted where the prescribed authority believes that continued questioning will assist in the collection of intelligence related to terrorism offenses and that there has been no undue delay on the part of the questioners. Certain time periods (for example, periods required to address complaints, or for rest, religious practice or medical attention) are not considered "questioning time" for the purpose of calculating periods of questioning; however, a person may not be detained continuously for more than 168 hours.

It is a criminal offence for a detainee to refuse to answer a question and there is no privilege against self-incrimination per se; however, information or documents provided by a person under questioning may not be used against that person in subsequent criminal proceedings.

The police have a range of powers they can use when seeking to give effect to a questioning warrant or a questioning and detention warrant, or a direction made by a prescribed authority in respect of such a warrant. These include powers to search a person, take a person into custody, and require the surrender of a person's passport.

Part III Division 3 of the ASIO Act also contains a range of secrecy offences, for example it is an offence to disclose information regarding the existence or contents of a questioning warrant or questioning and detention warrant during the period in which the warrant is in force and for two years afterwards. There are also offences relating to contravening a safeguard in this Part.

The IGIS or his or her representative may be present at any time during which a person is taken into custody or questioned under a questioning warrant or a questioning and detention warrant and can raise concerns regarding the legality or propriety of action in relation to the execution of the warrant.

While in detention, the person is prevented from contacting anyone not specified in the warrant.⁴²⁵ Contact is permitted, however, with the IGIS and the Ombudsman. Further, the warrant may specify that the person may contact 'his or her lawyer' or someone with a particular familial relationship.

⁴²⁴ *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34E, 34G

⁴²⁵ *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34F(5),(6).

The maximum period a person can be detained for the purpose of questioning by ASIO is 168 hours, or seven days.⁴²⁶

ASIO warrants are issued for specified periods. At the expiry of each warrant, ASIO must report to the Attorney-General on the extent to which the operation helped ASIO carry out its functions. ASIO must also report regularly on the use of its questioning and detention powers to Parliament.⁴²⁷ These reporting requirements have provided an important source of public information as to the use of the questioning and detention powers.

ASIO has reported that to date no questioning and detention warrants have been issued or used, however questioning warrants have been used on a number of occasions.⁴²⁸ For example, in 2004-2005, 11 questioning warrants were issued, involving 10 people.⁴²⁹ Two of the persons questioned under the warrants in 2004-2005 were subsequently charged with the offence of providing false or misleading information.⁴³⁰ The first was Faheem Lodhi, who was questioned in October and November 2003 under a questioning warrant and was charged with terrorism offences under section 101 of the *Criminal Code* and with five counts of false and misleading statements under section 34G(5) of the *ASIO Act*.⁴³¹ On 11 June 2005 Lodhi was committed to stand trial on all charges and was subsequently convicted of the majority of these offences.⁴³² The second was Abdul Rakib Hasan, who in July 2005 was charged with providing false and misleading information under section 34G of the *ASIO Act*.⁴³³ Mr Hasan was ultimately found guilty in October 2009 along with his four co-accused of conspiring to do acts in preparation for a terrorist act or acts.⁴³⁴

ASIO's questioning and detention powers have also been subject to review by the Senate Legal and Constitutional Review Committee (SLCRC)⁴³⁵ and the PJCIS.⁴³⁶ Both Committees have noted the controversial nature of the powers⁴³⁷ and the strong opposition to their introduction from a range of stakeholders in the community.

In its review, the PJCIS made a number of recommendations for reform, some of which were adopted by Parliament. However, many of the recommendations, including those that recommended confidential access to legal representation of a person's choice,⁴³⁸ were not adopted.

The Law Council has submitted that the seven day maximum period for detention and the 24 hour maximum period for questioning (or 48 hours where interpreters are used) are too long. These are considerable periods to restrict a person's liberty and require them to

⁴²⁶ *Australian Security and Intelligence Organisation Act 1979* (Cth) s34G(4).

⁴²⁷ *ASIO Act 1979* s94(1A).

⁴²⁸ Eg ASIO, Annual Report to Parliament 2007-2008 (tabled October 2008) p. 122 available at <http://www.asio.gov.au/img/files/ASIOsReportToParliament07-08.pdf>

⁴²⁹ ASIO, Annual Report to Parliament 2004-2005 pp.41-42 available at <http://www.asio.gov.au/img/files/ASIOsReportToParliament04-05.pdf>

⁴³⁰ *ibid* .

⁴³¹ *ibid*.

⁴³² Mr Lodhi was acquitted of making a document connected with preparing for a terrorist act, but found guilty of possessing a thing connected with preparing for terrorism; collecting documents connected with preparing for terrorism; doing an act in preparation for a terrorist act; and giving false or misleading answers to ASIO.

⁴³³ ASIO, Annual Report to Parliament 2004-2005 pp.41-42 .

⁴³⁴ Katelyn Catanzariti, 'Homegrown Terror Cell Guilty of Plot Against Australians', *Courier Mail*, 16 October 2009. Available from <http://www.couriermail.com.au/news/national/homegrown-terror-cell-guilty-of-plot-against-australia/story-e6freoo0-1225787728440>. See *R v Elomar & Others* [2010] NSWC 110.

⁴³⁵ Senate Legal and Constitutional Review Committee, *Report on the ASIO Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002.

⁴³⁶ PJCIS, *Report on ASIO's Questioning and Detention Powers*, (November 2005).

⁴³⁷ *ibid* at [1.3].

⁴³⁸ Parliamentary Joint Committee on ASIO, ASIS and DSD Report, *ASIO's Questioning and Detention Powers - Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* p. 24. AGD submission, pp. 3-4; ASIO transcript, public hearing 19 May 2005, Recommendations 4 to 7.

answer questions or face criminal sanction for failing to do so, particularly when the person need not be charged with or even suspected of a criminal offence prior to detention and questioning. Insufficient evidence has been made publicly available that would demonstrate that these maximum periods are necessary for ASIO to fulfil its statutory functions and to combat threats to national security, particularly in light of the range of other intelligence gathering powers available to ASIO.

Under Part 1C of the Crimes Act, a person believed to have committed or to be committing a terrorism offence may only be detained by the AFP for four hours prior to being charged (with a possible extension of up to 24 hours). By contrast, a non-suspect under the ASIO questioning and detention regime may be detained for up to 7 seven days. As the Hon Michael McHugh AC has observed:

“...a questioning and detention warrant authorises the detention of persons, not suspected of a terrorism offence, for seven times as long as a person suspected of a terrorism offence and 14 times as long as a person suspected of [a] non terrorist offence”.⁴³⁹

The Law Council has suggested that an appropriate period would be four hours of questioning with a four hour extension, and recommends that questioning occur under a regime subject to judicial oversight such as that available to the ACC, rather than the regime currently available under Part III Division 3 of the ASIO Act. Under such an approach, if eight hours of questioning is insufficient, any further extension should require approval from the judicial authority issuing the warrant for questioning.

If, contrary to the Law Council's recommendation, questioning and detention warrants continue to be available to ASIO, the Law Council recommends that the period of detention under a Part III Division 3 warrant should be a single period incapable of extension, and should be limited to a period no longer than that shown to be necessary in order for useful intelligence to be gained.

The Monitor also made a number of recommendations in relation to the use of questioning and questioning and detention warrants in his 2012 Annual Report.⁴⁴⁰ The Monitor supported the continued existence of questioning warrants for ASIO, which he described as ‘sufficiently effective to be appropriate, and in a relevant sense necessary’. However, he also recommended that the more intrusive questioning and detention warrant regime contained in the ASIO Act be repealed and replaced with an approach which provides a detention power narrower in scope than the power that currently exists. The Monitor explained that such an approach recognises the legitimate need of ASIO to ensure the attendance of a person for questioning while balancing the rights of individuals not to be unnecessarily detained on a pre-emptive basis.

5.6.3 Law Council Concerns

The Law Council accepts the need, in principle, to provide intelligence, security and law enforcement authorities with adequate powers to effectively investigate and obtain evidence in relation to appropriately defined terrorism offences. However, the Law Council is of the view that if the Government seeks to justify restriction of liberty on the basis of the need to pre-empt and prevent terrorist activity, it must ensure that its legislative response is the least restrictive means of achieving that protective purpose.

⁴³⁹ McHugh, M, ‘Constitutional Implications of Terrorism Legislation’ (2007) 8 *The Judicial Review* 189, 202

⁴⁴⁰ B. Walker SC, Independent National Security Legislation Monitor 2012 Annual Report, 20 December 2013, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf

As previously submitted on a number of occasions, the Law Council is concerned that ASIO's questioning and detention powers severely limit a person's right to challenge the lawfulness of his or her detention and are so broad they may be utilised arbitrarily.⁴⁴¹

In April 2009, these concerns were shared by the UNHRC in its Concluding Observations on Australia. The Committee commented on ASIO's expanded questioning powers and the so far unused powers to detain persons without access to a lawyer and in conditions of secrecy for up to seven-day periods. It recommended that Australia:

*envisage to abrogate provisions providing Australian Security Intelligence Organization (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.*⁴⁴²

The Law Council's concerns with these provisions are outlined below.

- The basis for detention is so broad in scope that it gives rise to arbitrary application.

The Law Council is concerned that the *ASIO Act* authorises the questioning and detention of a person, even though they are not suspected of any involvement in a terrorist offence, simply because they *may* have some knowledge about the commission or possible commission of a terrorist related offence.

The alarming prospect of the detention of 'non suspects', for the purpose of information gathering, is exacerbated when one considers what the term 'terrorism offence' encompasses. Such offences encompass much more than the commission or planned commission of a terrorist act. They include, for example being an 'informal member of a terrorist organisation' or 'associating with a terrorist organisation'.

Limited ability to challenge the lawfulness of detention

The secrecy surrounding detention under an ASIO warrant makes it very difficult for a detained person to both know and challenge the grounds for their detention.

For example, Part III Division 3 of the *ASIO Act* authorises the arrest of individuals for the purpose of questioning⁴⁴³ but provides no mechanism by which the person arrested shall be informed, at the time they are apprehended, of the reasons for his or her detention.⁴⁴⁴ While the prescribed authority is required to inform the detained person of the effect of the warrant, there is no obligation to inform the person of the reason the warrant was issued. In fact, a copy of the warrant itself is the only document required to be provided to the single lawyer of the person's choice.

⁴⁴¹ For example see Law Council of Australia Submission to the Independent National Security Legislation Monitor's Inquiry into Questioning and Detention Warrants, Preventative Detention Orders and Control Orders, 10 September 2012, available from <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2645%20-%20Inquiry%20into%20questioning%20and%20detention%20warrants,%20control%20orders%20and%20preventative%20detention%20orders.pdf>. See also Law Council of Australia Submission to the Parliamentary Joint Committee on ASIO, ASIS, DSD & Senate Legal & Constitutional Legislation Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, (29 April 2002); Law Council of Australia Submission to the Parliamentary Joint Committee on ASIO, *Review of ASIO Questioning and Detention Powers* (4 April 2005). A number of the Law Council's constituent bodies have also engaged in advocacy on this issue, see for example Law Institute of Victoria Submission, *Proposed new counter terrorism measures* (15 September 2005); Law Institute of Victoria Submission, *Parliamentary Joint Committee on ASIO, ASIS and DSD* (24 March 2005).

⁴⁴² UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 2 April 2009, CCPR/C/AUS/CO/5, para [11].

⁴⁴³ *Australian Security Intelligence Organisation Act 1979* (Cth) ss34E, 34G.

⁴⁴⁴ This is a requirement under Article 9(2) of the *International Covenant on Civil and Political Rights* and a key component of the right to liberty and security of person.

The absence of any requirement to inform the person detained of the grounds upon which the warrant was issued impedes his or her right to take proceedings before a court, in relation to the lawfulness of his or her detention.

Access to information relating to a warrant is also restricted by section 34ZS which makes it an offence for a person to disclose information that indicates the fact that a warrant has been issued or any information relating to the use of a warrant. Elements of strict liability apply if the disclosure is made by a lawyer of the person subject to a warrant in certain circumstances.

Access by a lawyer to relevant information may be further restricted by regulation⁴⁴⁵ or by the provisions of the *NSI Act*.

Under the *ASIO Act* the prescribed authority is required to inform the person being questioned of his or her right to seek a remedy from a federal court,⁴⁴⁶ but that safeguard is rather hollow in the circumstances as ASIO is exempt from the statutory grounds of judicial review under the *ADJR Act*. As a result, the only real mechanism for judicial review is the prerogative writ of habeas corpus. In any event, it is likely that habeas corpus proceedings would be unsuccessful unless the detained person could demonstrate that the relevant opinions of the Minister and issuing authority were not genuinely entertained or that the relevant opinions were wholly unreasonable. It is unlikely that such an argument could be mounted when the person detained only has access to the warrant itself, and no other information specifying the grounds supporting the warrant.

As a result, there is in reality almost no effective means by which a person who has been detained can attempt to persuade a court that his or her detention is not lawful, or challenge the conditions of his or her detention.

Limited access to a lawyer of choice

It is permitted, in certain circumstances, for persons questioned and/or detained under a Part III Division 3 warrant to contact a lawyer of their choice.⁴⁴⁷ However, this contact can be tightly controlled and limited by the prescribed authority.⁴⁴⁸

For example, section 34ZO allows the prescribed authority to prevent contact with a particular lawyer of the person's choice – even when the person is being detained under a warrant - or to limit that contact, if, for example, the prescribed authority is satisfied that contact with the particular lawyer may cause a record or thing relevant to the warrant to be destroyed or damaged.

In addition, section 34ZP(1) makes it clear that questioning under either warrant can occur *in the absence of a lawyer of a person's choice*.

⁴⁴⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) s34ZT.

⁴⁴⁶ *Australian Security Intelligence Organisation Act 1979* (Cth) s34J(f).

⁴⁴⁷ Subsections 34D(5) and 34E(3) of the *Australian Security Intelligence Organisation Act 1979* make it clear that a questioning or questioning and detention warrant must permit the person to contact 'a single lawyer of the person's choice at any time the person is appearing before a prescribed authority for questioning under the warrant' and at any time the person is in detention in connection with the warrant and at a time after detention. However, these provisions also provide that the person being questioned and/or detained must inform the prescribed authority of the identity of the lawyer and the person exercising authority under the warrant must be given the opportunity to request that the prescribed authority direct that the person be prevented from contacting the lawyer.

⁴⁴⁸ For example, subsection 34G(5) of the *Australian Security Intelligence Organisation Act 1979* provides that, as a person is generally prohibited from contacting any persons not named in the warrant, a questioning and detention warrant must identify the single lawyer of the persons choice. A questioning and detention warrant may also specify a time when the person is permitted to contact the person identified as a lawyer.

Further, subsection 34ZQ(2) provides that contact with a lawyer by a person subject to a questioning or questioning and detention warrant can be 'monitored by a person exercising authority under the warrant.'⁴⁴⁹

The Law Council considers that any person compelled to answer questions pursuant to a warrant must be entitled to access a lawyer at all stages of the questioning process, without that communication being monitored or otherwise restricted.

Such access is necessary to ensure the person subject to the warrant can exercise his or her right to challenge the legality of the detention, the conditions of detention and any ill-treatment occurring during the questioning process.⁴⁵⁰

Without access to independent legal counsel, the guarantee in section 34T - that persons detained should be treated with humanity and respect for human dignity – is rendered meaningless. Unless detainees can freely access legal advice and communicate confidentially with their lawyer, there are no practical means to challenge any ill-treatment.

The right to communicate with the IGIS and the Ombudsman,⁴⁵¹ whilst a laudable supplementary safeguard, is inadequate to ensure that detained persons, or persons on behalf of detained persons, are able to bring proceedings challenging the lawfulness of the detention and their treatment whilst being questioned or detained.

Right to Silence and Freedom from Self-incrimination undermined

Under the provisions of the *ASIO Act*, a person subject to a questioning warrant or a questioning and detention warrant who does not appear before the prescribed authority,⁴⁵² or appears but fails to give any information or to produce any record or thing requested in the warrant, is subject to a penalty of five years imprisonment.⁴⁵³ The fact that answering a question may require a person to incriminate him or herself is no defence. The right to silence cannot be claimed.

Section 34L of the *ASIO Act* compels a person named in a warrant to give information and items to ASIO regardless of whether doing so might tend to incriminate the person or make them liable to a penalty.

Although information obtained by ASIO under a questioning or questioning and detention warrant is not admissible in evidence against the person in other criminal proceedings ('use immunity'),⁴⁵⁴ there is no such bar on the use of further information or evidence subsequently revealed as a result of the information obtained ('derivative use immunity').

Hence, any evidence obtained as a result of information or items provided by the person under a questioning or questioning and detention warrant is capable of being used to prove that person has committed a criminal offence. The mandatory presence of a police

⁴⁴⁹ *Australian Security Intelligence Organisation Act 1979 (Cth)* s34ZQ. However, subsection 34ZQ(3) provides that subsection 34ZQ(2) does not apply in relation to contact with a lawyer where that contact is covered by subsection 34E(3)(a). Section 34ZQ further provides that although a legal adviser may provide legal advice in the breaks between questioning, a legal adviser must not disrupt questioning. Pursuant to subsection 34ZQ(9), if a prescribed authority considers the legal adviser's conduct is unduly disrupting the questioning, the authority may direct the removal of the legal adviser from the place where the questioning is occurring.

⁴⁵⁰ This view is supported by the UN Human Rights Committee, see UN Human Rights Committee, *General Comment No 20: Replaces General Comment No 7 concerning prohibition of torture and cruel treatment or punishment*, 10/03/92 at [11].

⁴⁵¹ Section 34K permits the person to contact the Inspector General of Intelligence and Security, the Ombudsman and a person referred to in the *Australian Federal Police Act 1979* s40SB(3)(b) while the person is in custody or detention.

⁴⁵² A prescribed authority is a person appointed in accordance with s 34B of the *Australian Security Intelligence Organisation Act 1979* and includes judges of superior courts and members of the Administrative Appeals Tribunal.

⁴⁵³ *Australian Security and Intelligence Organisation Act 1979 (Cth)* ss 34G(1), (3) & (6).

⁴⁵⁴ *Australian Security and Intelligence Organisation Act 1979 (Cth)* s 34L.

officer throughout questioning, required by ASIO's Statement of Procedures, ensures law enforcement agencies have ready access to information and material provided to ASIO by the detained person, and thus increases the likelihood of derivative use of information the detained person has been compelled to divulge.⁴⁵⁵

5.6.4 Law Council Recommendations

The Law Council recommends that Part III Division 3 of the *ASIO Act* be repealed and replaced with an alternative approach to gathering information about terrorist-related and other serious offences.

Such an alternative approach should accord with other recognised criminal investigation procedures (for example, the compulsory questioning regime of the Australian Crime Commission)⁴⁵⁶ and contain the following features:

- questioning should be limited to a defined period of four hours with a four hour extension;
- any further extension beyond this should require judicial approval from the authority issuing the warrant for questioning; and
- a person being questioned should be entitled to legal representation during the process.

If these recommendations are not adopted and the current questioning and detention regime is retained, the Law Council recommends the introduction of the following safeguards into Part III Division 3 of the *ASIO Act*:

- the types of offence for which evidence can be gathered under a warrant should be limited;
- the person the subject of a Division 3 warrant should be informed at the time of arrest of the reasons for the warrant being issued, including information specifying the grounds for issuing the warrant;
- all persons the subject of a Division 3 warrant should have access to a lawyer of their choice. That access should not be subject to limitation;
- a lawyer of the person's choice should be entitled to be present during the entire questioning process;
- persons detained or questioned should be entitled to make representations through their lawyer to the prescribed authority;
- all communications between a lawyer and his or client should be recognised as confidential and adequate facilities should be provided to ensure the confidentiality of communications between lawyer and client;
- the period of detention under a questioning and detention warrant should be a single period incapable of extension; and

⁴⁵⁵ Office of the Inspector General of Intelligence and Security, *Statement of procedures - warrants issued under Division 3 of Part III, Australian Security Intelligence Organisation Act 1979* at [7] available at <http://www.comlaw.gov.au/Series/F2006L03543>

⁴⁵⁶ Under the *Australian Crime Commission Act 1984* the ACC already has the power to summons witnesses and suspects to be questioned but does not have the power to detain people.

- section 34L should be amended to make it clear that evidence obtained directly or indirectly from a warrant issued under this Division cannot be used to prove that the person has committed a criminal offence.

As ASIO questioning and detention powers rely on administrative protocols to guide the conduct of officers exercising warrants,⁴⁵⁷ the Law Council further recommends the publication of information on any complaints received from persons subject to warrants in relation to their treatment in detention for the purpose of reviewing the relevant protocols.

6. Procedural and Classification Reforms

6.1 What measures were introduced?

In addition to the introduction of new criminal offences and extended investigation powers for law enforcement and intelligence agencies, a number of other anti-terrorism measures were introduced, changing the legal landscape of civil and criminal procedure. For example:

- In 2004 the Australian Government introduced the *NSI Act* for the purpose of restricting the disclosure of classified or security sensitive information in the course of civil and criminal proceedings.
- In 2005 the *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005* (Cth) (*the Video Link Evidence Act*) introduced changes to the procedures governing the trial of terrorist suspects in Australia. The Act allows a court to take evidence from witnesses via video link and to accept foreign evidence in the form of written statements, video or audio material.
- In 2007 the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth) (*the Terrorist Material Classification Act*) introduced reforms to Australia's classification regime, with the effect that certain types of publications, films and computer games must be refused classification if they 'advocate the doing of a terrorist act'.⁴⁵⁸

These measures have the potential to impact adversely on the right to a fair trial and the right to free speech and expression.

The Law Council's concerns in that regard are summarised below.

6.2 National Security Information and Court Proceedings

6.2.1 What measures were introduced and why?

The *NSI Bill* was introduced against the backdrop of an ALRC Inquiry into measures to protect classified and security information in the course of investigations and proceedings.⁴⁵⁹ The ALRC's background paper recognised that tensions exist between

⁴⁵⁷ Such protocols are issued by the Director General of Security under s34C(1) of the *Australian Security Intelligence Organisation Act 1979*.

⁴⁵⁸ See *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s9A(1).

⁴⁵⁹ On 2 April 2003, the then Attorney-General referred the matter of measures to protect classified and security information in the course of investigations and proceedings to the ALRC for inquiry and report. The ALRC released a background paper in July 2003, a discussion paper in January 2004, and its report in May 2004.

the right to a fair trial, guaranteed in Australian and international law, and the need to protect certain classified and security sensitive information from general disclosure.

A number of organisations, including the Law Council made submissions to the ALRC, arguing that there were well established mechanisms for protecting sensitive information in the context of court proceedings, such as measures to protect the identity of informants, suppress the names of parties or witnesses, or restrict or limit publicity associated with the proceedings.⁴⁶⁰ However, the Law Council also recognised that the practical application of public interest immunity law is difficult and complex, and that some further work on the systematisation of the various circumstances involving public interest immunity would be valuable.

Having considered the responses to its background paper, the ALRC produced a discussion paper in February 2004. The discussion paper proposed a detailed statutory scheme that would govern the use of classified and security sensitive information in all stages of proceedings in all courts and tribunals in Australia.⁴⁶¹ The ALRC again invited submissions and comments on the views presented in its paper.

Before the ALRC published its final report, the then Commonwealth Government introduced the *NSI Bill* and the *National Security Information (Security Proceedings) (Consequential Amendments) Bill 2004 (Cth) (the NSI Consequential Amendments Bill)* which adopted a number of the ALRC's proposals.

In its final report, the ALRC reinforced the findings that underpinned its proposal for the enactment of legislation to deal specifically and solely with the protection of classified and sensitive national security information in court and similar proceedings. It concluded that Australia's courts and tribunals must change the way they operate when dealing with classified and security sensitive information.⁴⁶²

However, while both the ALRC and the then Government recognised the need for the introduction of legislation that dealt specifically with the disclosure of sensitive material in federal criminal proceedings, there were significant points of departure between the ALRC's legislative proposal and the *NSI Bill*.

On 16 June 2004, the Senate referred the provisions of the *NSI Bill* and the *NSI Consequential Amendments Bill* to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 19 August 2004.

At this Inquiry, the Law Council told the Committee that while it was generally supportive of proposals to create new procedures for dealing expeditiously with the use and management of security sensitive information, the restrictive impact of the Bill on the fair trial rights of the accused went too far. The Law Council told the Committee that:

Ultimately, ... our interests ... at the end of the analysis lie in promoting fair trial values and in regarding the Australian population and its 'security' you do not keep the population secure by maximising the number of secrets that must be preserved. That being said, you cannot fight either crime or terrorism without some secrets. We all understand that, and that is why the trade-offs are really important.

⁴⁶⁰ For example *Crimes Act 1914* (Cth) s85B and *Criminal Code Act 1995* (Cth) s93.2 provide sufficient power to enable judges exercising federal jurisdiction to protect security sensitive information by closing proceedings in whole or in part or making restrictive orders. For further discussion see Law Council of Australia Submission to the Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information* (16 April 2004).

⁴⁶¹ <http://www.alrc.gov.au/dp-67>

⁴⁶² <http://www.alrc.gov.au/report-98>

*This bill is not all bad, far from it. A very conscientious attempt has been made to balance some very difficult things. It is just that, in the upshot, I think one of the prevailing views is that trade-offs have gone too far.*⁴⁶³

The Committee made a number of recommendations intended to ensure that there were adequate safeguards in the proposed legislation to protect the defendant's right to a fair trial and recommended that, subject to these recommendations, the Bill should proceed.⁴⁶⁴

In 2004 the Bill was passed (without amendments to accommodate the Committee's key recommendations).

Under section 24(1) of the *NSI Act* if a prosecutor or defendant (or his or legal representative) knows or believes that:

- he or she will disclose, in a federal criminal proceeding, national security information; or
- a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose national security information in giving evidence or by his or her mere presence.

the prosecutor or defendant must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

In 2010, this notice provision was expanded by the *NSLA Act*, so that it is also enlivened when the prosecutor or defendant (or the defendant's legal representative) knows or believes that "*on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal court proceeding.*"

Failure to give notice under section 24 is an offence under section 42, which carries a maximum term of imprisonment of two years.

Having received such notice, the Attorney-General must then determine whether the information falls within a much narrower category of information, that is, information which if disclosed would be likely to prejudice national security. If the information falls within this narrower category the Attorney-General may issue a non-disclosure certificate or a witness exclusion certificate preventing, for example, a particular witness from giving evidence on the grounds that it would be prejudicial to national security.⁴⁶⁵

Where a certificate has been issued, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or the calling of witnesses.

The *NSI Act* also provides that, during a federal criminal proceeding, a legal representative of a defendant may receive written notice from the Secretary of the Attorney-General's Department that an issue is likely to arise in the proceedings relating to the disclosure of information that is likely to prejudice national security.⁴⁶⁶ A person

⁴⁶³ Committee Hansard, 5 July 2004, pp. 14-15. The Law Council was represented at the Inquiry by Mr Bret Walker SC, former President of the Law Council.

⁴⁶⁴ Senate Committee on Legal and Constitutional Affairs, *Report on Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004*, (19 August 2004).

⁴⁶⁵ s26 and s 28.

⁴⁶⁶ s39(1).

who receives such a notice must apply to the Secretary for a security clearance.⁴⁶⁷ They must do so within 14 days of receiving a notice. If they do not apply for such a clearance, or if they are unsuccessful in obtaining such a clearance, then it is possible that they will not be able to view all the relevant evidence in the case and thus they will not be able to continue to effectively represent their client.⁴⁶⁸ In the circumstances the Court may recommend that the defendant retain a different legal representative.⁴⁶⁹

Despite these provisions, the Law Council has noted that most proceedings where the NSI Act could be invoked have been conducted without this action. As a Law Council representative told a parliamentary inquiry into the NSI 2010 Bill:

... nearly all of [the NSI Act's provisions are] dealt with by a series of ancillary rulings by the trial judge and undertakings by lawyers on both sides of the record – none of which needs the NSI Act to occur. One particular concern that we as the Law Council have and that we addressed in our submission is the requirement that at some stage in the process only security cleared defence lawyers should be allowed to participate in the trial. That is anathema to the rule of law in Australia. Thankfully, so far that has not been an issue.

As I understand it, every defence lawyer who has appeared in every terrorist case in Australia since 2005 has not had a security clearance, and every issue under the NSI Act has been dealt with without the need for them to have one. All of them have provided comprehensive undertakings not to disclose information, and that system seems to be working.

...

If the lawyers involved in these cases did not cooperate to the extent that they do, there is potential for these cases just to collapse in a heap because of the procedural burdens placed on the lawyers appearing.⁴⁷⁰

The use of agreements as an alternative to 'triggering' the notification provisions of the NSI Act appears to be a development generally welcomed by the legal profession, particularly those involved in representing clients charged with criminal offences, and a feature of the NSI Act that appears to be more frequently invoked than other provisions.

However, as the Monitor noted in his 2011-12 report, the infrequent use of the more intrusive features of the NSI Act did not point to a growing acceptance or support within the legal profession of the need for or value of these provisions.

To the contrary, experience within the legal profession suggests that the existence of these provisions continues to cast a shadow over the expedient and fair conduct of proceedings, particularly terrorism related criminal proceedings. If triggered, these intrusive provisions threaten to undermine the defendant's right to a fair trial and the independence of the legal profession.

6.2.2 Law Council Concerns

The Law Council has a number of concerns with the *NSI Act*, particularly insofar as it imposes broad and impractical notice provisions, establishes a system of security clearances for lawyers, and fetters the court's discretion to maintain, modify or remove

⁴⁶⁷ s39(2)

⁴⁶⁸ If the person does not obtain the security clearance, anyone who discloses relevant information to the person will, except in limited circumstances, commit an offence. s39(3).

⁴⁶⁹ s39(5)(b)(ii).

⁴⁷⁰ Senate Legal and Constitutional Affairs Committee, Inquiry into the provisions of the National Security Legislation Bill 2010 (21 May 2010) Committee Hansard p 7, Phillip Boulten SC

restrictions on disclosure of information. These concerns, along with a number of specific recommendations for reform, have been made known in a number of forums⁴⁷¹ and can be summarised as follows:

- Notice provisions are too broad

The rationale behind the *NSI Act* is to ensure that the Attorney-General is put on notice of any possible disclosure of information which may be *prejudicial to national security*, by ensuring that he or she has notice of any disclosure at all that relates to or may effect, however remotely, national security.

The problem with this approach is that national security is very broadly defined in section 8 of the *NSI Act* as follows:

“In this Act, national security means Australia’s defence, security, international relations or law enforcement interests.”

Security is defined in section 9 of the *NSI Act* as follows:

“In this Act, security has the same meaning as in the Australian Security Intelligence Organisation Act 1979”

Security is defined in section 4 of the *ASIO Act* as follows:

- (a) *the protection of, and of the people of, the Commonwealth and the several States and Territories from:*
 - i. *espionage;*
 - ii. *sabotage;*
 - iii. *politically motivated violence;*
 - iv. *promotion of communal violence;*
 - v. *attacks on Australia's defence system; or*
 - vi. *acts of foreign interference;*

whether directed from, or committed within, Australia or not; and

- (aa) *the protection of Australia's territorial and border integrity from serious threats; and*
- (b) *the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).*

'International relations' is defined in section 10 of the *NSI Act* as follows:

“In this Act, international relations means political, military and economic relations with foreign governments and international organisations.”

'Law enforcement interests' is defined in section 12 of the *NSI Act* as follows:

“In this Act, law enforcement interests includes interests in the following:

⁴⁷¹ For example see Law Council of Australia, Submission to the Independent National Security Legislation Monitor in response to his inquiry into the *National Security Information (Criminal and Civil Proceedings) Act 2004*, 19 July 2013, available at http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-2745_-_Inquiry_into_the_Operation_of_the_National_Security_Information_Criminal_and_Civil_Proceedings_Act_2004.pdf. See also Law Council Submission to the Senate Legal and Constitutional Committee, *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* (2 July 2004); Law Council of Australia Submission to the Australian Law Reform Commission, *Inquiry into Protecting Classified and Security Sensitive Information* (12 September 2003); Law Council of Australia Submission to the United Nations Human Rights Committee, *Shadow Report to Australia’s Common Core Document* (29 August 2008).

- (a) *avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;*
- (b) *protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;*
- (c) *the protection and safety of informants and of persons associated with informants;*
- (d) *ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies."*

Read together, these provisions would mean that lawyers representing a defendant in a terrorism prosecution may well be required and would be wise to put the Attorney-General on notice that their entire case may relate to or affect national security.

Given that a failure to comply with the notice provisions is an offence which carries a maximum penalty of two years, such a cautious approach is advisable.

However, if, in view of the broad definition of national security, parties were to adopt this approach, the regime set out in the *NSI Act* would be unworkable.

It would not be possible for the Attorney-General to personally consider, as is required under sections 26 and 38F, the volume of material referred to him or her for determination.

Thus at present, the workability of the regime is contingent on lawyers exercising their own discretion even though it may expose them to prosecution.

For that reason, the Law Council submits that the notice provisions should be redrafted so that they only relate to a narrower and more directly relevant class of information.

- Notice provisions should not be enlivened by issue of a subpoena

As noted above, in 2010 section 24(1)⁴⁷² of the *NSI Act* was amended so that the notice requirement is now also enlivened when the prosecutor or defendant (or the defendant's legal representative) knows or believes that "*on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal court proceeding.*"

The issue of a subpoena, in and of itself, will not result in the disclosure of information prejudicial to national security. The only third parties who are privy to the contents of the subpoena are the court officials who facilitate its issue and the party to whom it is directed. It can be assumed that this receiving party already has knowledge of any information sought to be captured by the subpoena.

Given the broad definition of "national security" (discussed above) and the lack of precision with which subpoenas are often drafted, it is likely to be very difficult for lawyers to determine in advance whether national security information will be captured by a particular subpoena.

⁴⁷² Section 38D which sets out the notice requirements in civil proceedings was amended in the same way. The Law Council's objections to the amendment of section 24 apply equally to section 38D.

Nonetheless, if a lawyer drafts a subpoena too widely, without due consideration for the type of information it might yield, he or she faces prosecution and imprisonment of up to two years.

For these reasons the Law Council submits that notice provisions in subsection 24(1) should not cover the issue of subpoenas.

- Security clearance system threatens the right to a fair trial

The security clearance system for lawyers which is prescribed in the *NSI Act* threatens the right to a fair trial in two ways.

Firstly, it potentially restricts a person's right to a legal representative of his or her choosing by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information.⁴⁷³

Secondly, the security clearance scheme threatens the independence of the legal profession by potentially allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information. By undermining the independence of the legal profession in this way, the right to an impartial and independent trial with legal representation of one's choosing is undermined.

Criminal defence lawyers were well used to dealing with confidential information in a variety of circumstances prior to the emergence of the *NSI Act*. No evidence was provided by the then Government to indicate that, in the experience of courts or disciplinary tribunals, lawyers frequently or even infrequently breached requirements of confidentiality imposed either by agreement or by the courts.

In the absence of a plausible justification for the security clearance system, the perception arises that the primary purpose of the system is to provide the executive arm of government with the ability to select the legal representatives permitted to appear in matters involving classified or security sensitive information.

The Law Council is aware that, notwithstanding the *NSI Act*, to date terrorism prosecutions have, as a result of the use of undertakings, proceeded without the need for defendants' legal representatives to seek security clearances.

Nonetheless, until the security clearance provisions are repealed or amended, defence lawyers continue to operate under their shadow, uncertain of when and if they might be invoked.

A suggested alternative to the system of security clearances for lawyers that has recently been proposed is for special advocates or special defence counsel to be used in certain situations.

Special advocates or special defence counsel are lawyers with high security clearance given access to secret evidence that cannot be disclosed to those for whom the

⁴⁷³ In addition to the provisions relating to the Secretary of the Attorney-General's Department requiring a lawyer to apply for a security clearance, the 2008 Commonwealth Legal Aid Guidelines provided that payment for lawyers acting on grants of aid in such matters could only be made if the work was done within 14 days of the notification by the Secretary of the requirement to obtain a clearance or where the lawyer was awaiting the determination of the application or had obtained the clearance. While this requirement has not been included in the 2010 guidelines, the Law Council understands that if a lawyer was required to obtain a security clearance and was not able to do so, the relevant legal aid commission would need to consider whether the lawyer could effectively represent the client if he or she could not be given access to all of the evidence. If the commission was not so satisfied, it would have to consider whether to transfer the grant of aid to another lawyer, possibly not of the client's choice.

advocates act. These special advocates act in closed material proceedings (CMPs). In such proceedings the individual who is subject to state action and his or her legal representatives are excluded, but the special advocate acts on the subject's behalf.

While the *NSI Act* does not specifically provide for the use of 'special defence counsel', in *Lodhi* the court held that the provisions of the *NSI Act* were not inconsistent with the appointment of special counsel and were in fact sufficiently wide to allow a person appointed as special counsel to take part in certain hearings under the *NSI Act* (as previously discussed).

The COAG Review recommended that consideration be given to introducing a nationwide system of special advocates to participate in control order proceedings. It suggested that such a system of special advocates would allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in CMPs in relation to a control order. It recommended that Government-funded special advocates would have full disclosure of information used where national security information is being relied upon or is relevant. As a model for its recommendations, the report referred to the UK model of special advocates used for TPIMs.

The Law Council has submitted that if defence lawyers are not allowed access to national security information, a special defence counsel or special advocate model could be considered subject to a range of critical safeguards. These safeguards include appointing special advocates under a process that is subject to the full discretion of the court and as a last resort, where the trial judge is satisfied that no other alternative will adequately meet the interests of fairness to the affected individual. Special advocates should also be provided with access to the affected individual, his or her counsel, and the case against him or her as well as access to the information subject to the closed hearing determination.⁴⁷⁴

- Court's discretion to maintain, modify or remove restrictions on disclosure of information is unduly fettered

Under the *NSI Act*, prosecutors and defendants in criminal proceedings must notify the Attorney-General if they know or believe that they will disclose or a witness they intend to call will disclose national security information in the course of the proceedings.⁴⁷⁵ Depending on the nature of the information, this may result in the Attorney-General issuing a certificate of non-disclosure, or a witness exclusion certificate preventing, for example, a particular witness from giving evidence on the grounds that it would be prejudicial to national security.⁴⁷⁶

Where a certificate has been issued, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or the calling of witnesses.

The matters which must be considered by the court in making this determination are set out in section 31, which relevantly provides as follows:

"31(7) The Court must, in deciding what order to make under this section, consider the following matters:

⁴⁷⁴ See Law Council submission to the Independent Monitor of National Security Legislation's Inquiry into the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, 19 July 2013 at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2745_-_Inquiry_into_the_Operation_of_the_National_Security_Information_Criminal_and_Civil_Proceedings_Act_2004.pdf

⁴⁷⁵ ss24-25.

⁴⁷⁶ s26(2) and s 28(2).

(a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:

(i) where the certificate was given under subsection 26(2) or (3)—the information were disclosed in contravention of the certificate; or

(ii) where the certificate was given under subsection 28(2)—the witness were called;

(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;

(c) any other matter the court considers relevant.

(8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).

The Law Council is concerned that subsection 31(8) of the *NSI Act* unduly restricts the court's discretion to determine how and when certain information may be disclosed in federal criminal proceedings.

The Law Council considers that the *NSI Act* tilts the balance too far in favour of the interests of protecting national security at the expense of the rights of the accused. While this has been found not to be in breach of Chapter III of the *Constitution*,⁴⁷⁷ the Law Council maintains that it is not a proportionate response to addressing the risk that information prejudicial to national security may be released.

For that reason, the Law Council considers that sub-section 31(8) should be repealed.

6.2.3 Law Council Recommendations

The Law Council recommends that the Government should:

- Repeal the security clearance process contained in section 39 of the *NSI Act*.
- Alternatively, if this recommendation is not adopted, the Law Council recommends that section 39 be amended so as to give the court a greater role in both determining whether a notice should be issued and in reviewing a decision to refuse a legal representative a security clearance through provisions by which:
 - The Secretary of the Attorney-General's Department should be obliged to apply to a court for leave to give a notice to a legal representative under s.39 of the *NSI Act*;
 - The application should be supported by an affidavit setting out the basis for the Secretary's contention that before or during a proceeding an

⁴⁷⁷ In *Lodhi v R* [2007] NSWCCA 360 the constitutionality of Part 3 of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (the *NSI Act*) was challenged on the grounds that by requiring the Court to give "greatest" weight to the risk of prejudice to national security (pursuant to section 31(8)) the Parliament had usurped the judicial function by directing the judge hearing the case how the case must effectively be decided. The Court of Appeal held that subsection 31(8) was constitutionally valid. The Court found that while the word 'greatest' meant that greater weight must be given to the risk of prejudice to national security than to any other of the circumstances weighed, the subsection did not usurp judicial power because it did not require that the balance must always come down in favour of the risk of prejudice to national security. *Lodhi v R* [2007] NSWCCA 360 at [40]-[49], per Spigelman CJ with whom Barr and Price JJ agreed.

issue is likely to arise relating to a disclosure of information in the proceeding that is likely to prejudice national security;

- The application by the Secretary should be made *ex parte* and *in camera*. This would allow the court to assess properly the nature of the information which was said to prejudice national security, without that information otherwise being disclosed;
 - The court should give leave to the Secretary to issue the notice if the Secretary established a *prima facie* case that an issue was likely to arise relating to a disclosure of information in the proceeding that was likely to prejudice national security;
 - A legal representative who receives an adverse decision with respect to his or her application for a security clearance should have a right of appeal against that adverse decision;
 - The right of appeal should be expressly set out in the *NSI Act* and should be distinct from the appeal rights available under the *ADJR Act*;
 - In the appeal the Attorney-General should have the burden of establishing on the balance of probabilities that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security;
 - The appeal should be held *in camera*;
 - The appeal should be conducted, if possible, so as to ensure that, during the hearing, the information concerned is not disclosed;
 - If it is not possible to conduct the appeal without the information concerned being disclosed, then the court should have the power to make appropriate orders for the conduct of the appeal in order to protect that information;
 - In the event that the Attorney-General fails to establish that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security, the appeal should be allowed and the legal representative should be entitled to have the information concerned disclosed to him or her in the course of acting for the defendant/client.
- Repeal sub-section 31(8) and subsection 38L (8) of the *NSI Act*;
 - Amend the notice provisions in the *NSI Act* so that they only require notice to be given to the Attorney-General about the potential disclosure of a much narrower and more directly relevant class of information; and
 - Amend the notice provisions in the *NSI Act* so that they do not apply to the issue of a subpoena.

6.3 Classification of Terrorist Material

6.3.1 What changes were introduced and why?

The *Classification (Publications, Films and Computer Games) Act 1985* (Cth) (the *Classification Act*) establishes a general scheme for uniform classification that operates throughout Australia, regulating the classification of all publications, films and computer games that are intended to be offered for sale, and prescribing by whom classification decisions are made. The States and Territories have enacted legislation that provides the means of enforcing those classification decisions.

Under the *Classification Act*, the Classification Board (the Board) is responsible for classifying publications, films and computer games. The Classification Review Board (the Review Board) has the power to review the decisions made by the Board. Section 9 of the *Classification Act* requires the Board (and the Review Board) to classify publications, films and computer games in accordance with the National Classification Code and the National Classification Guidelines.

Prior to 2007, the classification regime already provided (and continues to provide) that material must be refused classification if, amongst other things, it *promotes, incites or instructs in matters of crime or violence*.⁴⁷⁸

In 2007 the *Terrorist Material Classification Act* was introduced. This Act amended Australia's classification regime to provide that certain types of publications, films and computer games must be refused classification if they 'advocate the doing of a terrorist act'.

The 2007 amendments to the classification regime were justified on the basis that the existing provisions were not sufficiently clear to ensure that the Classification Board and the Classification Review Board would strike the correct balance with respect to material that advocates terrorist acts.⁴⁷⁹ In his Second Reading Speech, the then Attorney-General the Hon Philip Ruddock MP stated that the Bill:

*...improves the ability of our laws to prevent the circulation of material which advocates the doing of terrorist acts...Currently there is too much uncertainty around whether the existing classification laws adequately capture such material.*⁴⁸⁰

Under the amended classification regime, certain types of publications, films and computer games must be refused classification if they 'advocate the doing of a terrorist act'.⁴⁸¹ Materials which fall into this 'refused classification' category are banned from public distribution. This is because under State and Territory laws it is prohibited to sell, distribute or publicly exhibit materials which have been refused classification.⁴⁸²

In terms consistent with the *Criminal Code*, section 9A of the *Classification Act* provides that material will be regarded as 'advocating' the doing of a terrorist act and refused classification if it:

- directly or indirectly counsels or urges doing a terrorist act; or

⁴⁷⁸ See *Classification (Publications, Films and Computer Games) Act 1995* (Cth) Schedule 1.

⁴⁷⁹ See Explanatory Memorandum to *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth).

⁴⁸⁰ The Hon Mr Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 21 June 2007, p. 3.

⁴⁸¹ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s9A(1).

⁴⁸² See for example s6 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); ss16 and 25 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic).

- directly or indirectly provides instruction on doing a terrorist act; or
- directly praises doing a terrorist act where there is a substantial risk that such praise might lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act.

'Terrorist act' has the meaning given by section 100.1 of the *Criminal Code*.⁴⁸³

Material will *not* be regarded as advocating the doing of a terrorist attack if it depicts or directly describes a terrorist act but the depiction or description could reasonably be considered to have been done merely as part of public discussion or debate or as entertainment or satire.⁴⁸⁴

6.3.2 Law Council Concerns

At the time these measures were introduced, the Law Council, along with other sectors of the Australian community, was unconvinced that they were necessary in light of the scope of the pre-existing regime.⁴⁸⁵ The Law Council was also concerned by the restrictive impact such measures could have on the enjoyment of the right to free speech and expression in Australia, including the possibility that such laws could inadvertently capture genuine political commentary and education materials, and stifle robust public debate on terrorist-related issues. The Law Council's key concerns and recommendations for reform are listed below.

- No need to change the existing test

At the time the 2007 amendments were introduced, neither the Second Reading Speech nor the Explanatory Memorandum made any positive case for why the expansion of Australia's classification regime was necessary. For example, no details were provided of:

- particular cases where problematic materials regarded as 'advocating terrorist acts' had received classification under the pre-existing classification regime;
- examples of material which would not be considered to promote, incite or instruct in matters of crime or violence but which should nonetheless be banned on the basis that the doing of a terrorist act was advocated.

The case of *NSW Council for Civil Liberties Inc v Classification Review Board* provided an example of the scope of the previous classification regime and its ability to respond to terrorist related material.⁴⁸⁶

In November 2006 the Federal Court considered an appeal against a decision of the Classification Review Board, which refused classification to two publications *Join the Caravan* and *Defence of the Muslim Lands*.⁴⁸⁷ The applicant, the NSW Council for Civil Liberties, contended that the Review Board erroneously applied those provisions of the

⁴⁸⁴ See s 9A(3) *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

⁴⁸⁵ See Law Council of Australia Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (13 July 2007). The Human Rights and Equal Opportunity Committee (HREOC) (now the Australian Human Rights Commission) recommended that the proposal to amend the censorship provisions be reconsidered on the basis that it was 'not convinced of the necessity for tighter censorship laws in order to combat incitement and/or glorification of terrorism.' Submission of the Human Rights and Equal Opportunity Commission to the Attorney-General's Department on the Material that Advocates Terrorist Acts Discussion Paper, (29 May 2007) p. 3.

⁴⁸⁶ *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108

⁴⁸⁷ *ibid*

Classification Act and the National Classification Code which pertain to the making of classification decisions.

The Review Board had refused classification to the two publications on the basis that they fell within the description of a publication that 'promotes incites or instruct in matters of crime or violence'.⁴⁸⁸

In respect of the publication *Join the Caravan*, the Review Board said that the book was 'written as an emotive and passionate appeal to Muslims undertaking Jihad'.⁴⁸⁹ Further, it found that the book's objectives included an 'impassioned plea to Muslims to fight for Allah and engage in acts of violence' and to promote and incite acts of terrorism against 'disbelievers'.⁴⁹⁰

In coming to this conclusion, the Review Board specifically referred to section 101.1 of the *Criminal Code* which creates an offence of engaging in a 'terrorist act'.⁴⁹¹ The Review Board was satisfied that the objective purpose of *Join the Caravan* was to promote and incite actions of precisely this kind.⁴⁹²

In respect of the publication *Defence of the Muslim Lands*, the Review Board took the view that the book 'promotes and incites in matters of crime and violence, specifically terrorist acts and martyrdom operations'.⁴⁹³ The Review Board also referred to section 101.1 of the *Criminal Code*, taking the view that the objective purpose of *Defence of the Muslim Lands* was to promote and incite actions of the type proscribed by that section and the definition of terrorist act.⁴⁹⁴

The Federal Court appeal was dismissed on the grounds that it had not been established that the Review Board had erroneously applied the relevant provisions of the Act.

This case demonstrates that, prior to the 2007 amendments, the Review Board was already sufficiently empowered to refuse classification to material that promoted or incited terrorist acts. Such a result questions the necessity of enacting a more stringent regime in 2007.

To date the Law Council is not aware of any judicial consideration of the new terrorist-specific provisions in the *Classification Act*, or whether such provisions have been used by the Classification Board.

Broad and ambiguous nature of amendments

As well as being unnecessary, the 2007 amendments have the potential to unduly burden public debate in a manner which is incompatible with freedom of expression. The use of the term 'advocates a terrorist act' as a ground for refusing classification sets an unacceptably low standard of what material should be refused classification. For example, according to the 2007 amendments, material 'advocates' the doing of a terrorist act if it 'directly praises doing a terrorist act where there is a substantial risk that such praise *might* lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act'.⁴⁹⁵

⁴⁸⁸ Ibid at[3]

⁴⁸⁹ Ibid at[12]

⁴⁹⁰ Ibid at[12]

⁴⁹¹ Ibid at[15]

⁴⁹² Ibid

⁴⁹³ Ibid at [18].

⁴⁹⁴ Ibid at [20].

⁴⁹⁵ See *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* s9A(2)

The Law Council considers that assessing material on the basis of how it *might* be received and understood by potentially suggestible members of the community, even where it is not specifically designed to target or play upon their vulnerabilities, creates an unacceptably wide net which includes a broad range of material. The Law Council is of the view that the ability of people to participate in public debate, both by receiving and imparting information, should not be unduly circumscribed by prohibitions based on speculation about how certain actors *may* respond to certain material.

Further, the test to be applied when determining whether to refuse classification to material that advocates a terrorist act is internally inconsistent and confusing to apply.

Material will not be regarded as advocating the doing of a terrorist attack if it depicts or directly describes a terrorist act, but the depiction or description could reasonably be considered to have been done as part of public discussion or debate or as entertainment or satire.

At the same time, the provisions require that when classifying material, decision makers must *not* consider the *intent of the creator*, and are instead required to focus on the possible effect that the material might have on a person exposed to it.

It is difficult to see how these concepts can be reconciled.

The end result is a test that is confusing to apply and unacceptably broad in scope, investing decision makers with a wide discretion to ban material from publication.

6.3.3 Law Council Recommendations

The Law Council recommends that the Government:

- Repeal the changes introduced to the *Classification Act* by the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth).
- If this recommendation is not adopted, amend section 9A of the *Classification Act* as follows:
 - (a) Amend subparagraph 9A(2)(c) to delete 'regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person may suffer'.
 - (b) Amend the definition of 'advocates' by deleting the words 'or indirectly' from subsection 9A (2)(a) and (b) and by deleting subsection 9A(2)(c) which deals with praise of terrorist acts.

6.4 Foreign Evidence

6.4.1 What measures were introduced and why?

The *Video Link Evidence Act* introduced changes to the procedures governing the trial of terrorist suspects in Australia. The key purpose of the Act was to allow a court to take evidence from witnesses via video link and to accept foreign evidence in the form of written statements, video or audio material.

The Explanatory Memorandum to the relevant Bill explained that the provisions would facilitate the prosecution of terrorism offences by ensuring that, in the absence of

compelling reasons to the contrary, important evidence from overseas witnesses who are unable to travel to Australia can be put before the court using video link technology.

The *Video Link Evidence Act* introduced a new section 15YV into the *Crimes Act* which provides that a court must direct or allow a witness to give evidence by video link if:

- the prosecutor or the defendant applies for such a direction or order;
- the court is satisfied that the reasonable notice of the application was given;
- the witness is not the defendant in the proceeding;
- the witness is available to give video evidence; and
- the facilities required are available or can be reasonably made available.

Section 15YV of the *Crimes Act* was used in the case of *R v Benbrika*.⁴⁹⁶ In this case Bongiorno J ordered that the evidence of an undercover police officer (known as SIO39), could be led by the Crown via audio-visual link from outside the courtroom as it was in the public interest to do so. It was agreed that the witness's face could be pixelated so that he could not be recognised.

When the video link was set up, it became apparent that it was not possible to show the witness's features with only his face pixelated. His whole body had to be shown this way if any of it was to be disguised. This being the case, the court felt that it was necessary to revoke the original orders. The court replaced the earlier orders made on 28 April 2008 with the following:

- "That pursuant to s 42E(1) of the *Evidence Act 1958* (Vic), the evidence of the witness known only as SIO39 be taken by audio link from a place outside the courtroom in which this trial is being conducted";⁴⁹⁷ and
- "That before being sworn, SIO39 provide the Court with his true name and professional address and proof of his employment as a member of the Victoria Police, such information to be kept in confidence by the trial Judge and not communicated to any other person other than as required by law."⁴⁹⁸

Another recent case in which section 15YV of the *Crimes Act* was used was *R v Lodhi*.⁴⁹⁹ The Crown sought an order that certain witnesses be allowed to give evidence via audio visual link in accordance with section 15YV of the *Crimes Act*. One witness was serving a prison sentence in the US. Two others were serving members of the US Federal Bureau of Investigation and stationed in Washington DC. Whealy J ultimately ordered that the evidence of these witnesses could be provided by audio-visual link.

The *Video Link Evidence Act* also introduced amendments to the *Foreign Evidence Act 1994* (Cth) (*the Foreign Evidence Act*) which limit the court's ability to refuse foreign evidence being adduced. A new section 25A was inserted into the Act, which provides:

If a proceeding is:

(a) *a criminal proceeding for a designated offence; or*

⁴⁹⁶ [2008] VSC 137

⁴⁹⁷ *Ibid.*, at [20]

⁴⁹⁸ *Ibid.*

⁴⁹⁹ [2006] NSWSC 587

- (b) *a proceeding under the Proceeds of Crime Act 2002 in relation to a designated offence;*

and the prosecutor seeks to adduce foreign material as evidence in the proceeding, then:

- (c) *the court must not give a direction under subsection 25(1) in relation to the foreign material; and*
- (d) *the court may direct that the foreign material not be adduced as evidence in the proceeding if the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.*

A designated offence is defined in the Act to include an offence against Part 5.3 of the *Criminal Code* (terrorism offences). Under s 25 (1) a court may direct that foreign material not be adduced as evidence, if it is not in the interests of justice to do so. Section 25 (2) sets out a list of factors the court must take into account in determining whether or not it is in the interests of justice to do so.

6.4.3 Law Council Concerns

The Law Council is concerned that a number of the changes introduced by the *Video Link Evidence Act* inhibit the defendant's right to a fair trial and also leave open the possibility that evidence obtained under torture may be admitted in Australian courts.

- Unequal onuses inhibit defendant's right to a fair trial

As noted above, section 15YV of the *Crimes Act* provides that a court must direct or allow a witness to give evidence by video link in certain listed circumstances. However, the court *does not* have to allow a witness to give evidence by video link if:

- in the case of an application by the prosecution, 'giving the direction or making the order would have a *substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing*',⁵⁰⁰ or
- in the case of an application by the defendant, 'it would be *inconsistent with the interests of justice for the evidence to be given by video link*'.⁵⁰¹

The different onus placed on the defendant compared to the prosecution when seeking to oppose an application for a witness to give evidence via video link raises concerns regarding the fair trial rights of the defendant.

Pursuant to subsection 15YV(1), where the prosecution applies for a direction allowing evidence by video link, the onus is on the defendant to demonstrate that video evidence should not be used, rather than on the prosecution who seeks to rely on the evidence.

This represents a removal of the usual onus on the party seeking to utilise the evidence to satisfy the Court of its integrity. The consequence is that a defendant seeking to oppose such an application by the prosecutor will, if only for practical reasons, not necessarily be in a strong position to expose the technical defects in the evidence being adduced.

⁵⁰⁰ *Crimes Act 1914* (Cth) s15YV(1).

⁵⁰¹ *Crimes Act 1914* (Cth) s15YV(2).

Under subsection 15YV(1), the defendant is required to show that the evidence 'would have a substantial adverse effect' on their right to a fair hearing. This is a much higher standard than that which the prosecution has to meet when it seeks to oppose a defendant from using the same kind of evidence, 'in the interests of justice', required by subsection 15YV(2).

This unequal onus creates an imbalance in favour of the prosecution and violates the right to the 'equality of arms principle'⁵⁰² protected by the fair trial right guarantees in articles 14(1) and 14(3)(e) of the ICCPR.⁵⁰³ The Law Council is of the view that the 'interests of justice' standard should be common to the court's ability to refuse applications for evidence via video link from either party.

- Risk that evidence obtained by torture may be admissible in Australian courts

Section 25 of the *Foreign Evidence Act*, provides in relation to offences other than 'designated' offences that the court can direct that foreign material:

not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.

Section 25A of the *Foreign Evidence Act* introduced by the *Video Link Evidence Act* expressly removed the question of foreign evidence in proceedings related to 'designated offences' such as terrorism offences from the reach of section 25.

Under this provision, the only way a court may deny an attempt by a prosecutor to adduce foreign evidence is if the court is satisfied that to do so 'would have a *substantial adverse effect* on the right of the defendant in the proceedings to receive a fair hearing.' This standard is the same as that introduced into section 15YV of the *Crimes Act*.

This restriction of the court's discretion to refuse an application by a prosecutor to rely on previously obtained foreign evidence is particularly concerning given the possibility that some foreign evidence may have been procured through the use of torture.

This risk is even more pronounced than that in respect of the provisions that allow testimony to be made by video link, where the court is able to appoint an observer to be physically present when evidence is being given.⁵⁰⁴ In the context of foreign evidence already obtained, the observer option is not available.

Thus the amendments to the *Foreign Evidence Act* have increased the risk that foreign evidence acquired through torture or other degrading treatment will be relied upon in Australian courts. This increased risk highlights the need to retain judicial discretion to exclude the use of foreign evidence on this basis.

⁵⁰² For example article 14(3)(e) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

⁵⁰³ This view was shared by a number of groups, including the then Human Rights and Equal Opportunity Commission. See Report of the Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*, (November 2005) at [3.52]. See also Gilbert + Tobin Centre of Public Law, Submission to the Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*, 16 October 2005.

⁵⁰⁴ Under section 15YW, the court may allow video evidence on the condition that an observer is appointed to be physically present at the place where the evidence is being given. However, at present, the Court is not required to appoint an observer and the observer is not required to provide a report.

6.4.4 Law Council's Recommendations

The Law Council recommends that the Government should:

- Amend section 15YV of the *Crimes Act* to include:
 - (a) the use of a single standard governing the court's discretion to allow evidence via video link – regardless of which party makes the application, and
 - (b) a mandatory requirement for a court appointed observer who is to deliver a report on the conditions under which evidence was given at the place of the witness.
- Repeal section 25A of the *Foreign Evidence Act*, or alternatively, enact an express ground for the court to refuse an application for use of foreign evidence where the court is not satisfied that the evidence in question was not obtained through the use of torture or inhuman and degrading treatment.

7. Summary of key recommendations

7.1 Terrorism Offences and the meaning of ‘terrorist act’

In respect of the definition of ‘terrorist act’ in section 100.1 of the *Criminal Code* the Law Council recommends that the Government should:

- Review the definition of ‘terrorist act’ to provide a more direct reference to dangers to life and limb in relation to acts that cause serious damage to property or that interfere with telecommunications or financial systems; and
- Remove the reference to ‘threat of action’ and other references to ‘threat’ from the definition of ‘terrorist act’ in section 100.1(1).
- Not proceed with the proposal to expand the definition to include acts that cause psychological as opposed to physical harm or actions or threats of actions likely to cause death, injury, property damage or other consequences referred to in sub-section 100.1 (2).

In relation to terrorist offences in Part 5.3 of the *Criminal Code* and the new hoax offence proposed in the National Security Legislation Discussion Paper, the Law Council recommends that:

- the Government repeal Schedule 1 of the *Anti-Terrorism (No1) Act 2005* and reintroduce the preposition ‘the’ before ‘terrorist act’ in sections 101.2, 101.4, 101.5, 101.6 of the *Criminal Code*;
- the Independent National Security Legislation Monitor review the necessity and effectiveness of the offences in sections 101.2, 101.4, 101.5 and 101.6 of the *Criminal Code* and consider whether those offences should be repealed; and
- the Government not proceed with the new hoax offence proposed in the National Security Legislation Discussion Paper.

In respect of the financing terrorism offences in Division 103 of the *Criminal Code*, the Law Council recommends that the Government:

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

In respect of section 15AA of the *Crimes Act* relating to bail for terrorism offences, the Law Council recommends that:

- The presumption against the grant of bail in terrorism cases should be repealed; and

- There should be no provision for a grant of bail to be stayed if the prosecution notifies an intention to appeal.

In relation to the urging violence offences in Part 5.1, Division 80 of the *Criminal Code*, the Law Council recommends that the Government should:

- Repeal the urging violence offences in Division 80.
- If the recommendation is not adopted, that the Government:
 - Amend section 80.2 to require knowledge to be proven in relation to the physical elements of the offences in section 80.2.
 - Provide an exemption to the offences in section 80.2 for statements made for journalistic, educational, artistic, scientific, religious or public interest purposes.
 - Place sections 80.2A and 80.2B in a separate Division dealing with anti-vilification laws.
 - Subject the urging violence offences in Division 80 to regular, independent review.

7.2 Terrorist Organisations and Related Offences

In respect of proscribing terrorist organisations by regulation pursuant to section 102.1 of the *Criminal Code*, the Law Council recommends that the Government:

- Repeal the current procedure for proscribing organisations as terrorist organisations by regulation pursuant to section 102.1(1).
- Introduce a fairer and more transparent process for proscribing an organisation as a terrorist organisation. Such a process should have the following features:
 - a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected parties and a hearing in open court;
 - clear and publicly stated criteria for proscription;
 - detailed procedures for revocation, including giving the right to a proscribed organisation to apply for review of a decision not to revoke a listing; and
 - that once an organisation has been proscribed, that fact should be publicised widely, notifying any person connected to the organisation of the possible risk of criminal prosecution.

In the alternative, the Law Council recommends that paragraph 102.1(2)(b) relating to proscribing organisations which ‘advocate’ the doing of terrorist acts and subsection 102.1(1A) relating to the definition of ‘advocates’ should be repealed.

In respect of the terrorist organisation offences in Division 102 of the *Criminal Code*, the Law Council recommends that the Government should:

- repeal the terrorist organisation offences in Division 102, or in the alternative, repeal the association offence in section 102.8 of the Criminal Code;
- repeal the membership offence in section 102.3 or, at the very least, amend the definition of 'member' in section 102.1 of the Criminal Code to limit membership to formal members of the organisation who are directly participating in the activities of the organisation;
- amend the offence provisions in sections 102.2 (2), 102.5 (1), 102.6 (2) and 102.7 (2) to require knowledge rather than recklessness as to whether the organisation was a terrorist organisation;
- Amend the exception in sub-section 102.6 (3) to facilitate the ability of legal practitioners to rely on the exception in the ordinary course of legal practice;
- Amend the offences in s 102.6 so that the person receiving funds or making funds available to or collecting funds for or on behalf of a terrorist organisation must do so with the intention to assist it to engage in a terrorist act;
- amend the providing support offence in section 102.7 so that:
- the support provided must be material support; and
- a person must provide the resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.
- Amend the providing training offence in section 102.5 so that the type of training targeted is better defined.

7.3 Investigation Powers of Law Enforcement and Intelligence Agencies

In relation to the expanded investigation powers of law enforcement and intelligence agencies, the Law Council recommends that:

- Division 3A of Part 1AA of the *Crimes Act* relating to stop, question, search and seize powers in Commonwealth places and prescribed security zones be repealed.
- If this recommendation is not adopted, amend Division 3A to require the Minister to regularly (such as daily or weekly) consider whether to revoke a declaration of a prescribed security zone made under section 3UJ.
 - A member of the AFP who conducts a search under s.3UEA of the *Crimes Act* should be required to go before a magistrate or judge after the search has been conducted to obtain an ex post facto search warrant;
 - If an ex post facto search warrant is not granted, it should be explicitly provided that any evidence identified by the member of the AFP during the course of the search may be ruled inadmissible in future court proceedings; and

- The exercise of this power by the AFP should be reported on annually to the Commonwealth Parliament. In particular, reports should be made of any instances in which an ex post facto search warrant has not been granted.

In relation to the investigation period provisions relating to terrorism offences in the *Crimes Act*, the Law Council recommends that the Government should:

- Amend the 'dead time' cap in s.23DB of the *Crimes Act* so that it is no more than 48 hours unless sufficient justification can be provided by relevant agencies for the cap to be longer. It is preferable that the cap be set low and then be reviewed by the Independent National Security Legislation Monitor, rather than being set at seven days.
- Amend provisions such as s 23DC(5) and s 23DD(4) so that the judicial officer has the discretion to determine what information should be disclosed, to whom and in what form.
- Amend section 23DD to preclude a judicial officer from adjourning an application made under s.23DC for more than a specified number of hours, or alternatively, that s 23DB(9)(h) be amended to provide that any period of adjournment in excess of a certain number of hours is not 'dead time' and therefore must be included in the calculation of the investigation period.
- Amend the *Crimes Act* so that when an application under section 23DE(1) is made there is a requirement for the police to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.

In relation to control orders and preventative detention orders under the *Criminal Code*, the Law Council recommends that the Government:

- Repeal the control order and preventative detention order regime in Divisions 104 and 105 of the Criminal Code.
- If the provisions are to remain, ensure that amendments are made to:
- prescribe a maximum period for which a person can be held under successive continued preventative detention orders in Division 105;
- ensure a person who is the subject of a control order or a preventative detention order is provided with all the information and evidence that forms the basis of the application for such an order, or at the very least, that the court should be empowered to exercise discretion in this regard;
- ensure a person subject to a preventative detention order is entitled to attend an application hearing and present his or her case;
- require a relevant prior conviction and evidence of unsatisfactory rehabilitation for the making of control orders or preventative detention orders;
- repeal section 105.38, that provides that any contact between a detained person and his or her lawyer must be monitored. At the very least, the courts should be given discretion to determine whether such monitoring is required;

- subject the exercise of powers under Divisions 104 and 105 of the Criminal Code to full judicial review under the Administrative Decisions (Judicial Review) Act 1977;
- appoint an independent body such as a Public Interest Monitor with access to all material upon which an application for control orders and/or preventative detention orders is based.

In relation to questioning and detention powers under Part III Division 3 of the *ASIO Act*, the Law Council recommends that Part III Division 3 be repealed and replaced with an alternative approach to gathering information about terrorist-related and other serious offences.

Such an alternative approach should accord with other recognised criminal investigation procedures (for example, the compulsory questioning regime of the Australian Crime Commission) and contain the following features:

- questioning should be limited to a defined period of four hours with a four hour extension;
- any further extension beyond this should require judicial approval from the authority issuing the warrant for questioning; and
- a person being questioned should be entitled to legal representation during the process.

If these recommendations are not adopted and the current questioning and detention regime is retained, the Law Council recommends the introduction of the following safeguards into Part 3 Division 3 of the *ASIO Act*:

- the types of offence for which evidence can be gathered under a warrant should be limited;
- the person the subject of a Division 3 warrant should be informed at the time of arrest of the reasons for the warrant being issued, including information specifying the grounds for issuing the warrant;
- all persons the subject of a Division 3 warrant should have access to a lawyer of their choice. That access should not be subject to limitation;
- a lawyer of the person's choice should be entitled to be present during the entire questioning process;
- persons detained or questioned should be entitled to make representations through their lawyer to the prescribed authority;
- all communications between a lawyer and his or client should be recognised as confidential and adequate facilities should be provided to ensure the confidentiality of communications between lawyer and client;
- the period of detention under a questioning and detention warrant should be a single period incapable of extension; and
- section 34L should be amended to make it clear that evidence obtained directly or indirectly from a warrant issued under this Division cannot be used to prove that the person has committed a criminal offence.

As ASIO questioning and detention powers rely on administrative protocols to guide the conduct of officers exercising warrants, the Law Council further recommends the publication of information on any complaints received from persons subject to warrants in relation to their treatment in detention for the purpose of reviewing the relevant protocols.

7.4 Procedural and Classification Reforms

In relation to the *NSI Act*, the Law Council recommends that the Government should:

- Repeal the security clearance process contained in section 39 of the *NSI Act*.
- Alternatively, if this recommendation is not adopted, the Law Council recommends that section 39 be amended so as to give the court a greater role in both determining whether a notice should be issued and in reviewing a decision to refuse a legal representative a security clearance through provisions by which:
 - The Secretary of the Attorney-General's Department should be obliged to apply to a court for leave to give a notice to a legal representative under s.39 of the *NSI Act*;
 - The application should be supported by an affidavit setting out the basis for the Secretary's contention that before or during a proceeding an issue is likely to arise relating to a disclosure of information in the proceeding that is likely to prejudice national security;
 - The application by the Secretary should be made *ex parte* and *in camera*. This would allow the court to assess properly the nature of the information which was said to prejudice national security, without that information otherwise being disclosed;
 - The court should give leave to the Secretary to issue the notice if the Secretary established a *prima facie* case that an issue was likely to arise relating to a disclosure of information in the proceeding that was likely to prejudice national security;
 - A legal representative who receives an adverse decision with respect to his or her application for a security clearance should have a right of appeal against that adverse decision;
 - The right of appeal should be expressly set out in the *NSI Act* and should be distinct from the appeal rights available under the *ADJR Act*;
 - In the appeal, the Attorney-General should have the burden of establishing on the balance of probabilities that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security;
 - The appeal should be held *in camera*;
 - The appeal should be conducted, if possible, so as to ensure that, during the hearing, the information concerned is not disclosed;
 - If it is not possible to conduct the appeal without the information concerned being disclosed, then the court should have the power to

make appropriate orders for the conduct of the appeal in order to protect that information;

- In the event that the Attorney-General fails to establish that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security, the appeal should be allowed and the legal representative should be entitled to have the information concerned disclosed to him or her in the course of acting for the defendant/client.

- Repeal sub-sections 31(8) and 38L (8) of the *NSI Act*;
- Amend the notice provisions in the *NSI Act* so that they only require notice to be given to the Attorney-General about the potential disclosure of a much narrower and more directly relevant class of information; and
- Amend the notice provisions in the *NSI Act* so that they do not apply to the issue of a subpoena.

In relation to provisions relating to the classification of material that advocates terrorist acts, the Law Council recommends that the Government:

- Repeal the changes introduced to the *Classification Act* by the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*.
- If this recommendation is not adopted, amend section 9A of the *Classification Act* as follows:
 - (a) Amend subparagraph 9A(2)(c) to delete 'regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person may suffer'.
 - (b) Amend the definition of 'advocates' by deleting the words 'or indirectly' from subsection 9A(2)(a) and (b) and by deleting subsection 9A(2)(c) which deals with praise of terrorist acts.

In relation to provisions relating to evidence in terrorist cases, the Law Council recommends that the Government should:

- Amend section 15YV of the *Crimes Act* to include:
 - (a) the use of a single standard governing the courts' discretion to allow evidence via video link – regardless of which party makes the application, and
 - (b) a mandatory requirement for a court appointed observer who is to deliver a report on the conditions under which evidence was given at the place of the witness.
- Repeal section 25A of the *Foreign Evidence Act*, or alternatively, enact an express ground for the court to refuse an application for use of foreign evidence where the court is not satisfied that the evidence in question was not obtained through the use of torture or inhuman and degrading treatment.

Attachment A: Profile of the Law Council of Australia

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

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

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

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

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

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

Attachment B: Relevant Law Council Submissions

Date	To	Title
2002		
27 March 2002	Federal Attorney-General	David Hicks
April 2002	Senate Legal and Constitutional Legislation Committee	Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills
16 April 2002	Senate Legal and Constitutional Legislation Committee	Border Security Legislation Bill 2002
21 April 2004	Criminal Law Branch, Attorney-General's Department	Crimes Legislation Amendment (Telecommunications and Other Measures) Bill 2004
29 April 2002	Parliamentary Joint Committee on ASIO, ASIS, DSD & Senate Legal & Constitutional Legislation Committee	Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002
11 September 2002	Criminal Justice Division, Attorney-General's Department	Review of International Money Laundering Standards: Financial Action Taskforce on Money Laundering
14 October 2002	Parliamentary Joint Committee on the National Crime Authority	Australian Crime Commission Establishment Bill 2002
20 November 2002	Senate Legal and Constitutional References Committee	Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002
2003		
16 April 2003	Secretary Senate Economics Legislation Committee	Terrorism Insurance Bill 2002
5 June 2003	Commonwealth Attorney-General	Protecting Classified Information in Court Proceedings
10 July 2007	Commonwealth Attorney-General	David Hicks
12 September 2003	Australian Law Reform Commission	Inquiry into Protecting Classified and Security Sensitive Information
2004		
3 March 2004	Attorney-General, House of Representatives	Criminal Code Amendment (Terrorist Organisation) Bill
16 April 2004	Australian Law Reform Commission	Protecting Classified and Security Sensitive Information
21 April 2004	Attorney-General's Department	Crimes Legislation Amendment (Telecommunications and Other Measures) Bill 2004
26 April 2004	Senate Legal and Constitutional Committee	Anti-Terrorism Bill 2004

Date	To	Title
10 May 2004	Senate Legal and Constitutional Committee	Surveillance Devices Bill 2004
20 June 2004	Senate Standing Committee for the Scrutiny of Bills	Inquiry Into the Operation of Entry and Search Provisions in Commonwealth Legislation
2 July 2004	Senate Legal and Constitutional Committee	National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004
15 July 2004	Senate Legal and Constitutional Committee	Anti-Terrorism Bill (No. 2) 2004
30 November 2004	Attorney General	National Security Information (Criminal Proceedings) Bill 2004 and National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004
29 November 2004	Attorney General	National Security Information (Criminal Proceedings) Bill 2004 and National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004
2005		
4 April 2005	Parliamentary Joint Committee on ASIO	Review of ASIO Questioning and Detention Powers
27 May 2005	Senate Legal and Constitutional Legislation Committee	Inquiry into the Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005
7 October 2005	Parliamentary Joint Committee on the Australian Crime Commission	Review of the Australian Crime Commission Act 2002
3 November 2005	Parliamentary Joint Committee on the Australian Crime Commission	Review of the Australian Crime Commission Act 2002 – Supplementary Information
11 November 2005	Senate Legal and Constitutional Committee	Anti-Terrorism (no. 2) Bill 2005
23 November 2005	Senate Legal and Constitutional Committee	Anti-Terrorism (no. 2) Bill 2005
2006		
13 March 2006	Senate Legal and Constitutional Legislation Committee	Telecommunications (Interception) Amendment Bill 2006
19 July 2006	Australian Law Reform Commission	Review of Sedition Laws
7 August 2006	Department of Immigration & Multicultural Affairs	Bridging Visas: Migration Act 1958 (“the Act”) & Migration Regulations 1994 (“the Regulations”)

Date	To	Title
17 November 2006	Senate Legal and Constitutional Affairs Committee	Anti-Money Laundering and Counter-Terrorism Financing Bill 2006
2007		
19 January 2007	Legal and Constitutional Affairs Committee	Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006
30 January 2007	Mr Mark Trowell QC	Specific Provisions of the National Crime Authority Act 1984 and the Australian Crime Commission Act 2002
9 February 2007	Parliamentary Joint Committee on Intelligence and Security	Review of the Power to Proscribe Organisations as Terrorist Organisations
1 May 2007	Parliamentary Joint Committee on Intelligence and Security	Review of the Power to Proscribe Organisations as Terrorist Organisations
28 May 2007	Attorney-General's Department	Law Council Response to Discussion Paper on Material that Advocates Terrorists Acts
13 July 2007	Senate Standing Committee on Legal and Constitutional Affairs	Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007
13 July 2007	Senate Legal and Constitutional Affairs Committee	Telecommunications (Interception and Access) Bill 2007
31 October 2007	Secretary, Attorney-General's Department	Australian Security Intelligence Organisation (ASIO) Guidelines
2008		
1 April 2008	Parliamentary Joint Committee on the Australian Crime Commission	Inquiry into the Australian Crime Commission Amendment Act 2007
4 April 2008	Senate Legal and Constitutional Affairs Committee	Inquiry into the Telecommunications (Interception and Access) Amendment Bill 2008
16 May 2008	The Hon Mr Clarke QC	Clarke Inquiry into the case of Dr Mohamed Haneef
29 August 2008	United Nations Human Rights Committee	Shadow Report to Australia's Common Core Document
1 September 2008	Attorney-General's Department	Australia's response to the concluding observations of the UN Committee against Torture
15 September 2008	Senate Legal and Constitutional Affairs Committee	Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 (No 2)
23 September 2008	Senate Legal and Constitutional Affairs Committee	Supplementary Information: Inquiry into the Independent Reviewer of Terrorism Bill 2008 (No 2)

2009		
19 February 2009	Senate Legal and Constitutional Affairs Committee	Inquiry into Foreign Evidence Amendment Bill 2008
6 May 2009	National Consultation on Human Rights	A Charter: Protecting the Rights of All Australians
27 July 2009	Senate Finance and Public Administration Committee	Inquiry into National Security Legislation Monitor Bill 2009.
28 August 2009	Senate Legal and Constitutional Affairs Committee	Inquiry into the provisions of the <i>Anti-Terrorism Laws Reform Bill 2009</i>
9 October 2009	Attorney-General's Department	National Security Legislation Discussion Paper
23 November 2009	Attorney-General's Department	Australia's Response to the Concluding Observations of the UN Human Rights Committee
2010		
10 May 2010	Senate Legal and Constitutional Affairs Committee	Inquiry into the <i>National Security Legislation Amendment Bill 2010</i> and <i>Parliamentary Joint Committee on Law Enforcement Bill 2010</i>
16 April 2010	Attorney-General's Department	United Nations Universal Periodic Review of Australia - Australian Government's National Report
9 July 2010	Senate Legal and Constitutional Affairs Committee	Inquiry into the <i>Human Rights (Parliamentary Scrutiny) Bill 2010</i> and <i>Human Rights (Parliamentary Scrutiny)(Consequential Provisions) Bill 2010</i>
28 October 2010	Senate Legal and Constitutional Affairs Committee	Inquiry into the <i>Telecommunications Interception and Intelligence Services Bill 2010</i>
11 November 2010	Senate Legal and Constitutional Affairs Committee	<i>Human Rights (Parliamentary Scrutiny) Bill 2010</i> (Supplementary Submission)
2011		
9 February 2011	Attorney-General's Department	National Human Rights Action Plan Background Paper
31 March 2011	Attorney-General's Department	Consultation on Universal Periodic Review Recommendations
3 May 2011	Senate Legal and Constitutional Affairs Committee	Inquiry into the <i>Intelligence Services Legislation Amendment Bill 2011 [Provisions]</i>
14 June 2011	Senate Standing Committee on Legal and Constitutional Affairs	Supplementary Submission – <i>Intelligence Services Legislation Amendment Bill 2011</i>
2 September 2011	Attorney-General's Department	Baseline Study for a National Human Rights Action Plan
2012		

29 February 2012	Attorney-General's Department	Australia's National Human Rights Action Plan
20 August 2012	Parliamentary Joint Committee on Intelligence and Security	Inquiry into National Security Law Reform
10 September 2012	Independent National Security Legislation Monitor	Inquiry into Questioning and Detention Warrants, Preventative Detention Orders and Control Orders
27 September 2012	COAG Counter-Terrorism Review Committee	COAG Review of Counter-Terrorism Legislation
2013		
19 July 2013	Independent National Security Legislation Monitor	Inquiry into <i>National Security Information (Criminal and Civil Proceedings) Act 2004</i>
5 August 2013	Independent National Security Legislation Monitor	Inquiry into Financing Terrorism Offences

Attachment C: Terrorism Cases

***R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005)**

Mr Mallah was acquitted by jury of two counts of committing an act in preparation for or in the planning of a terrorist act, contrary to section 101.6(1) of the *Criminal Code*. He pleaded guilty to a third count of recklessly making a threat to cause serious harm to a third party. He was sentenced to a total term of two years, six months imprisonment.

***R v Roche* [2005] WASCA 4**

In June 2003 Mr Roche was sentenced to 9 years imprisonment, with a non parole period of 4.5 years, for conspiring to destroy the official premises of internationally protected persons by means of explosives, with the intent to endanger the lives of internationally protected persons, contrary to section 8(3C)(a) of the *Crimes (Internationally Protected Persons) Act 1976*. The sentence was appealed by both Mr Roche and the Crown, however it was upheld. Mr Roche was released on parole on 17 May 2007.

***R v Lodhi* [2006] NSWSC 584; *Lodhi v R* [2006] NSWCCA 121; *Lodhi v R* [2007] NSWCCA 360**

Faheem Lodhi was acquitted of one count of making a document connected with preparing for a terrorist act, but found guilty of possessing a thing connected with preparing for terrorism; collecting documents connected with preparing for terrorism; doing an act in preparation for a terrorist act; and, giving false or misleading answers to ASIO. Mr Lodhi was sentenced to a 20 years imprisonment with a 15- year non-parole term. He appealed his conviction and sentence. Both were upheld by the NSW Court of Appeal on 20 December 2007. The High Court refused special leave to appeal on 13 June 2008 (*Lodhi v R* [2008] HCATrans 225).

***R v Ul-Haque* [2007] NSWSC 1251.**

Izhar Ul-Haque was arrested and charged with training with a terrorist organisation, Lashkar-e-Taiba (LET), in Pakistan. The Crown case relied primarily on two records of interview in which admissions were made. Objection was made to the admission of these interviews on the grounds that the admission was influenced by oppressive conduct. The trial judge held that both records of interview were inadmissible. A few days later the Commonwealth DPP terminated the proceedings.

***R v Khazaal* [2006] NSWSC 1061, see also *R v Khazaal* [2009] NSWSC 1015 and *R v Khazaal* [2012] HCA 26.**

In September 2008 Belal Khazaal was found guilty of making a document in connection with the engagement of a person in a terrorist act contrary to section 101.5 of the *Criminal Code*, and sentenced to 12 years imprisonment, with a non-parole period of nine years. The jury was unable to reach a unanimous verdict in relation to another charge. Both charges related to Mr Khazaal's production and publication of a document entitled '*Provisions on the Rules of Jihad - short judicial rulings and organisational instructions for fighters and mujahideen against infidels*'. Mr Khazaal successfully appealed to the NSW Court of Criminal Appeal (NSW CCA) in June 2011, where his conviction was quashed and a retrial ordered on the basis that the judge who had presided over his 2009 trial, had failed to properly instruct the jury.

However, the Crown was granted special leave to appeal to the High Court, which unanimously reinstated Mr Khazaal's conviction on 10 August 2012. First, it found that the trial judge had not erred in refusing to leave to the jury the defence under section 101.5(5), that the document was not intended to facilitate assistance in a terrorist act. It held that in relying on evidence that he had acted lawfully in the past as a journalist

interested in and publishing material about Islam, Mr Khazaal had failed to discharge the evidential burden necessary to enliven the defence. Given that it contained methods as to the assassination of identified persons as targets, the High Court considered that the document was incapable of raising an inference that it was lawful, scholarly or educational. It was held that the evidence did not suggest a reasonable possibility that the respondent lacked the intention of facilitating assistance in a terrorist act.

Secondly, the High Court held that the trial judge's directions to the jury were sufficient regarding the requirement that the document be "connected with" assistance in a terrorist act. The trial judge had directed the jury that this phrase should be interpreted according to its plain English meaning, and had declined to direct that more than a remote connection was required.

The High Court remitted the matter to the NSW CCA for consideration of Mr Khazaal's sentence appeal.

***R v Benbrika & Others* [2009] VSC 21.**

In these proceedings, 12 accused were charged with a number of terrorist organization offences, totaling 27 charges under Part 5.3 of the Criminal Code. Seven of the accused were found guilty of at least one charge connected to their involvement in or support of a terrorist organisation. Four of the accused were found not guilty of all charges against them. The jury was unable to reach a verdict in relation to the charge against the remaining accused. On 3 February 2009 Abdul Nacer Benbrika, the leader of the Melbourne terrorist cell, was sentenced to 15 years jail with a non-parole period of 12 years. The remainder of the convicted accused were sentenced to between six and 10 years in jail.

***R v Kent* [2009] VSC 375**

Mr Kent was originally indicted with 12 other men on counts alleging offences against Pt 5.3 of the *Commonwealth Criminal Code*, see *R v Benbrika* [2009] VSC 21. The trial ran from February to September 2008, with the jury being discharged without verdict when they failed to reach agreement on one count he faced. He was remanded for re-trial and pleaded guilty on 28 July 2009 to being a member of a terrorist organisation under s102.3 of the *Commonwealth Criminal Code* and to making a document connected with preparation for a terrorist act, and being reckless as to that connection under s101.5(2) of the *Commonwealth Criminal Code*. Mr Kent was found to be a member of Jemaah, a terrorist organisation, between 1 July 2004 and 8 November 2005. The organisation was headed by Abdul Nacer Benbrika.

He was sentenced on the same factual basis as his former co-accused. His membership rests on evidence obtained from intercepted conversations involving members of Jemaah in 2004 and 2005. From the conversations it was clear that Mr Kent was committed to jihad and that the group's intention was to engage in terrorist activity to put pressure the Commonwealth government to withdraw troops from Iraq and/or Afghanistan. The count relating to making a document in preparation for a terrorist act was Mr Kent's involvement in editing seven minutes of a propaganda video which promoted jihad for an overseas jihadi website. Mr Kent's computer contained a significant amount of terrorist material, much of it supporting violence against the kuffar. On the count of being a member of a terrorist organisation Mr Kent was sentenced to 4 ½ years imprisonment. On the count of making a document in connection with a terrorist act, being reckless as to that connection he was sentenced to 2 ½ years imprisonment. A non-parole period of 3 years and 9 months was set.

***R v Thomas* [2006] VSC 120, see also *R v Thomas (No 3)* (2006) 14 VR 512.**

Joseph Thomas was charged with offences under Division 102 of the *Criminal Code*, including receiving financial support from al-Qa'ida, providing al-Qa'ida with resources or support to help it carry out a terrorist attack and having a false passport. Mr Thomas was found guilty of receiving funds from a terrorist organisation and possessing a falsified passport. He was acquitted of the other charges. The Victorian Court of Criminal Appeal upheld an appeal by Mr Thomas and quashed the convictions. Soon after Mr Thomas' matter was remitted to the Supreme Court for a re-trial on the grounds that fresh evidence had emerged following an interview with Australian Broadcasting Corporation's Four Corners television program, *The Convert*, Four Corners, (27 February 2006). Mr Thomas sought special leave to appeal to the High Court, which was refused. Mr Thomas' retrial commenced in October 2008. On 23 October 2008 the jury acquitted Mr Thomas of the charge of receiving money from a terrorist organization, but found Mr Thomas guilty of the charge of possessing a falsified passport. He was sentenced to nine months jail, however he was free to go on the basis of a recognisance release order as he had already served the specified time in custody.

Vinayagamoorthy & Anor v DPP [2007] VSC 265.

On 1 May 2007 Aruran Vinayagamoorthy and Sirajah Yathavan were charged with three offences relating to membership of, and support for, a terrorist organisation. They were also charged with one offence under the *Charter of the United Nations Act 1945* relating to alleged links to the Liberation Tigers of Tamil Elam (LTTE). Arumugan Rajeevan was also charged with offences concerning alleged links to the LTTE. Yathavan, Vinayagamoorthy and Rajeevan were released on bail. All three were committed to stand trial on 14 December 2007. On 6 March 2009 the prosecution dropped the charges relating to the terrorist organisation offences, but continued to pursue the charges under the *Charter of the United Nations Act 1945*. Difficulties in the prosecution case arose as the Australian Government had been hesitant to proscribe the LTTE as a terrorist organisation and had to rely on the *Charter of the United Nations Act 1945* as the UN designates the LTTE as a terrorist organisation. There was also evidence that the LTTE was operating as a de facto state in the north of Sri Lanka during the period of the indictment. However, ample material demonstrated that the accused would have known that the LTTE had a reputation as a terrorist organisation. The three accused were found guilty of making money available to a proscribed organisation under s.21 of the *Charter of the United Nations Act 1945*. Vinayagamoorthy was sentenced to two years' jail but released on a good behaviour bond for four years and Yathavan and Rajeevan were each sentenced to one year in jail and released on a good behaviour bond for three years. Vinayagamoorthy's sentence was higher on account of his provision of electronic components to the LTTE which could be used for little else apart from terrorist attacks.

Regina (C'wealth) v Elomar & Ors [2010] NSWSC 10.

On 3 November 2008, Mohammed Ali Elomar, Khaled Cheikho, Moustafa Cheikho, Abdul Rakib Hasan, and Mohammed Omar Jamal, pleaded not guilty to alleged participation in a conspiracy to do acts in preparation for a terrorist act or acts under sections 11.5 and 101.6 of the *Criminal Code*. On 16 October 2009 each man was found guilty by the jury on a single count in the indictment. They were found to have prepared for action involving explosives or firearms with intent to advance cause of violent jihad to coerce Australian government to alter policies. The conspiracy occurred over a period of 9 months and involved collecting ammunition, ordering and obtaining laboratory equipment and chemicals used in the manufacture of explosives, attending camping trips involving detonation of explosive devices, concealing items connected to the conspiracy, obtaining instructions for making explosives and detonators and possessing a vast quantity of extremist or fundamentalist material.

The offences committed were considered to be marginally short of the most serious case. Each person was driven by a fundamentalist view of the Muslim faith and was sternly opposed to anyone who had an alternative view. An examination of the acts that each person committed, whether that was the purchase of ammunition, battery acid or laboratory equipment, showed that it was done for the purpose and fulfilment of the agreement to which each offender was a party.

Each offender unequivocally and voluntarily adhered to the objects of the criminal enterprise. The enterprise was deliberate and determined, through the defiant nature of their acts and their attempts at concealment, which was evident from the surveillance evidence and telephone intercepts. The offenders were willing to commit violent acts against persons or property in line with their radicalised beliefs. The offenders showed little remorse or contrition for their acts.

Mr Ali Elomar was sentenced to 28 years imprisonment with a non-parole period of 21 years. He was deemed to have co-ordinated many of the acts committed by the conspiracy. Mr K. Cheikho was sentenced to 27 years imprisonment with a non-parole period of 20 years. Mr Rakib Hasan was sentenced to 26 years imprisonment with a non-parole period of 19 years and six months. Mr M. Cheikho was sentenced to 26 years imprisonment with a non-parole period of 19 years and six months. Mr Omar Jamal was sentenced to 23 years imprisonment with a non-parole period of 17 years and three months. His sentence was lower by virtue of the length of time he spent as part of the conspiracy and his position in the hierarchy of the conspiracy. All of the offenders will be granted 'AA' classification upon the commencement of their imprisonment.

R v Khaled Sharrouf [2009] NSWSC 1002.

Mr Sharrouf was charged under s101.4 of the *Commonwealth Criminal Code* and pleaded guilty to possessing a thing which was connected with preparation for a terrorist act or acts knowing of that connection. He was found in possession of six clocks and one hundred and forty batteries which could have been used to fire a detonator for an explosive device. The Crown agreed that at or about the time of the offence Mr Sharrouf was suffering from a mental illness. Mr Sharrouf was sentenced to 5 years and 3 months with a non-parole period of 3 years and 11 months. Given the time he had already spent in custody he had to spend roughly 3 additional weeks in prison. He was to be sentenced for 7 years, but a 25% discount was awarded taking into account factors such as his mental illness and the fact that he was classified as an AA prisoner, incarcerated as a high security prisoner, and insufficient steps were made to treat his mental illness.

R v Fattal and Others [2011] VSC 681

The accused, Saney Edow Aweys, Nayef El Sayed, Yacqub Khayre, Abdirahman Ahmed and Wissam Mahmoud Fattal were charged with conspiracy to engage in acts done in preparation for or planning a terrorist attack on the Holsworthy Army Base in Sydney. The attack was to be carried out with guns with the intention of shooting as many people as possible.

On 22 December 2010, a jury found Saney Edow Aweys, Nayef El Sayed and Wissam Mahmoud Fattal guilty of planning a terrorist attack. In December 2011, Saney Edow Aweys, Nayef El Sayed and Wissam Mahmoud Fattal were sentenced to 18 years imprisonment, with a minimum term of 13 and a half years.

Yacqub Khayre and Abdirahman Ahmed were found not guilty of conspiring to do acts in preparation for, or planning, a terrorist act.

The Commonwealth Director of Public Prosecutions appealed against the adequacy of the sentences in the Victorian Court of Appeal. Mr Fattal, Mr Aweys and Mr El Sayed

appealed against both the conviction and the sentences imposed. On 2 October 2013, the Victorian Court of Appeal upheld the convictions and the sentences imposed at first instance, finding that whilst the sentences imposed were severe, this was quite properly so. While the offending was not in the worst category, which would have attracted the maximum penalty of life imprisonment, it was serious and the sentences were within the range of sentences for similar offences.

Attachment D: Glossary

Legislation

ADJR Act: *Administrative Decisions (Judicial Review) Act 1997* (Cth)

AML/CTF Act: *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth)

ASIO Act: *Australian Security and Intelligence Organisation Act 1979* (Cth)

Classification Act: *Classification (Publications, Film and Computer Games) Act 1995* (Cth)

Crimes Act: *Crimes Act 1914* (Cth)

Criminal Code: *Criminal Code Act 1995* (Cth)

NSI Act: *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

NSI Bill: *National Security Information (Criminal and Civil Proceedings) Bill 2004* (Cth)

NSI Consequential Amendments Bill: *National Security Information (Security Proceedings) (Consequential Amendments) Bill 2004* (Cth)

NSI Consequential Amendments Act: *National Security Information (Security Proceedings) (Consequential Amendments) Act 2004* (Cth)

NSLA Act: *National Security Legislation Amendment Act 2010* (Cth)

NSLA Bill: *National Security Legislation Amendment Bill 2010* (Cth)

SDA: *Surveillance Devices Act 2004* (Cth)

SFT Act: *Suppression of the Financing of Terrorism Act 2002* (Cth)

SLAT Act: *Security Legislation Amendment (Terrorism) Act [No 2] 2002*

SLAT Bill: *Security Legislation Amendment (Terrorism) Bill [No 2] 2002*

Terrorist Material Classification Act: *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth)

UN Charter Act: *Charter of the United Nations Act 1945* (Cth)

Video Link Evidence Act: *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005* (Cth)

Other

AAT: Administrative Appeals Tribunal

ACC: Australian Crime Commission

AFP: Australian Federal Police

ALRC: Australian Law Reform Commission

ALRC Sedition Report: *Fighting Words: A Review of Sedition Laws in Australia*

ASIO: Australian Security Intelligence Organisation

AUSTRAC: Australian Transaction Reports and Analysis Centre

Board: Classification Board

CAT Committee: The United Nations Committee Against Torture

CDPP: Commonwealth Director of Public Prosecutions

Clarke inquiry: Inquiry into the case of Dr Mohammed Haneef

COAG: Council of Australian Governments

DIAC: Department of Immigration and Citizenship

FRLI: Federal Register of Legislative Instruments

Haneef report: Report on the case of Dr Mohammed Haneef

HREOC: Human Rights and Equal Opportunity Commission, now the Australian Human Rights Commission

ICCPR: International Covenant on Civil and Political Rights

IGIS: Inspector General of Intelligence and Security

Monitor: The Independent National Security Legislation Monitor

PJCAAD: Parliamentary Joint Committee on the Australian Security Intelligence Organisation, the Australian Security Intelligence Service and the Defence Signals Directorate

PJCHR: Parliamentary Joint Committee on Human Rights

PJCIS: Parliamentary Joint Committee on Intelligence and Security

PJCLE: Parliamentary Joint Committee on Law Enforcement

PKK: Kurdistan Workers' Party

Review Board: Classification Review Board

Sheller Committee: Security Legislation Review Committee

SLCRC: Senate Legal and Constitutional Review Committee

Street Review: Review of the Interoperability between the Australian Federal Police and National Security Agencies

UN: United Nations

UNHRC: United Nations Human Rights Committee

UN HR Council: United Nations Human Rights Council

UN Special Rapporteur: United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering Terrorism