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# Anti-Terrorism Reform Project

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

**August 2009**

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# 1. Introduction

## 1.1.1 What is Covered?

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

The Law Council has often been critical of anti-terrorism 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.

The contents of this Paper reflect those matters to which the Law Council has devoted considerable attention.<sup>1</sup> They are:

- the definition of ‘terrorist act’ in section 100.1 of the *Criminal Code 1995* (‘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* (‘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 investigation 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 ASIO in Division 3 of the *Australian Security Intelligence Organisation Act* (‘the *ASIO Act*’);
  - laws restricting access to and disclosure of information that could prejudice national security in criminal and civil proceedings;

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<sup>1</sup> 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*.

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- changes to the classification regime to refuse classification for terrorist related material; and
  - changes to the laws regulating the use of foreign evidence in terrorist related criminal proceedings.

During the period March 2002 to October 2008 the Law Council of Australia has made over 40 separate submissions on Australia's anti-terrorism measures (all of which are available on the Law Council website [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)). 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, DSD and 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 Australian Law Reform Commission, *Inquiry into Protecting Classified and Security Sensitive Information* (12 September 2003)
- Submission to the Attorney-General, House of Representatives, *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 Australian Law Reform Commission, *Review of Sedition 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)

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- 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 Mr Clarke QC, *Clarke 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).

In addition to outlining the nature of the measures introduced and the rationale behind their introduction, the Paper will summarise the Law Council's concerns relating to particular aspects of Australia's anti-terrorism laws. The Paper also contains a number of key recommendations for reform.

The Law Council wishes to acknowledge the contributions of its constituent bodies, both through ongoing advocacy in respect of 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 been since been updated and is now current as at 5 August 2009.

### **1.1.2 General Themes Emerging**

There is no doubt that terrorism continues to pose a significant threat to Australia's national security.<sup>2</sup> In its 2007-2008 Annual Report to Parliament, ASIO described the security environment faced by Australia as follows:

*Terrorism – particularly by violent jihadists – has posed the most significant security threat to Australia for at least the last seven years. It will continue to do so for the foreseeable future.*<sup>3</sup>

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<sup>2</sup> ASIO, Annual Report to Parliament 2007–08 p. 5, available at <http://www.asio.gov.au/Publications/Content/CurrentAnnualReport/pdf/ASIOAnnualReport0708.pdf>

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The Law Council has always acknowledged the paramount importance of ensuring Australia's national security and supports measures which protect the community from possible terrorist acts. However, serious concerns about the nature of the measures enacted have prompted the Law Council to contribute to the public debate on Australia's legislative response to terrorism, particularly where such laws vary established legal rights and safeguards.

In assessing Australia's legislative response to the threat of terrorism, the Law Council considers it critical to ask whether the new laws constitute a necessary and proportionate response to the threat of terrorism and whether they are consistent with the values underpinning Australian democracy, such as respect for the rule of law and protection of individual rights.

In other instances, the Law Council has questioned why new measures have been introduced without the types of safeguards necessary to protect against overuse or misuse of power by the executive arm of government.

As well as questioning the measures enacted, the Law Council has monitored the operation of the new laws and observed serious problems with the way they have been applied by law enforcement officers.

The Law Council's efforts over the past seven years to promote review and reform of Australia's anti-terrorism measures have not been in vain. Significant changes have been made to Australia's anti-terrorism laws, many recommended by the Law Council, that have, to some extent, redressed the balance between national security and individual rights.<sup>4</sup> Perhaps more significantly, in recent years the public debate 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. Two recent developments have been particularly significant: the Clarke Inquiry into the handling of the Haneef Case and the National Consultation on Human Rights.

The Law Council also notes that in June 2009 the Australian Greens introduced a private members Bill into the Senate entitled the *Anti-Terrorism Law Reform Bill 2009*. This Bill seeks to identify the most concerning components of Australia's anti-terrorism laws and remove the offending provisions from the relevant legislation. This Bill has yet to be debated in the Senate and has been referred to a Senate Committee for Inquiry. If passed, the Bill would address many of the Law Council's concerns and recommendations for reform as outlined in this Paper.

#### 1.1.2.1 Clarke Inquiry 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. In March 2008 the Commonwealth Attorney-General, the Hon Robert McClelland MP announced a public inquiry into Dr Haneef's arrest, detention, charge and subsequent release, to be conducted by former judge the Hon John Clarke QC. The Law Council made detailed written and

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<sup>3</sup> ASIO Website, 'ASIO's Year in Review 2007-08' available from <http://www.asio.gov.au/Review/YearInReview.aspx> accessed 23 October 2008.

<sup>4</sup> 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 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*.

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oral submissions to the Clarke Inquiry,<sup>5</sup> as did many other non-government organisations and relevant Government agencies and Departments. On 21 November 2008 Mr Clarke handed down his report, making a number of findings highly critical of the handling of the case by key government agencies<sup>6</sup>.

The Report contained 10 key recommendations for reform, many of which correspond to the recommendations made by the Law Council in its submissions, including that the Commonwealth Government:

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

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 review of terrorist organisation laws and the Australian Law Reform Commission's review of sedition laws. In this response, the Government indicated that it would consider appointing a new National Security Legislation Review Monitor to review Australia's anti-terrorism laws and report to Parliament.<sup>7</sup>

On 24 June 2009 the *National Security Legislation Monitor Bill 2009* was introduced into Parliament. The Bill has now been referred to a Senate Committee for Inquiry. The National Security Legislation Monitor also received funding in the recent Federal Budget 2009-2010.<sup>8</sup>

The Government also indicated that it would review and consider amending: the terrorist organisation offences and the procedure for listing an organisation as a terrorist organisation; the sedition offences; the definition of 'terrorist act'; and Part 1C of the *Crimes Act*.<sup>9</sup>

If these proposed reforms are implemented, they could go some way to ensuring Australia's anti-terrorism laws are consistent with respect for fundamental human rights and rule of law principles. The Law Council will closely examine the reform proposals when they are issued in order to ensure that the Clarke recommendations are implemented fully and that the Law Council's long standing concerns about these laws are seriously addressed.

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<sup>5</sup> For example, see Law Council of Australia, *Submission to the Clarke Inquiry into the Haneef Case* (June 2008) available at <http://www.lawcouncil.asn.au/library/submissions.cfm>.

<sup>6</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008.

<sup>7</sup> Commonwealth Attorney-General's Department, 'Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef – December 2008', 23 December 2008, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008) at 16 June 2009.

<sup>8</sup> Commonwealth Attorney-General's Department, 'Portfolio Budget Statements 2009-2010, Attorney-General's Department', 14 May 2009, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~02\\_03+PBS+09\\_10+AGD\\_web+Final.pdf/\\$file/02\\_03+PBS+09\\_10+AGD\\_web+Final.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~02_03+PBS+09_10+AGD_web+Final.pdf/$file/02_03+PBS+09_10+AGD_web+Final.pdf)> at 16 June 2009.

<sup>9</sup> *Ibid* n5.

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### 1.1.2.1 National Consultation on Human Rights

In December 2008, the Commonwealth Government announced a National Consultation on the protection and promotion of human rights in Australia, to be conducted by an independent Committee led by Father Frank Brennan.<sup>10</sup> The Law Council has been actively involved in the Consultation and has 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.<sup>11</sup> The consultation process has provided another opportunity for the Law Council to highlight growing concerns surrounding the introduction of anti-terrorism legislation and its impact upon human rights.

Despite these important gains, much more needs to be done in order to enhance the protection of rights and provide safeguards against the misuse of executive power under Australia's anti-terrorism legislative regime.

### **1.1.3 The Imperative for Reform**

As Australia's anti-terrorism laws proliferate, and the expansion of executive power increases, the Law Council's calls for reform and review have escalated.

By consolidating its past advocacy into one document the Law Council intends to highlight the gravity of its concerns and the imperative for urgent review and reform of Australia's anti-terrorism laws.

The Law Council's recommendations are summarised at the end of this Paper, but can broadly be categorised as follows:

- Australia's 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 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;

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<sup>10</sup> For further information on the National Consultation on Human Rights see <http://www.humanrightsconsultation.gov.au/>.

<sup>11</sup> Law Council of Australia, 'A Charter: Protecting the Rights of all Australians', 6 May 2009, <[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=576D5A42-1E4F-17FA-D260-F75AF0309582&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=576D5A42-1E4F-17FA-D260-F75AF0309582&siteName=lca)> at 16 June 2009.

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- 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.

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## 2. Background and Context

### 2.1 What measures were introduced?

The past eight years have seen prolific legislative activity in an effort to protect the Australian community from the threat of international terrorism. Since 2001 the Commonwealth Parliament has passed over 30 separate pieces of legislation dealing with terrorism and security, accompanied by significant budget increases to fund these new security measures.<sup>12</sup>

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

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

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

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

Since these particular legislative acts were introduced, further amendments to existing legislation have been made in response to the threat of terrorism.<sup>13</sup>

### 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.<sup>14</sup>

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<sup>12</sup> The full list appears at the National Security Australia web site:

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

<sup>13</sup> 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*.

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A significant shift in the way the world understood 'terrorism' occurred following the attack on the United States (US) on 11 September 2001. The bombing of the Madrid railway system in 2004 and the London Underground on 7 July 2005, are potent reminders of the risk and consequences of modern terrorist violence.

The impact of these horrific events was brought home for Australia by the bombings in Bali in 2002 and 2005 and the Australian embassy in Jakarta in 2004.

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

- perpetrated by people often operating through loose personal networks;
- aimed at maximising civilian casualties;
- with perpetrators likely to receive training or get financial support from sources in other countries; and
- that change in response to new security measures and make use of modern technologies.<sup>15</sup>

In response to this 'new' form of terrorism, the international community called member States into action. A number of new United Nations (UN) Conventions were developed and resolutions passed, multilaterally and bilaterally, and Australia expressed its firm commitment to do its part to combat this threat.<sup>16</sup>

Within Australia there has been bipartisan and broad community support for Australia to take strong action to protect against and eliminate terrorist violence.<sup>17</sup>

The threat posed by international terrorism to Australia has been assessed as 'medium' since 2003,<sup>18</sup> and terrorism continues to be cited as a key national security concern for Australia. ASIO has recently described terrorism as continuing to pose the most significant security threat to Australia<sup>19</sup> and has identified a number of terrorist attacks or incidents affecting Australian civilians in the past years.<sup>20</sup> It further reported that

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<sup>14</sup> 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](http://www.bbc.co.uk/history/recent/sept_11/changing_faces_01.shtml) (accessed 11 November 2008).

<sup>15</sup> Pursuant to section 29(1)(ba) of the *Intelligence Services Act 2001*, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (formerly named the Parliamentary Joint Committee on ASIO, ASIS and DSD) was required to review the operation, effectiveness and implications of the *Security Legislation Amendment (Terrorism) Act 2002*; *Border Security Legislation Amendment Act 2002*; *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and *Suppression of the Financing of Terrorism Act 2002* and report to each House of the Parliament and to the responsible Minister, as soon as practicable after the third anniversary of the laws coming into force. The PJCIS released its report, entitled *Review of Security and Counter Terrorism Legislation* on 4 December 2006 (PJCIS Review 2006). For this particular reference see PJCIS Review 2006 at [2.12].

<sup>16</sup> The relevant international Conventions and resolutions are discussed later in this Paper at 2.3.1.

<sup>17</sup> Media Release by Prime Minister John Howard, 'A More Safer More Secure Australia' (30 October 2001); Kim Beazley MP, 'Fighting Terrorists Today – Ten Things Australia Needs to Do and Labor's Commitment to Do Them' (Press Release, 13 September 2001).

<sup>18</sup> 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.

<sup>19</sup> ASIO Website, 'ASIO's Year in Review 2007-08' available from <http://www.asio.gov.au/Review/YearInReview.aspx> accessed 23 October 2008.

<sup>20</sup> In its 2007-2008 Annual Report to Parliament, ASIO listed the 'terrorist attacks or incidents affecting Australian civilians' in the past years. This list included the following: on 10 July 2007, private security contractor Darryl de Thierry died in Iraq as a result of an improvised explosive device (IED) attack; on 14 January 2008, the Serena Hotel in Kabul, Afghanistan – the temporary home of the Australian Embassy – was attacked by Islamic militants; on 29 April 2008, an Australian journalist travelling in a police convoy in Nangharar Province, Afghanistan, was injured by a suicide bomber. At least 18 Afghans were

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statements by extremist elements, including groups associated with al-Qa'ida, continue to mention Australia.<sup>21</sup>

## 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 impact 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 conventions<sup>22</sup> and has supported a number of terrorism-related resolutions.<sup>23</sup>

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 United States (US),<sup>24</sup> other commentators have asserted that the laws may not need to be so exacting and should only address gaps in existing Australian laws.<sup>25</sup>

When encouraging nation States to take steps to combat international terrorist, the UN also made it clear that States should exercise caution when enacting new laws to avoid infringing their international human rights obligations.<sup>26</sup>

### 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 and State and Territory offences relating to murder, kidnap, conduct likely to involve serious risk to life or personal injury and damage to property,<sup>27</sup> as well as offences covering conduct generally associated with

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killed and 35 injured; and four members of the Australian Defence Force were killed during counter-terrorism related operations in Afghanistan. See ASIO, Annual Report to Parliament 2007–08 p. 6, available at <http://www.asio.gov.au/Publications/Content/CurrentAnnualReport/pdf/ASIOAnnualReport0708.pdf>

<sup>21</sup> 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/Publications/Content/CurrentAnnualReport/pdf/ASIOAnnualReport0708.pdf>

<sup>22</sup> 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/>.

<sup>23</sup> 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/unscl\\_resolutions.html](http://www.un.org/Docs/sc/unscl_resolutions.html).

<sup>24</sup> 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

<sup>25</sup> 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/library/pubs/RP/2001-02/02rp12.htm>

<sup>26</sup> 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 OSCE 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.

<sup>27</sup> 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.

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terrorism.<sup>28</sup> For example, prior to September 2001 laws were in place making it an offence to:

- engage in treason, treachery, sabotage, sedition, espionage, or disclose official secrets, or possess weapons of mass destruction or be in a prohibited place;<sup>29</sup>
- engage in 'politically motivated violence',<sup>30</sup> which includes acts or threats of violence or harm for the purpose of influencing domestic or foreign governments or overthrowing or destroying a domestic government or constitutional system;
- be a member of, or provide funds to, a prohibited association;<sup>31</sup> and
- recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil.<sup>32</sup>

In addition to these substantive offences, under the Commonwealth *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.<sup>33</sup> 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,<sup>34</sup> use listening and tracking devices, gain access to computers<sup>35</sup> and engage in undercover operations.<sup>36</sup>

A National Crime Authority also existed with power to investigate and combat serious organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence to law enforcement agencies.<sup>37</sup> The Government also had the power to amend the *Migration Regulations 1994* to exclude from Australia government officials from a particular country based on that country's complicity in acts of terrorism.<sup>38</sup>

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<sup>28</sup> 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*'.

<sup>29</sup> See for example *Crimes Act 1914* (Cth) (which contained offences including treason, treachery, sabotage, sedition, unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, taking unlawful soundings, computer related acts, postal and telecommunications offences); *Air Navigation Act 1921*; *Public Order (Protection of Persons and Property) Act 1971*; *Crimes (Biological Weapons) Act 1976*; *Nuclear Non-Proliferation (Safeguards) Act 1984*; *Crimes (Hostages) Act 1989*; *Crimes (Aviation) Act 1991*; *Crimes (Ships and Fixed Platforms Act) Act 1992*; *Chemical Weapons (Prohibition) Act 1994*; *Weapons of Mass Destruction (Prevention of Proliferation) Act 1994*.

<sup>30</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ss4, 8A, *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)* (1992).

<sup>31</sup> *Crimes Act 1914* (Cth) Part 11A concerning unlawful associations.

<sup>32</sup> *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

<sup>33</sup> *Criminal Code Act 1995* (Cth) Division 11.

<sup>34</sup> *Telecommunications (Interception) Act 1979* (Cth).

<sup>35</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth).

<sup>36</sup> *Crimes Act 1914* (Cth).

<sup>37</sup> *National Crime Authority Act 1984* (Cth).

<sup>38</sup> See *Migration (Republic of Sudan - UN Security Council Resolution No. 1054) Regulations 1996*.

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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*  
...<sup>39</sup>

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'.<sup>40</sup>

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.

As noted by the UN 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 necessary and proportionate to the threat it sought to counter – that is, whether the particular measure adopted is the least restrictive means of achieving a legitimate protective purpose.<sup>41</sup> Such an assessment must 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 the each of the anti-terrorism laws it enacted were 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 annual reviews by the Ombudsman and the Inspector General of Security (IGIS) appointed to regularly monitor and report on the activities of Australia intelligence and security agencies, provide some insight into how often the laws have been used and whether they have been effective. Parliamentary Committees also provide a useful source of information.

For example, the Parliamentary Joint Committee on Intelligence and Security (PJCS), which consists of members of both Houses of Commonwealth Parliament and is tasked with reviewing the use of and changes to the powers of the Australian intelligence and security agencies, reported that by the end of July 2006, the AFP had conducted 479 investigations since the introduction of the new laws in mid 2002. Twenty-five people had been charged with terrorism related offences under Chapter 5.3 (Terrorism) of the

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<sup>39</sup> Report of Australia to the Counter-Terrorism Committee of the UN Council pursuant to paragraph 6 of Security Council Resolution 1373 (28 September 2001).

<sup>40</sup> Report of Australia to the Counter-Terrorism Committee of the UN Council pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001.

<sup>41</sup> 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).

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Commonwealth *Criminal Code*.<sup>42</sup> However, without access to security-sensitive information, measuring the effectiveness of these investigations in combating the threat of terrorism remains difficult.

While judicial consideration of Australia's anti-terrorism laws provides only a narrow perspective on their rate of use and effectiveness, it can be observed that, despite the prolific legislative activity seen in the past seven years, few prosecutions have resulted from the anti-terrorism laws and even fewer convictions.

The Attorney-General's website on National Security and Related Cases reports that to date only 12 people have been convicted or found guilty of terrorism and terrorism related offences, although more than 10 other defendants are currently before Australian courts on terrorism-related charges.<sup>43</sup>

Cases that have proceeded to trial and conviction or acquittal include: *R v Mallah*,<sup>44</sup> *R v Lodhi*,<sup>45</sup> *R v Ul-Haque*,<sup>46</sup> *R v Khazaal*,<sup>47</sup> *R v Benbrika & Others*,<sup>48</sup> and *R v Thomas*.<sup>49</sup>

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<sup>42</sup> PJCIS Review 2006 at [2.37]-[2.38]. The number of persons charged with terrorist-related offences has now risen to 29 see The Hon Robert McClelland MP, Attorney-General, Speech at 3rd Annual Counter-Terrorism Summit, East Melbourne (28 October 2008).

<sup>43</sup> See Attorney-General's Department, National Security and Counter Terrorism Website, Counter-terrorism and related cases, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity\\_Counter-terrorismandrelatedcases](http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Counter-terrorismandrelatedcases), accessed 20 October 2008.; 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.

<sup>44</sup> [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. Mr Mallah has since been released from prison, see <http://www.theaustralian.news.com.au/story/0,25197,25085233-5006784,00.html>

<sup>45</sup> (2005) 199 FLR 236, see also *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006). 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).

<sup>46</sup> [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.

<sup>47</sup> 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*. 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*'.

<sup>48</sup> [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.

<sup>49</sup> 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.

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In addition to these matters, a number of criminal trials involving terrorist related offences are currently pending in Australian courts including: *R v Baladjam & Others*,<sup>50</sup> and *R v Vinayagamoorthy, Yathavan and Rajeevan*.<sup>51</sup>

It is likely that further proceedings will also be commenced in the wake of arrests made in Melbourne in August 2009. It has been reported that a number of suspects, involved in an alleged plan to attack Holsworthy Army barracks have been charged with terrorist-related offences, including conspiring to prepare for a terrorist act.<sup>52</sup>

In addition to criminal matters culminating in criminal trials or hearings, there have 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 Haneef<sup>53</sup> and David Hicks.<sup>54</sup>

The court's 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 Australian criminal law and have a restrictive impact on individual rights. As observed by NSW Chief Justice Spigelman:

*The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.*<sup>55</sup>

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

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<sup>50</sup> Bradley Umar Sariff Baladjam, Khaled Cheikho, Moustafa Cheikho, Mohamed Ali Elomar, Abdul Rakib Hasan, and Mohammed Omar Jamal, have each been charged with one count of conspiring to do acts in preparation for a terrorist act contrary to sections 11.5 and 101.6 of the Criminal Code. Pre-trial hearings in this case commenced in February 2008 in the Supreme Court of NSW. As at 27 October 2008, a jury selection process was underway.

<sup>51</sup> 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 1976 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 1976.

<sup>52</sup> For example see '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).

<sup>53</sup> 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 website of the Clarke Inquiry into the Case of Dr Mohamed Haneef <http://www.haneefcaseinquiry.gov.au>. 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://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=6A0BC784-1C23-CACD-227C-88939D926B22&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=6A0BC784-1C23-CACD-227C-88939D926B22&siteName=lca). This submission is also available for download from the Clarke Inquiry website.

<sup>54</sup> See the Law Council's submissions to the Commonwealth Attorney-General. Law Council of Australia, *David Hicks* (27 March 2002), [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=8C716E56-1C23-CACD-22BE-F17F5907939D&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C716E56-1C23-CACD-22BE-F17F5907939D&siteName=lca) and Law Council of Australia, *David Hicks* (10 July 2003), [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=8C71415A-1C23-CACD-22F3-88146B57B43C&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C71415A-1C23-CACD-22F3-88146B57B43C&siteName=lca). See also *Jabbour v Hicks* [2007] FMCA 2139.

<sup>55</sup> *Lodhi v R* [2006] NSWCCA 121 at 66.

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may, over time, influence legal policy more generally with potentially detrimental impacts on the rule of law'.<sup>56</sup>

While valuable in their own right, past reviews of Australia's terrorism laws<sup>57</sup> have failed to provide a comprehensive analysis of the content and workings of Australia's terrorism laws and have excluded key legislative Acts such as the *National Security Information (Criminal and Civil Proceedings) Act* and Part 1C of the *Crimes Act*.

In addition, past and present review mechanisms do not have the mandate to consider how terrorism provisions are understood and applied by those agencies responsible for their implementation, such as law enforcement and intelligence agencies, court and prison authorities.<sup>58</sup> For example, the review powers of the Inspector General of Intelligence and Security (IGIS) do not cover the activities of the Australian Federal Police (AFP) or the legislation which establishes the Australian control order regime. Similarly, while complaints regarding the actions of the AFP may be made to the Commonwealth Ombudsman, he or she may only review individual complaints, and cannot enquire into the operation of the particular measures, such as the control order regime, as a whole.

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

The Law Council is of the view that a comprehensive, independent evaluation of Australia's terrorism laws - that considers the content and operation of such laws and explores their impact on the practices of law enforcement and intelligence officers, courts and the community more broadly - is urgently needed in Australia.<sup>59</sup>

Without such evaluation, existing review mechanisms are unlikely to identify systemic operational problems or assess whether measures that impact significantly on the rights of individuals are actually effective in combating terrorism and continue to be necessary.

The need for comprehensive, independent review of Australia's anti-terrorism laws has been recently emphasised by both domestic and national bodies and acknowledged Commonwealth Government.

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<sup>56</sup> PJCISReview 2006 at [2.48]

<sup>57</sup> 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.

<sup>58</sup> It should be noted that the on 22 November 2007, in the context of significant public debate regarding the handling of the Dr Mohamed Haneef case, the Australian Government directed a review be undertaken into the interoperability between the AFP and its national security partners. The Inquiry was to be 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. On 26 February 2008 the Review Panel delivered 10 recommendations it hoped would significantly improve the way joint agency counter-terrorism investigations were managed in the future. The recommendations covered four broad areas – operational decision making; joint taskforce arrangements; information sharing; and training and education. In a media release dated 16 October 2008, the Attorney-General said that ASIO, AFP and the Commonwealth Director of Public Prosecutions had made considerable progress in implementing the key recommendations of the Street Inquiry. In particular, they had implemented two key recommendations (1) putting in place new *Counterterrorism Prosecution Guidelines*, to improve consultation and communication in the investigation and prosecution of terrorist offences; and (2) agreeing on a new *Joint Operations Protocol between ASIO and AFP*, to provide for regular and accountable exchange of national security information and ongoing high-level consultations on operations.

<sup>59</sup> 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).

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In 2009 the United Nations Human Rights Committee (UNHRC) conducted a review and delivered its observations on Australia's human rights performance.<sup>60</sup> 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 *International Covenant on Civil and Political Rights (ICCPR)*. In particular, concerns were expressed regarding the application and enforcement of anti-terror legislation, for example the definition of a terrorist act contained in the *Criminal Code Act 1995*.<sup>61</sup>

The Law Council has noted similar concerns in its previous advocacy and is of the view that some of the issues raised by the Committee could be countered through the introduction of an independent reviewer of terrorism laws.

As noted above, one of the key recommendations made by Mr Clarke in his Report of the Inquiry into the Case of Dr Haneef (the Haneef Report) was that the Commonwealth Government consider appointing an independent reviewer of Commonwealth anti-terror laws.

In its response to this and other similar recommendations made by independent review bodies,<sup>62</sup> the Government said that it would establish the office of a National Security Legislation Monitor to undertake this review function.

In June 2009 the *National Security Legislation Bill 2009* was introduced into the Senate. It has since been referred to the Senate Committee on Legal and Constitutional Affairs for Inquiry. The Law Council has made written submission to the Inquiry wherein it evaluates the features of the proposed model to determine whether it offers the type of comprehensive, independent and regular review of the content and operation of anti-terrorism laws that is currently absent in Australia.<sup>63</sup> If enacted with the recommendations proposed by the Law Council in its submission, National Security Legislation Monitor Bill could provide the type of comprehensive, independent and regular review of Australia's anti-terrorism laws that is urgently needed.

## 2.6 Law Council Recommendation

A mechanism for ensuring regular, comprehensive, independent review of Australia's terrorism laws should be created. Such a mechanism could take the form of a panel of independent experts with a clear mandate to regularly report to Parliament on the operation, effectiveness, continued necessity and human rights implications of Australia's anti-terrorism laws.

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<sup>60</sup> 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 2609<sup>th</sup>, 2610<sup>th</sup> and 2611<sup>th</sup> 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.

<sup>61</sup> . 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].

<sup>62</sup> Commonwealth Attorney-General's Department, 'Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef – December 2008', 23 December 2008.

<sup>63</sup> Law Council of Australia, Submission to the Senate Finance and Public Administration Committee, *Inquiry into National Security Legislation Monitor Bill 2009*, (27 July 2009).

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## 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.<sup>64</sup> For example, in 1979 in the "Protected Security Review", 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.*<sup>65</sup>

On this basis, there was little apparent need to enact specific offences to target terrorists and their associates. For example, in 1993, an official report 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.*<sup>66</sup>

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.<sup>67</sup>

While, the Australian Government had quickly acknowledged that it already had in place a wide range of laws which address the core elements of terrorism and laws which deal in some detail with law enforcement agencies and law enforcement methods, the Government also acknowledged limitations in its preparedness to counter international terrorism.<sup>68</sup>

On 2 October 2001 the Australian 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';
- introduce new general offences based on the *Terrorist Act 1994 (UK)* covering 'violent attacks and threats of violent attacks intended to advance a political,

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<sup>64</sup> 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.

<sup>65</sup> Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. xv.

<sup>66</sup> Alan Thompson, 'Management of Australia's Counter-Terrorism Program', Australian Defence Studies Centre, Working Paper No. 28, Canberra, September 1994.

<sup>67</sup> 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'.

<sup>68</sup> 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.

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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'.<sup>69</sup>

On 28 October 2001 Prime Minister Mr 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'.<sup>70</sup> 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'.<sup>71</sup>

The *Security Legislation Amendment (Terrorism) Bill [No 2] 2002* (the *SLAT Bill*) was introduced on 13 March 2002<sup>72</sup> along with a package of counter-terrorism legislation.<sup>73</sup> 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 Commonwealth *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 armoury in the war against terrorism.<sup>74</sup> The need for the new laws was explained further by Government agencies.<sup>75</sup> For example, the Director-General of Security Mr Dennis Richardson said that legislation was 'necessary to deter, to punish and to seek to prevent' terrorist activity'.<sup>76</sup> 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.<sup>77</sup>

### 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)<sup>78</sup> and is a central element of the terrorist related offences contained in Part 5.3 of the *Criminal Code*.

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<sup>69</sup> The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.

<sup>70</sup> The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.

<sup>71</sup> The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.

<sup>72</sup> 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.

<sup>73</sup> The other Bills in the package were the *Suppression of the Financing of Terrorism Bill 2002* (the Terrorist Financing Bill), 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 enables interception warrants to be granted to investigate 'an offence constituted by conduct involving an act or acts or terrorism'.

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> 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.

<sup>77</sup> Attorney-General's Department *Submission 383A*, pp. 1-3.

<sup>78</sup> The current UK definition of 'terrorist act' is contained in section 1 of the *Terrorist Act 2000* (UK).

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Section 100.1 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:
  - 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.

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### 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,<sup>79</sup> as well as by members of the judiciary writing extra-judicially.<sup>80</sup>

The Law Council’s concerns with the definition have been made known through a number of submissions to Parliament and Government bodies<sup>81</sup> and can be summarised as follows:

1. The definition of ‘terrorist act’ goes beyond internationally accepted definitions of terrorism

As noted above, Australia is a party to 11 of the 12 UN terrorism related conventions, including UN Security Council Resolution 1566 which provides a summary of the internationally accepted understanding of the term ‘terrorist act’.<sup>82</sup> Resolution 1566 requires members States to cooperate fully in the fight against terrorism and prevent and punish acts that are committed:

- with the intention of causing death or serious bodily injury or the taking of hostages; and
- for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organisation to do or to abstain for doing any act (irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature).<sup>83</sup>

The Law Council is of the view that the breadth of the Australian definition in section 100.1 of the *Criminal Code* falls outside this internationally accepted definition of terrorist act. For example, the Australian definition encompasses acts that cause serious damage to property and acts that interfere with telecommunications or financial systems, and is not limited to those acts done with the intention of causing serious bodily injury or the taking of hostages. Further, as discussed below, the Australian definition includes *threats* of action, as well as completed acts.

The Australian definition’s departure from internationally accepted definitions of ‘terrorist act’ has been confirmed by the findings of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (‘UN Special Rapporteur’). When examining Australia’s legislative response to terrorism in 2006, the UN Special Rapporteur took the view that the definition of ‘terrorist act’ in

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<sup>79</sup> For e.g., 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’); PJCS Review 2006 [5.30]

<sup>80</sup> 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/terror.pdf>

<sup>81</sup> 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). See also the work of the Law Institute of Victoria on this issue, 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); Law Institute of Victoria Submission, *Security Legislation Review Committee’s Security Legislation Review* (18 January 2006).

<sup>82</sup> Report of UN Special Rapporteur 2006 at [7].

<sup>83</sup> UN Security Council Resolution 1566 ‘Threats to international peace and security caused by terrorist acts’ (adopted 8 October 2004), S/RES/1566 (2004) para 3.

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section 100.1 of the *Criminal Code* oversteps the Security Council's characterisation of the term.<sup>84</sup> It was observed that the acts defined in subsections 100.1(2), such as acts causing damage to property or to electronic systems, include actions not defined in the international conventions and protocols relating to terrorism.<sup>85</sup>

The Law Council is of the view that the Australian definition of 'terrorist act' should go no further than its international obligations in this area, particularly given the significance the definition has for the scope and application of terrorist-related offences and for the nature and scope of law enforcement and intelligence agencies powers - the limits of which are often informed by the meaning of this term.

## 2. The definition includes threats of action

A terrorist act means an action or threat of action that falls within subsection (2). Subsection (2) refers to action causing: (a) serious harm; (b) serious damage to property; (c) a person's death; (d) serious danger to a person's life; (e) serious risk to the health and safety of the public; and (f) serious interference with, serious disruption or destruction of an electronic system.

The Law Council is concerned that none of the subparagraphs (a) to (f) sit comfortably with a "threat" of action, such as a bomb threat by a terrorist organisation. This is because paragraph (1)(a) requires that the action fall within subsection (2), for example, that it 'causes serious harm that is physical harm to a person'. Subsection (2) speaks, like paragraph (a), of 'action', i.e. the bombing itself, falling within the subsection. However, if the action is not "done" even though the threat is made, subsection (2) could not apply.<sup>86</sup>

As well as unduly broadening the scope of the definition, the legal circularity 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.<sup>87</sup>

## 3. Impact of definition on the Australian community

The Law Council is also concerned that the broadly defined, 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.<sup>88</sup> In its 2007-2008 Annual Report to Parliament, ASIO described the continuing threat to Australia's national security posed by terrorism as continuing to come from 'violent jihadists who act on the belief that it is a religious and moral duty of every Muslim to attack

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<sup>84</sup> Report of UN Special Rapporteur 2006 at [15].

<sup>85</sup> Report of UN Special Rapporteur 2006 at [16].

<sup>86</sup> Sheller Review 2006 at [6.11]. 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'). The report is available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~SLRC+Report-+Version+for+15+June+2006\[1\].pdf/\\$file/SLRC+Report-+Version+for+15+June+2006\[1\].pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report-+Version+for+15+June+2006[1].pdf/$file/SLRC+Report-+Version+for+15+June+2006[1].pdf).

<sup>87</sup> This view was shared by the Sheller Committee, see Sheller Review 2006 at [6.12].

<sup>88</sup> PJCIS Review 2006 at [2.2].

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'Crusaders'.<sup>89</sup> This has put Arab and Muslim Australians under significant pressure and led to incidences of discrimination and prejudice.<sup>90</sup>

The PJCIS has noted that the ambiguity and uncertainty surrounding the definition of terrorism has generated confusion and contributed to this experience of fear and alienation.<sup>91</sup>

#### 4. Recent calls for reform of the definition of 'terrorist act'

There has been widespread debate by a number of independent bodies regarding reform of the broad and ambiguous definition of 'terrorist act' contained in the *Criminal Code*. For example, the Law Council's calls for amendments to the definition have been mirrored in the report issued by the 2008 PJCIS Review of Security and Counter-Terrorism Legislation and the Commonwealth Government response, and more recently by the UNHRC's in its Concluding Observations into Australia's human rights performance.

The PJCIS review commented on the definition of a terrorist act, recommending "...that 'threat' of terrorist act be removed from the definition of terrorism and be dealt with as a separate offence."<sup>92</sup> The report further commented that it was necessary to distinguish between threats of action relating to damage caused as a result of the terrorist threat as opposed to damage that is actually caused by a terrorist act. The recommendation made by the PJCIS review has been supported in principle by the Government who have stated that they will consult with the States and Territories on clarifying the definition of terrorist act.<sup>93</sup> The UNHRC has also raised its concerns with the definition, noting in its concluding observations 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".<sup>94</sup>

#### 3.2.2 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:

1. Review the definition 'terrorist act' in light of the findings of the UN Special Rapporteur to ensure the Australian definition is consistent with internationally accepted definitions of 'terrorist act'.
2. Remove the reference to 'threat of action' and other references to 'threat' from the definition of 'terrorist act' in section 100.1(1).

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<sup>89</sup> ASIO, Annual Report to Parliament 2007–08 p. 5, available at <http://www.asio.gov.au/Publications/Content/CurrentAnnualReport/pdf/ASIOAnnualReport0708.pdf>

<sup>90</sup> PJCIS Review 2006 at [3.29].

<sup>91</sup> PJCIS Review 2006 at [3.13].

<sup>92</sup> PJCIS Review 2006 Recommendation 10.

<sup>93</sup> Attorney-General's Department, *Australian Government response to PJCIS Review of Security and Counter-Terrorism Legislation – December 2008*, available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoPJCISReviewofSecurityandCounter-TerrorismLegislation-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISReviewofSecurityandCounter-TerrorismLegislation-December2008).

<sup>94</sup> 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, available at: <http://www.unhcr.org/refworld/docid/48c7b1062.html> para [11].

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## 3.3 Terrorist Offences

### 3.3.1 What measures were introduced?

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

In 2005 the *Anti-Terrorism Bill (No 1) Act* made a number of small but significant amendments to the offences 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.<sup>95</sup>

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);
- provide support or resources that would help a terrorist organisation engage in preparation for, planning, assisting or fostering of the doing of a terrorist act (102.7 – imprisonment for up to 25 years)
- 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. (102.8 – imprisonment for 3 years)
- finance terrorism (s103.1 – life imprisonment).

To date there have been four prosecutions under Part 5.3 of the *Criminal Code* that have proceeded through to conviction and sentence: two involving terrorist organisation

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<sup>95</sup> In a statement to the media, the 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).

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offences (one with multiple accused),<sup>96</sup> and two involving terrorist act offences in sections 101.4, 101.5 and 101.6 of the *Criminal Code*.<sup>97</sup>

### 3.3.2 Law Council Concerns

As with the definition of 'terrorist act' described above, these offences have received sustained 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.<sup>98</sup>

The Law Council's concerns in respect of the terrorist organisation offences and the financing terrorism offences will be discussed later in this Paper. The Law Council's concerns with respect to the offences in section 101.1 to 101.6 are described below.

#### 1. The preparatory and preventative character of terrorism offences challenges 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 terrorism and some arise before any criminal intent has crystallised into an attempt to carry out the act of violence.

Many of the offences relate to preliminary acts – such as 'possessing a thing' or 'preparing a document' - which may in themselves 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.<sup>99</sup> In addition, since the amendments in 2005, these preliminary acts can become an offence regardless of whether they are related to any specific terrorist act.<sup>100</sup> For example, under section 101.4 a person commits an offence if they:

- possesses 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.<sup>101</sup>

A person will also be guilty of a lesser offence if they were reckless as to the existence of that connection.<sup>102</sup>

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<sup>96</sup> *R v Benbrika & Ors* [2009] VSC 21; *R v Thomas*. These cases will be discussed later in this paper.

<sup>97</sup> *Zaky Mallah (R v Mallah)* [2005] NSWSC 317 and *Faheem Lodhi (R v Lodhi)* [2006] NSWSC 584). NB, proceedings are currently before the New South Wales Supreme Court against Hasan, K Cheiko, M Cheiko, Sharrouf, Mulahlivoci, Touma, Elomar, Baladjam and Jamal for offences under section 101.6 (*R v Baladjam & Ors* – pre-trial hearings commenced February 2008 in the Supreme Court of NSW, trial pending.)

<sup>98</sup> 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 United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document* (29 August 2008).

<sup>99</sup> 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.

<sup>100</sup> 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*.

<sup>101</sup> *Criminal Code Act 1914* (Cth) s101.4(1). Penalty for this offence is 15 years imprisonment.

<sup>102</sup> *Criminal Code Act 1914* (Cth) s101.4(2). Penalty for this offence is 10 years imprisonment.

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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.<sup>103</sup>

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

*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 ...*<sup>104</sup>

2. The broadly defined, preparatory character of terrorism offences gives rise to complexities as to the elements of the offence.

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, gives rise to considerable complexities surrounding of the terrorist act offences. This can be demonstrated in one of the few cases in which the offences received judicial attention, *Lodhi*.<sup>105</sup>

In 2006 Faheem Lodhi was the first (and at the time of writing only) person to be convicted of a terrorist act offence under the *Criminal Code*.<sup>106</sup> 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.

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<sup>103</sup> *Criminal Code Act 1914* (Cth) 101.4(3). NB, 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'.

<sup>104</sup> *Lodhi v The Queen* [2006] NSWCCA 121 at [66].

<sup>105</sup> [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006)

<sup>106</sup> 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.

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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 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 4<sup>107</sup> on the grounds that they were bad for duplicity.<sup>108</sup> 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.

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 with 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 s 3. Again this is an element that must be proved beyond reasonable doubt.<sup>109</sup>*

Whealy J further noted:

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<sup>107</sup> 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.

<sup>108</sup> *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. For summary of Mr Lodhi's duplicity argument see [9].

<sup>109</sup> *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [71]-[74].

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*In addition, it seems to me, it is not necessary that the terrorist act be capable of identification in terms of its ultimate target. ...*<sup>110</sup>

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.<sup>111</sup>

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

### 3. 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 a generally innocuous preliminary act will become criminal by virtue of its connection with the '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 the prosecutorial authorities are unlikely to lay charges of terrorism without evidence of the existence of the most serious of acts or the most dangerous and threatening of organisations. However, the Law Council is vigorously opposed to the conferral on prosecutorial authorities of such sweeping and arbitrary powers in the characterisation of offences and laying of charges. 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.<sup>112</sup> 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 Law Council Recommendations

In addition to the above recommendations in respect of the definition of terrorist act and the below recommendations in respect of financing terrorism and terrorist organisation offences, the Law Council recommends that the Australian Government:

1. 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 repealing those offences; and

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<sup>110</sup> R v *Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) at [83]-[84].

<sup>111</sup> See *R v Lodhi* (2006) 199 FLR 303 (Spigelman CJ with McClellan CJ at CL and Sully J agreeing) at [80], [90].

<sup>112</sup> This concern was shared by the PJCIS in its 2006 Review of the offence provisions at [2.34]-2.35].

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2. 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*.

### 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* 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*. The Division 400 provisions were added to the *Criminal Code* to reflect the serious nature of money laundering offences and to implement the recommendations made by the Australian Law Reform Commission in its report *Confiscation that Counts*.<sup>113</sup> The money laundering offences in Division 400 make it an offence for a person (whether an individual or corporate) 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* (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 Transaction Task Force (FATF) recommendations on terrorist financing.

The SFT Act amended the Extradition Act 1988, the Financial Transaction Reports Act 1988, the Mutual Assistance in Criminal Matters Act 1987, and the Charter of the United Nations Act 1945 and created a new offence in the *Criminal Code* of financing terrorism in section 103.1 of the *Criminal Code*.

In 2005 an additional financing terrorist offence was inserted into section 103.2 of the *Criminal Code*.<sup>114</sup> This offence is titled 'financing a terrorist' as opposed to 'financing terrorism'. The same year also saw the term 'the terrorist act' change to 'a terrorist act', removing the requirement that the prosecution prove that the person was engaged in financing a specific terrorist act.<sup>115</sup>

Under section 103 of the *Criminal Code* it is an offence to:<sup>116</sup>

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<sup>113</sup> 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/>

<sup>114</sup> *Anti-Terrorism Act (No 2) 2005* (Cth).

<sup>115</sup> *Anti-Terrorism Act (No 1) 2005* (Cth).

<sup>116</sup> 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

- 
- provide or collect funds being reckless as to whether the funds will be used to facilitate or engage a terrorist act (imprisonment for life) (section 103.1);<sup>117</sup>
  - 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).<sup>118</sup>

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.

To date no person has been committed for trial for an offence under section 103 of the *Criminal Code*.

In 2006 the *Anti-Money Laundering/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'<sup>119</sup> and 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.<sup>120</sup>

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).

The second stage of the reforms (to be introduced at a later date) will apply to real estate agents, jewellers and a range of non-financial transactions provided by accountants, lawyers 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*.<sup>121</sup>

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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.

<sup>117</sup> *Criminal Code Act 1995* (Cth)s 103.1.

<sup>118</sup> *Criminal Code Act 1995* (Cth)s 103.2.

<sup>119</sup> 'Designated services' is defined in *Anti-Money Laundering/Counter Terrorism Financing Act 2006* (Cth) s 6.

<sup>120</sup> See for example *Anti-Money Laundering/Counter Terrorism Financing Act 2006* (Cth) Parts 2-4.

<sup>121</sup> 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

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When the *SFT Act* was introduced into Parliament the Law Council raised a number of concerns with the new offence provisions.<sup>122</sup> 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 intention 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 Australian Government stated that section 103.1 implements article 2 of the *Convention for the Suppression of the Financing of Terrorism* and paragraph 1b of United Nations Security Council resolution 1373, and draws on the language used in those international instruments.<sup>123</sup>

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...'.<sup>124</sup>

Further, paragraph 1b 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.*<sup>124</sup>

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

The Law Council also expressed concern at the introduction of the financing a terrorist offence into section 103.2 of the *Criminal Code* in 2005.<sup>125</sup> 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.

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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).

<sup>122</sup> 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).

<sup>123</sup> 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](http://www.austlii.edu.au/au/legis/cth/bill_em/sotfotb2002453/memo1.html).

<sup>124</sup> UN Security Council Resolution 1373 (2001) 28 September 2001 at para 1(b).

<sup>125</sup> See Law Council of Australia Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into Anti-Terrorism (No 2) Bill 2005* (11 November 2005).

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The Law Council is concerned that this offence casts the net of criminal liability too wide and encroaches on everyday activities. It has the capacity to catch all financial transactions, including purchasing items, paying bills, banking transactions and charitable and other collections, many of which typically do not warrant or require an enquiry as to the purpose of the funds.

Under section 103.2, the failure to make an enquiry could constitute recklessness, especially where the recipient is later shown to have been engaged in terrorist activities. This may have the unintended consequence of discouraging charitable conduct, particularly by certain religious or ethnic organisations. For example, the offence places an unnecessary burden on innocent, well meaning people who propose to donate funds to a seemingly needy group or cause by requiring such donors to investigate how the recipients propose to use the funds.

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

- (a) section 103.1(a) be amended by inserting 'intentionally' after 'the person';
- (b) recklessness be replaced with knowledge in paragraph 103.1(b); and
- (c) paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.<sup>126</sup>

In its recent response to the recommendations contained in this report, the Commonwealth Government indicated that it did not support these recommendations.<sup>127</sup>

### 3.4.3 Law Council Recommendations

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

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

## **3.5 Terrorism Offences and Bail**

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

In 2004 the *Anti Terrorism Bill 2004* was introduced to provide 'important measures to improve Australia's counter-terrorism legal framework'.<sup>128</sup> This included amending the

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<sup>126</sup> Parliamentary Joint Committee on Intelligence and Security. Review of Security and Counter-Terrorism Legislation (Tabled 4 December 2006) Recommendation 21.

<sup>127</sup> 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/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoPJCISReviewofSecurityandCounter-TerrorismLegislation-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISReviewofSecurityandCounter-TerrorismLegislation-December2008).

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*Crimes Act 1914* to 'provide a national solution to bail issues for persons charged with terrorism offences, and certain other offences that are relevant to terrorist activity'.<sup>129</sup>

In 2004 the *Anti-Terrorism Act 2004* was passed, introducing s15AA into the *Crimes Act 1914* (Cth).

Section 15AA of the *Crimes Act* provides that if a person is charged with a terrorist offence,<sup>130</sup> or a Commonwealth offence resulting in the death a person,<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup>

### 3.5.1 Law Council Concerns

#### 1. No justification for displacement of presumption in favour of bail

The key Law Council concern with the introduction of section 15AA is that the Australian Government failed to demonstrate why the reversal of the long held presumption in favour of bail was necessary to aid in the investigation or prosecution of terrorist related offences.

No evidence has been 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 appears to assume that that the restriction of liberty will be necessary when a person is charged with a terrorist-related offence.

This unfounded assumption was reinforced by the comments of the former Attorney-General following the operation of section 15AA in the Haneef case.<sup>134</sup> The Haneef case, which will be discussed in further detail later in this Paper, involved an Indian born doctor,

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<sup>128</sup> Australian Government, Australian National Security Website, accessed 10 November 2008, available at <http://www.ag.gov.au/agd/www/nationalsecurity.nsf/>.

<sup>129</sup> Australian Government, Australian National Security Website, *ibid*.

<sup>130</sup> In this section 'terrorism offence' means a *terrorism offence (other than an offence against section 102.8 of the Criminal Code)*.

<sup>131</sup> A relevant Commonwealth offence causing the death of a person is described in subsection 15AA(2)(b)-(d).

<sup>132</sup> 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).

<sup>133</sup> 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). 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.

<sup>134</sup> 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.

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Mohamed Haneef, who was working in Australia on a temporary work visa when he was arrested and detained on suspicion for 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 former Attorney-General suggested that there may be a need to tighten bail laws further.<sup>135</sup>

The former 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. .

## 2. Requirement to prove 'exceptional circumstances' undermine s fair trial rights of 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.<sup>136</sup>

The issue of whether lengthy delay between arrest and trial can amount to exceptional circumstance has attracted particular judicial consideration. For example, in *R v Vinayagamoorthy & Yathavan*<sup>137</sup> 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, can amount 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 some at least 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 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..<sup>138</sup>*

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<sup>135</sup> ABC Television 'Ruddock hints at tougher anti-terrorism laws' on *Lateline*, accessed at: <http://www.abc.net.au/lateline/content/2007/s1982170.htm>

<sup>136</sup> This right is protected by article 14(3)(c) of the *International Covenant of Civil and Political Rights* ('ICCPR').

<sup>137</sup> 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) 212 FLR 326 at [19]-[20].

<sup>138</sup> *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* (2007) 212 FLR 326 at [19]-[20].

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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.<sup>139</sup>

However, in the case of *Ezzit Raad*, Bougiorno 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.*<sup>140</sup>

This was the case despite the evidence before the court that the accused (and his co-accused) were being held in particularly harsh conditions of detention. 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.*<sup>141</sup>

A similar result followed an application for bail by co-accused Shoue Hammoud<sup>142</sup> and Amer Haddara.<sup>143</sup>

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 have been shared by the UNHRC in its recent 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 in full conformity with the ICCPR and ensure that the notion of 'exceptional circumstances' does not create an automatic obstacle to release on bail.<sup>144</sup>

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<sup>139</sup> *Application for Bail by Shane Kent* [2008] VSC 431 at [13]

<sup>140</sup> *Application for Bail by Ezzit Raad* [2007] VSC 330 at [6]. Mr Raad was one of 12 accused tried by jury in the Benbrika trials, described earlier in this Paper.

<sup>141</sup> *Application for bail by Ezzit Raad* [2007] VSC 330 at [6].

<sup>142</sup> *Hammoud v DPP* [2006] VSC 516

<sup>143</sup> *Application for Bail by Amer Haddara* [2006] VSC 8.

<sup>144</sup> 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].

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### 3.5.2 Law Council Recommendation

The Law Council recommends that section 15AA of the *Crimes Act* be repealed.

## **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.<sup>145</sup> Traditional sedition crimes were enshrined in Australian laws before federation and inserted into the *Crimes Act 1914 (Cth)* in 1920.<sup>146</sup> For example, the *Crimes Act 1914 (Cth)* criminalised seditious behaviour that intended to: (i) bring the government into hatred or contempt; (ii) excite disaffection against the government, constitution, UK parliament and Kings Dominions; and (iii) bring about change to those institutions unlawfully.<sup>147</sup>

In recent times, many have argued that sedition offences are 'archaic' and 'defunct', and unnecessary in a modern political democracy.<sup>148</sup> 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.<sup>149</sup>

Following a Special Meeting of COAG convened on 27 September 2005 by the Prime Minister, to discuss the risks of a terrorist attack occurring in Australia, the federal, state and territory leaders agreed in principle to cooperate in matters of counter-terrorism and to introduce a common package of legislative measures.<sup>150</sup> State and territory leaders agreed with the Commonwealth that the *Criminal Code (Cth)* 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 the Australian Parliament on 3 November 2005. Among other significant reforms,<sup>151</sup>

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<sup>145</sup> For example see Collins Dictionary, 3<sup>rd</sup> edition (Harper Collins) p. 871.

<sup>146</sup> *War Precautions Act 1914 (Cth)*.

<sup>147</sup> *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)*.

<sup>148</sup> 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].

<sup>149</sup> ALRC Sedition Report at [1.9].

<sup>150</sup> 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.coag.gov.au/meetings/270905/>> at 12 January 2006. 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.

<sup>151</sup> 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).

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Schedule 7 of the Bill included the modernisation of the old sedition offences, as recommended by the Gibbs Committee a decade earlier, 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 will address problems with those who incite directly against other groups within our community’.<sup>152</sup> The Attorney also said that the sedition amendments were modernising the language of the provisions and are not a wholesale revision of the sedition offence’.<sup>153</sup>

On 3 November 2005, the Senate referred the provisions of the *Anti-Terrorism Bill (No 2) 2005* 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.<sup>154</sup>

In relation the proposed sedition laws, the Committee recommended that Schedule 7 (containing the new offences) be removed from the Bill in its entirety.<sup>155</sup>

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 Attorney-General confirmed his earlier undertakings that the offence provisions would be subject to a review.<sup>156</sup>

In November 2005, the Australian Government rushed the *Anti-Terrorism Bill 2005* through federal Parliament. When the Bill was enacted, new offences were introduced into Division 80 of Commonwealth *Criminal Code*.

Almost three months later, the sedition provisions were referred to the ALRC for review.<sup>157</sup> 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) are inappropriately broad’ and recommended that they be repealed.<sup>158</sup> Despite these recommendations, the offences in Division 80 remain in force.

### 3.6.2 The Sedition Offences in Division 80

Pursuant to Division 80 of Commonwealth *Criminal Code* it is an offence to *urge*:

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<sup>152</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, (Attorney-General), at p.103.

<sup>153</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, at p. 103.

<sup>154</sup> 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 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.

<sup>155</sup> Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005 (2005)*, Recommendation No 25.

<sup>156</sup> 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.

<sup>157</sup> ALRC Sedition Report.

<sup>158</sup> ALRC Sedition Report at [3.29].

- 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 Australian Government;
- 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;
- a group or groups to use force or violence against another group or other groups and the use of the force or violence which would threaten the peace, order and good government of the Commonwealth;
- another person to assist the enemy of Australia; or
- another person to assist those in armed hostilities.

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 sedition. 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.<sup>159</sup>

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* generated considerable community debate, much of which was 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.<sup>160</sup> The Law Council's key concerns with the offences in Division 80, and recommendations for reform are summarised as follows:

#### 1. The offences in Division 80 are unnecessary.

The Law Council is of the view that the sedition offences in Division 80 of the *Criminal Code* are unnecessary.

The stated aims of the legislation introducing the sedition offences, namely to protect the Australian community from new and emerging threats of terrorism,<sup>161</sup> are already adequately addressed by those sections of the *Criminal Code* that deal with ancillary offences such as inciting, conspiring, aiding, abetting, counselling or procuring the commission of an offence.<sup>162</sup> For example, under subsection 11.4(1) of the *Criminal Code*

<sup>159</sup> *Criminal Code Act 1995 (Cth)* s 80.3

<sup>160</sup> 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).

<sup>161</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (P Ruddock—Attorney-General), 102-103.

<sup>162</sup> *Criminal Code Act 1995 (Cth)* Part 2.4 -- Extensions of criminal responsibility.

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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.

Indeed, to date there have been no prosecutions of the new sedition offences in Division 80 of the *Criminal Code*.

The unnecessary nature of the new offences was recognised by the Senate Committee when it inquired into the Bill. Like the Law Council, the Committee recommended that the sedition provisions be removed from the Bill in their entirety.<sup>163</sup>

## 2. The offences lack clarity and precision and are indeterminate in scope

The Law Council is further concerned that the sedition offences lack the clarity and precision necessarily to enable citizens to foresee the consequences of their conduct on the basis of the law.

For example, each of the new offences is made out if the accused person *urges* another person to do the prescribed act. The concept of ‘urging’ another person is undefined and the nexus required between the speaker and the actor is unclear. It is unclear, for example, whether the work of broadcasters, publishers, journalists and media commentators could be categorised as ‘urging’ another to do a proscribed act. It is also unclear whether ‘urging another’ could potentially be construed to include the activities of peace activists and protestors demonstrating, for example, against Australia’s involvement in armed hostilities overseas.

The use of the word *assists* in the sedition offences also gives rise to an unacceptable degree of ambiguity regarding the element of intention required to prove the criminal offences contained in sections 80(7) and (8). The Law Council is concerned that the word ‘assists’ in the context of the sedition offences may be broad enough to encompass non-violent criticism of the Australian Government. This would appear to be contrary to the right to freedom of expression protected by article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) and may have the effect of chilling legitimate political dissent.<sup>164</sup>

## 3. The offences have a corrosive impact on free speech and expression in Australia

The broad scope of the prohibition imposed by the new sedition offences threatens free and uninhibited reporting of news by media outlets. The mere existence of the new sedition offences has the effect of making people cautious about publishing material that may potentially be regarded as seditious, 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.<sup>165</sup>

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 sedition falls within the limited ‘good faith’ exception after the fact, does not dilute the

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<sup>163</sup> Report of the Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005* Recommendation 27.

<sup>164</sup> This concern was one of the factors underlying the ALRC’s recommendations to repeal section 80.2(7)–(8), and to modify the equivalent provisions in section 80.1(1)(e)–(f) to provide that, for a person to be guilty of any of the offences the person must intend that the urged force or violence will occur. See Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* Report No 104, (July 2006) at 5.55.

<sup>165</sup> 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].

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fear of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the sedition offences.

#### 4. Recent steps towards reform

Although the offences in Division 80 currently remain in force, in December 2008 the Commonwealth Government made a commitment to 'consider the provisions with a view to repealing outdated offences or modernising necessary offences for inclusion in the *Criminal Code*.' This commitment was made in response to the Clarke Inquiry into the Haneef Case and the ALRC's Review of Sedition Laws in Australia.

In its response to these reports, the Commonwealth Government has indicated that it supports the recommendations made by the ALRC to:<sup>166</sup>

- remove the term 'sedition' from federal criminal law;
- initiate a process to remove 'sedition' from the laws of the States and Territories;
- repeal the unlawful association offences in Part IIA of the *Crimes Act*;
- amend section 80.2 of the *Criminal Code* to provide that, for a person to be guilty of any offence under section 80.2 the person must intend that the urged force or violence will occur;
- insert 'intentionally' into section 80.2(1) of the *Criminal Code* before the word 'urges' to clarify the fault element applicable to urging the use of force or violence;
- insert 'intentionally' into section 80.2(3) before the word 'urges' to clarify the fault element applicable to the use of force or violence;
- repeal sections 80.2(7),(8) and (9), concerning the offences of urging a person to assist the enemy and urging a person to assist those engaged in armed hostilities against the Australian Defence Force;
- amend section 80.3 of the *Criminal Code* concerning the defence of 'good faith' so that it does not apply to the offences in section 80.2; and
- amend section 80.2 to provide that in determining whether a person intends that the urged force or violence will occur for the purposes of section 80.2(7), the trier of fact must have regard to the context in which the conduct occurred.

The Commonwealth Government has promised to release a Discussion Paper or Amending Bill containing reforms to the sedition and treason offences in Division 80 of the *Criminal Code*. If implemented, the recommendations the Commonwealth Government supports would go some way to addressing the Law Council's most serious concerns with the sedition offences in Division 80 of the Code.

#### 3.6.4 Law Council Recommendations

In respect of Division 80 of the *Criminal Code*, the Law Council recommends that the Government:

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<sup>166</sup> Australian Government response to ALRC Review of sedition laws in Australia - December 2008, available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoALRCReviewofseditionlawsinAustralia-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoALRCReviewofseditionlawsinAustralia-December2008).

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1. Repeal the sedition offences in Division 80.

If the above recommendation is not accepted, that the Government:

2. Amend section 80.2 to expressly require that to be guilty of an offence, the person must have intended that the 'urged' force or violence would occur.
3. Amend section 80.2 to require knowledge to be proven in relation to the physical elements of the offences in section 80.2.
4. Provide an exemption to the offences in section 80.2 for statements made for journalistic, educational, artistic, scientific, religious or public interest purposes.
5. Subject the sedition offences in Division 80 to regular, independent review for example review by an appointed panel of independent experts with a clear mandate to review the content and operation of all Australia's anti-terrorism laws, and report regularly to Parliament.<sup>167</sup>

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<sup>167</sup> For more details on this model of independent review, 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).

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## 4. Terrorist Organisations

### 4.1 What measures were introduced and why?

Before Division 102 was introduced into the *Criminal Code*, the *Commonwealth Crimes Act* already contained provisions allowing for the outlawing of specific groups of individuals. Under subsection 30A(1) of the *Crimes Act*, the following groups are declared to be *unlawful associations*:

- (a) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages:
  1. the overthrow of the Constitution of the Commonwealth by revolution or sabotage; or
  2. the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilised country or of organised government; or
  3. the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States; oror which is, or purports to be, affiliated with any organisation which advocates or encourages any of the doctrines or practices specified above; or
- (b) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention.

Where an organisation is declared to be an unlawful association,<sup>168</sup> a number of criminal offences apply, including:<sup>169</sup>

- failure to provide information relating to an unlawful association upon the request of the Attorney-General (s30AB);
- being an officer, member or representative of an unlawful association (s30B);
- giving contributions of money or goods to, or soliciting donations for, an unlawful association (s30D);
- printing, publishing or sending material by an unlawful association (ss30E-FA); or
- allowing meetings of an unlawful association to be held on property owned or controlled by a person (s30FC).

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<sup>168</sup> Without limiting the effect of subsection 30A(1), subsection 30A(2) provides that any body of persons, incorporated or unincorporated, which is, in pursuance of section 30AA, declared by the Federal Court to be an unlawful association, shall be deemed to be an unlawful association for the purposes of this Act. Under section 30AA the Attorney-General may apply to the Federal Court for an order calling upon any body of persons, incorporated or unincorporated, to show cause why it should not be declared an unlawful association. The application must be based on the grounds that the body of persons is one which falls within the categories of section 30A(1). If no cause is shown, subsection 30AA(7) authorises the Federal Court to make an order declaring that the association is an "unlawful association".

<sup>169</sup> See *Crimes Act 1995* (Cth) ss 30B-30FCC, maximum penalties range from imprisonment for six months to imprisonment for one year.

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These unlawful association provisions have been reviewed and criticised on the basis that they are no longer a relevant or necessary part of federal criminal law.<sup>170</sup> This assertion is supported by the fact that only one person has ever been convicted in Australia of an offence under the unlawful association provisions of the *Crimes Act* – and that conviction was overturned on appeal.<sup>171</sup>

However, this emerging consensus was disrupted by the terrorist attacks in the US in September 2001, and growing international pressure on all Nation States to take action to combat terrorism, including taking action to combat terrorist organisations.<sup>172</sup>

On 18 December 2001, the Attorney-General announced that, following an interagency review established in September 2001, Cabinet had agreed that new counter-terrorism legislation and enhanced Commonwealth powers were needed to combat terrorism.<sup>173</sup> As part of that new legislation, specific terrorism offences would be created, as would be a procedure for outlawing terrorist organisations.

The *SLAT Bill 2002* 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)<sup>174</sup> despite the existence of laws outlawing specific associations in Part IIA of the *Crimes Act*.<sup>175</sup>

Like the other provisions introduced by the *SLAT Act*, the proscription of terrorist organisation provisions attracted considerable debate and aroused 'vehement opposition'.<sup>176</sup> When it reviewed the relevant provisions of the *SLAT Bill* the Senate Committee on Legal and Constitutional Affairs recommended that the proscription provisions in proposed Division 102 should not be enacted.<sup>177</sup>

This recommendation was not adopted and in 2002 the Bill was enacted, introducing a new Division 102 into the Commonwealth *Criminal Code* which included a definition of 'terrorist organisation', a system for proscribing organisations as terrorist organisation 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.<sup>178</sup> For example, since 2003 a regulation

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<sup>170</sup> Gibbs, R Watson and A Menzies in their *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) [38.2]-[38.9]. In 2006, the Australian Law Reform Commission also concluded that the unlawful association provisions in the *Crimes Act* were no longer necessary and ought to be repealed; See ALRC report, *Fighting Words: A Review of Seditious Laws in Australia* (ALRC 104, 2006).

<sup>171</sup> *R v Hush; Ex parte Devanny* (1992) 48 CLR 487.

<sup>172</sup> 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).

<sup>173</sup> Attorney-General "Upgrading Australia's Counter-Terrorism Capabilities" News Release, 18 December 2001.

<sup>174</sup> Report of Senate Legal and Constitutional Legislation Committee, *Inquiry into Security Legislation Amendment Bill 2002*, (May 2002) p. 26 ('Senate Committee Report'); Attorney-General's Department Submission 383A, pp. 1-3.

<sup>175</sup> 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.

<sup>176</sup> Senate Committee Report at pp.59-60.

<sup>177</sup> Senate Committee Report at pp.59-60.

<sup>178</sup> 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].

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proscribing an organisation comes into effect on the date it is lodged, rather than the day after the disallowance period, usually 15 days.<sup>179</sup>

Further reforms were adopted in 2004 by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) which:

- introduced a system whereby the Parliamentary Joint Committee on ASIO, ASIS and DSD (later renamed as the PJCIS) may 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.<sup>180</sup> 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 ceases to be satisfied that the entity meets the statutory definition.

In 2005 the *Anti Terrorism Act (No.2) 2005* extended the power to proscribe an entity to include organisations that 'advocate the doing of a terrorist act'.

The 2005 Act also introduced a new offence into Division 102.8 making it illegal to associate with a terrorist organisation. At the time section 102.8 was introduced into the *Criminal Code*, the 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.*<sup>181</sup>

In September 2007 Division 102 was reviewed by the PJCIS who made a number of recommendations for reform. To date none of these recommendations have resulted in legislative change, however, recently the Commonwealth Government has released a response to the PJCIS's 2007 review of Division 102 and has indicated its support for a number of the PJCIS's recommendations for reform.<sup>182</sup>

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<sup>179</sup> See *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

<sup>180</sup> 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.

<sup>181</sup> See Explanatory Memorandum to the *Anti-Terrorism Bill (No 2) 2004*.

<sup>182</sup> See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptio nofterroristorganisationsundertheAustralianCriminalCode-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptio nofterroristorganisationsundertheAustralianCriminalCode-December2008) (accessed 3 August 2009).

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## 4.2 Proscribing Terrorist Organisations

Terrorist organisations are defined and regulated under Division 102 of the *Criminal Code*.<sup>183</sup>

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:

- (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 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 17 organisations officially listed as 'terrorist organisations'.<sup>184</sup>

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<sup>183</sup> 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).

<sup>184</sup> The organisations currently proscribed as terrorist organisations are: Abu Sayyaf Group (ASG); Al Qa'ida; Al-Qa-ida in Iraq (formerly listed as Al-Zarqawi); Ansar al-Islam, Asbat al-Ansar;; Hamas's Izz al-Din al-Qassam Brigades; Hizballah External Security Organisation; Islamic Army of Aden; Islamic Movement of Uzbekistan; Jaish-e-Mohammed; Jamiat ul-Ansar; Jemaah Islamiyah; Kurdistan Workers Party (PKK); Lashkar-e Jhangvi; Lashkar-e-Tayyiba; Palestinian Islamic Jihad; Al-Qa'ida in the Lands of the Islamic Maghreb (AQIM). 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,

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The listing of an organisation ceases to have effect two years after listing, or if the Minister ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whichever occurs first.<sup>185</sup>

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 or fostering the doing of a terrorist act.'<sup>186</sup>
- If de-listing is denied by the Minister, the entity has the opportunity, under the *Administrative Decisions (Judicial Review) Act 1977*, to have this decision reviewed. (It should be noted however that this review involves testing the legality of the decision rather than its merits.)<sup>187</sup>
- 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.<sup>188</sup>

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.

Although the PJCIS has never recommended that Parliament disallow a regulation proscribing an organisation as a terrorist organisation,<sup>189</sup> or relisting an organisation as a terrorist organisation, it has questioned the process undertaken by the key agencies involved in the proscription process.

#### 4.2.2 Law Council Concerns

When the laws were first introduced, the Law Council queried whether such provisions were necessary to meet the objectives espoused by the Australian Government, namely to protect the community from organised terrorist activities.<sup>190</sup> The Law Council submitted and continues to assert that such activities are already criminalised by existing offences

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see the Australian Government's National Security website at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>.

<sup>185</sup> *Criminal Code Act 1995* ss102.1(3), 102.1(4).

<sup>186</sup> *Criminal Code Act 1995* s102.1(4).

<sup>187</sup> 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.

<sup>188</sup> 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.

<sup>189</sup> The most critical review conducted by the Committee 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).

<sup>190</sup> 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).

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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 are 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 forums<sup>191</sup> and are summarised below.

1. Broad executive discretion to proscribe terrorist organisations

Pursuant to 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 19 organisations have been listed to date.<sup>192</sup> 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.

The Law Council believes that conferring a broad executive discretion to ban a particular organisation is not acceptable in circumstances where the consequences of outlawing the group are to limit freedom of association and expression and to expose people to serious criminal sanctions.

2. Absence of clear criteria for listing an organisation as a terrorist organisation

The absence of publicly available, clear 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.

Since the proscription regime has come into operation, the Law Council has identified the absence of such criteria as inhibiting the review process conducted by the PJCIS and contributing to the lack of public confidence in the regime as a whole.<sup>193</sup>

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 that criteria when listing (or re-listing) organisations in the future.<sup>194</sup>

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<sup>191</sup> 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 Attorney-General, House of Representatives, *Criminal Code Amendment (Terrorist Organisation) Bill* (3 March 2004).

<sup>192</sup> 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>.

<sup>193</sup> 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) at [1.20].

<sup>194</sup> 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].

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In particular, the Committee has expressed concern that some link between the organisation and Australia be demonstrated before the organisation is listed.<sup>195</sup> It has expressed the firm view that 'without a specific Australian link, the new proscription power would appear to be either unnecessary or, at best, poorly focused'.<sup>196</sup>

During its 2005 review of the listing of four terrorist organisations<sup>197</sup> the Committee 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:<sup>198</sup>

- 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 Committee 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.<sup>199</sup>

However, when reviewing the listing of the Kurdistan Workers' Party (PKK) the Committee 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'.<sup>200</sup>

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.<sup>201</sup> The result is that while both the 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 transparent 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.

The lack of clear, publicly available criteria has also contributed to the fear and alienation felt by certain groups within the Australian community, particularly Arab and Muslim Australians, who are unable to obtain a clear sense of what attributes, beyond religious and ideological commonality, render an organisation susceptible to being proscribed as a

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<sup>195</sup> See for example PJCAAD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, (16 June 2004).

<sup>196</sup> PJCAAD, *Review of the listing of six terrorist organisations*, (5 September 2005) at [2.36].

<sup>197</sup> PJCAAD *Review of the listing of six terrorist organisations* (5 September 2005)

<sup>198</sup> PJCAAD *Review of the listing of six terrorist organisations* (5 September 2005) [3.2].

<sup>199</sup> PJCAAD *Review of the listing of six terrorist organisations* (5 September 2005, Recommendation 2.

<sup>200</sup> PJCIS, *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006) [2.3].

<sup>201</sup> Minority Report of PJCIS, *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006) at p. 36.

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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<sup>202</sup>*

The Law Council notes that in its December 2008 response to the recommendations made by the PJCIS, the Commonwealth Government has indicated that it supports the recommendation that ASIO and 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’.<sup>203</sup> This unclassified protocol would include the six non-statutory factors ASIO uses as a guide to inform them when assessing whether an organisation meets the legislative requirements for listing as a terrorist organisation under the *Criminal Code*.

### 3. Attribution of characteristics to a group

The lack of precision arising from the absence of clear criteria is exacerbated by the manner in which the proscription process seeks to attribute particularly criminal characteristics to a group of individuals.

In the absence of a constitution, corporate plan or some other statement of an organisation’s goals and mandate, the attribution of defining characteristics to a group or organisation of people inevitably requires assumptions to be made, based on the statements or activities of certain individuals within the group, about the existence of a commonly shared motive or purpose.

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.<sup>204</sup>

Section 102.1(1A) of the *Criminal Code* defines what advocacy means in this context,<sup>205</sup> but does not specify when the ‘advocacy’ of an individual member of a group will be attributable to the organisation as a whole.

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<sup>202</sup> Submission to the Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) by The Australian Muslim Civil Rights Advocacy Network (AMCRAN).

<sup>203</sup> See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptio nofterroristorganisationsundertheAustralianCriminalCode-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptio nofterroristorganisationsundertheAustralianCriminalCode-December2008) (accessed 3 August 2009).

<sup>204</sup> *Criminal Code Act 1995* (Cth), s 102.1(2).

<sup>205</sup> 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.*

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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.<sup>206</sup>

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 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.<sup>207</sup>

Similarly problematic terms in the section dealing with proscription include ‘indirectly fostering’ the doing of a terrorist act by an organisation. ‘Fostering’ is defined as ‘promoting the development of’. Indirectly fostering the development of a terrorist act becomes even more uncertain if the terrorist act is a ‘threat of action’. This definition lacks legal certainty and introduces unclear terminology that may encompass a very wide spectrum of acts or representations.<sup>208</sup>

#### 4. 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 has been 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, and has undertaken efforts to ensure the community is aware of the proposed listing before it takes place. For example, in its review of the listing of the al-Zarqawi network in 2005 the Committee suggested that it would be most beneficial if community consultation occurred prior to the listing.<sup>209</sup>

The Law Council notes that in December 2008 the Commonwealth 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 has expired.<sup>210</sup>

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<sup>206</sup> Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.10].

<sup>207</sup> The Law Council’s concerns were shared by the Security Legislative Review Committee who observed that:

*[Proscription on the basis of ‘advocacy’] could lead to a proscription of an organisation which was in no way involved in terrorism because a person identified as connected with the organisation praises a terrorist act, although that person had no intention to provoke a terrorist act. The consequences could be a heavy penalty imposed on a member innocent of any connection with terrorism.*

See Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.6].

<sup>208</sup> 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.

<sup>209</sup> 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

<sup>210</sup> PJCIS 2007 Report Recommendation 4.

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In its response, the 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).<sup>211</sup>*

## 5. Inadequacies of Existing Review Processes

The Law Council recognises that there are avenues for review *after* an organisation has been listed, however it considers this form of post facto review to provide inadequate protection for the rights of persons who might be affected by the proscription process. For example:

- Review by the Parliamentary Joint Committee on Intelligence and Security (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.<sup>212</sup>

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,<sup>213</sup> 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 come into effect.

Further, while 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 Executive to commit to a fixed set of criteria for selecting organisations for listing or to address its reasons for listing according to those criteria.<sup>214</sup>

- Moreover, the reality of party politics in Australia dictates that there is often insufficient distinction between the Executive and the Parliament to suggest the latter can be relied upon to provide independent supervision of the former. Consultation with States and Territories

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<sup>211</sup> See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptioofterroristorganisationsundertheAustralianCriminalCode-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptioofterroristorganisationsundertheAustralianCriminalCode-December2008) (accessed 3 August 2009).

<sup>212</sup> 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).

<sup>213</sup> Because such material will not be available to Parliament generally.

<sup>214</sup> For example the PJCIS has indicated that it requires pre-identified criteria to use as a basis for testing a listing and it has adopted for that purpose the criteria provided by ASIO. However, as was revealed in the review of the listing of the Kurdistan Workers Party (PKK), the Executive regards the ASIO criteria only as a rough, non-binding guide. Therefore it is difficult for the PJCIS to employ a consistent and rigorous framework for 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*', Tabled 16 June 2004.

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Mandatory consultation on a proposed new listing with State and Territory leaders, pursuant to the Inter-Governmental Agreement on Counter-Terrorism laws,<sup>215</sup> has provided only doubtful additional accountability. It is difficult to accept that consultation of this type acts as a genuine safeguard. Further, there is no basis for the assumption that representatives of the Executive 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.

- 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.

#### 4.2.3 Law Council Recommendations

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

1. Repeal the current procedure for proscribing organisations as terrorist organisations by regulation pursuant to section 102.1(1). (Given the recommendations below with respect to terrorist organisation offences, the court's role in finding an organisation to be a terrorist organisation currently contained in section 102(1) would no longer be necessary).
2. If the above recommendation is not adopted, a fairer and more transparent process should be devised for proscribing an organisation as a terrorist organisation. Such a process should have the following features:
  - (a) 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;
  - (b) clear and publicly stated criteria for proscription;
  - (c) detailed procedures for revocation, including giving the right of a proscribed organisation to apply for review of that decision;
  - (d) 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.

### **4.3 Terrorist Organisation Offences**

#### 4.3.1 What measures were introduced?

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

Division 102 of the *Criminal Code*, which was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* and later amended in 2003<sup>216</sup> and 2004,<sup>217</sup> contains a number of what are generally described as 'terrorist organisation offences'.

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<sup>215</sup> Inter-Governmental Agreement on Counter-Terrorism laws was signed by the Prime Minister, Premiers and Chief Ministers on 24 October 2002. The text of the agreement is available at [http://www.coag.gov.au/meetings/250604/iga\\_counter\\_terrorism.pdf](http://www.coag.gov.au/meetings/250604/iga_counter_terrorism.pdf).

<sup>216</sup> See *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

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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 (102.2)
- be a member of a terrorist organisation (102.3)
- recruit a person to join or participate in the activities of a terrorist organisation (102.4)
- receive or provide training to a terrorist organisation (102.5)
- receive funds from or make funds available to a terrorist organisation (102.6)
- provide support or resources that would help a terrorist organisation engage in, plan, assist or foster the doing of a terrorist act (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. (102.8)

Over 15 people have been charged with terrorist organisation offences in Division 102 of the *Criminal Code*, but to date only seven have been ultimately convicted.<sup>218</sup>

#### 4.3.2 Law Council Concerns

At the time the offence provisions in Division 102 were introduced into the *Criminal Code*, and each time they have been subsequently expanded and refined by amendment, they have attracted considerable criticism, including from the Law Council.<sup>219</sup>

The Law Council is concerned that by shifting the focus of criminal liability from a person's conduct to their associations, the terrorist organisation offences unduly burden freedom of association and are likely to 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, can feed ignorance and prejudice within the Australian community and has generated confusion, fear and alienation, particularly among Arabic and Islamic Australians.<sup>220</sup>

The problems inherent in the terrorist organisation offences are exacerbated by the manner in which terrorist organisations are proscribed as noted above.

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<sup>217</sup> See *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

<sup>218</sup> Seven accused were convicted of terrorist organisation charges in *Benbrika & Ors* (see above note 41); Jack Thomas was found guilty of receiving funds from a terrorist organisation, however the verdict was later overturned on appeal and a re-trial ordered. On retrial, Mr Thomas was acquitted of this charge (see above note 42); 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 1976 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 1976.

<sup>219</sup> See Law Council's Submission to the PJCIS, *Inquiry into the Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (16 April 2002).

<sup>220</sup> 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.

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The Law Council is particularly concerned by three of the organisation offences: membership of a terrorist organization; association with a terrorist organisation; and funding a terrorist organisation.

1. 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.

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.

First, 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 a result, the potential class of persons that fall within the definition of “membership” is indeterminately wide.

The scope of persons falling within the ‘membership’ category is further extended by the broad definition of membership in the *Criminal Code*, 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 absenting oneself from the group’s activities – without announcement or fanfare of any sort. The Law Council is of the view that the difficulty the defendant might have in proving this is inconsistent with the presumption of innocence and might result in the conviction of an innocent person and the incarceration of that person unjustly. This view

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was also expressed by the Security Legislation Review Committee when it reviewed the terrorist organisation offences in 2006.<sup>221</sup>

## 2. 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 support to the organisation and is intended to help the organisation expand or continue to exist.<sup>222</sup> 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 is of the view that it was unnecessary 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 efficacy of the association offences in deterring the conception or continued existence of terrorist organisations.<sup>223</sup>

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.<sup>224</sup>

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

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<sup>221</sup> Security Legislation Review Committee, Report of the Security Legislation Review Committee, (2006), at [10.20].

<sup>222</sup> *Criminal Code (Cth)* s102.8(2).

<sup>223</sup> See Explanatory Memorandum to the *Anti-Terrorism Bill (No 2) 2004*.

<sup>224</sup> This view was shared by the Security Legislative Review Committee, see Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at para [10.75].

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manner which breaches the implied freedom and that the actual ambit of the offence can only be determined by challenging its constitutionality.

### 3. 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.

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 professional 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 Security Legislation Review Committee, considers these provisions, and in particular the exception in subsection 102.6, to be unreasonably restrictive.<sup>225</sup>

### 4. Association based offences give rise to extensive executive intrusion

In the context of the terrorist organisation offences, the Federal 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.

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<sup>225</sup> Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 120.

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However, the danger with the terrorist organisation offences, many of which have never and may never lead 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,<sup>226</sup> 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, those 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.

#### 4.4.3 Law Council Recommendations

In addition to the above recommendations regarding the proscription of terrorist organisations and the definition of 'terrorist act', the Law Council recommends that the Government:

1. Repeal the terrorist organisation offences in Division 102.
2. If this recommendation is not adopted, and the offence provisions in Division 102 remain, that the Government:
  - (a) 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 'membership' 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, 102.5, 102.6 and 102.7 to require *knowledge* rather than *recklessness* as to whether the organisation was a terrorist organisation.
  - (d) provide for regular and independent review of the offence provisions in Division 102 to report on their continued necessity, effective operation and impact on human rights.<sup>227</sup>

The Law Council notes that the Clarke Inquiry into the handling of the Haneef Case 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 and at risk of resulting in judicial error.<sup>228</sup> Mr Clarke expressed particular concern at the difficulties which would be encountered when attempting to direct juries as to the correct physical

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<sup>226</sup> For example there was no conviction for the offence of receiving funds from a terrorist organisation in the case of Jack Thomas, see above note 42.

<sup>227</sup> For more details on this model of independent review, 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).

<sup>228</sup> *Ibid* n5, p.260.

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and mental elements of the offence and recommended that section 102.7 of the *Criminal Code* be amended to remove these uncertainties.<sup>229</sup> This could be achieved, for example, by amending section 102.7 to require knowledge rather than recklessness as to whether the organisation was a terrorist organisation.

The Government has indicated that it supports Mr Clarke's recommendation to review section 102.7 and has said that it will confer to the States and Territories in order to make amendments to s. clarify the fault element of the offence.<sup>230</sup>

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<sup>229</sup> Ibid.

<sup>230</sup> Ibid n6.

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## 5. Investigation Powers of Law Enforcement and Intelligence Agencies

### 5.1 What measures were introduced and why?

In addition to a broad range of criminal offences, prior to September 2001 law enforcement and intelligence agencies already had a considerable framework of laws to investigate and prosecute acts connected with terrorism. Some of these agencies had the power to engage in telecommunications interception,<sup>231</sup> use listening and tracking devices, gain access to computers<sup>232</sup> and engage in undercover operations.<sup>233</sup> A National Crime Authority also existed with power to investigate and combat serious organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence to law enforcement agencies.<sup>234</sup>

Despite this extensive framework of existing laws, the Australian 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.

#### 5.1.1 Measures introduced in 2002

The *SLAT Bill 2002* and related Bills<sup>235</sup> 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.<sup>236</sup> The package extended telecommunication interception powers to the investigation of terrorism offences, child pornography and serious arson offences and extended the purpose for which intercepted information can be communicated.<sup>237</sup>

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'.<sup>238</sup> The AFP told the Senate Committee who inquired into the *SLAT Bill* in 2002 that:

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<sup>231</sup> *Telecommunications (Interception) Act 1979* (Cth).

<sup>232</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth).

<sup>233</sup> *Crimes Act 1914* (Cth).

<sup>234</sup> *National Crime Authority Act 1984* (Cth).

<sup>235</sup> *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.*

<sup>236</sup> *Telecommunications Interception Legislation Amendment Act 2002*

<sup>237</sup> 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), enacted in 1979). During the last four years a number of legislative developments significantly broadened these powers. For example one of the most concerning developments in the area of telecommunications interception is the introduction of the B-Party warrant system, introduced by the *Telecommunications (Interception) Amendment Act 2006* (Cth). Access to stored communications has been another area of significant reform, with significant implications for human rights.

<sup>238</sup> 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.

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... 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.<sup>239</sup>

In 2003 significant amendments were made to the Division 3 of the *Australian Security Intelligence Organisation Act 1979* (the *ASIO Act*).<sup>240</sup> 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.

#### 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) and the *Anti-Terrorism Act 2004* (Cth).

The *Surveillance Devices Act 2004* (Cth) empowered police officers<sup>241</sup> to obtain warrants, emergency authorisations and tracking device authorisations for the installation and use of surveillance devices in relation to Commonwealth criminal investigations.<sup>242</sup> The *Surveillance Devices Act* allows police officers to use listening devices, optical surveillance devices, tracking devices and data surveillance devices. Police officers may exercise the necessary powers to install, maintain and retrieve surveillance devices and may do so without a warrant in some circumstances.<sup>243</sup>

The *Anti-Terrorism Act 2004* was introduced to improve Australia's counter-terrorism legal framework by making amendments to:

- Part 1C of the *Crimes Act 1914* to extend the fixed investigation period applying to federal 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 *Crimes (Foreign Incursions and Recruitment) Act 1978* to enhance the foreign incursions offences, particularly in situations where terrorist organisations are operating as part of the armed forces of a state;

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<sup>239</sup> 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.

<sup>240</sup> *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

<sup>241</sup> This includes officers of the AFP, the Australian Crime Commission or a State or Territory police force investigating a Commonwealth offence.

<sup>242</sup> Under the Act, a warrant for use or retrieval of a surveillance device may be issued by an eligible Judge or by a nominated AAT 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.

<sup>243</sup> 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).

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- the *Criminal Code Act 1995* 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* to improve restrictions on any commercial exploitation by a person who has 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 1914* (Cth) and Divisions 104 and 105 into the Commonwealth *Criminal Code*. The Explanatory Memorandum to the *Anti-Terrorism Act (No 2) Bill* 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 activity and confers powers on law enforcement and intelligence agencies to effectively prevent and investigate terrorism.*<sup>244</sup>

Key features of the Bill include:

- the expansion of the grounds for the proscription of terrorist organisations to include organisations that 'advocate' terrorism (Schedule 1 of the Bill);
- 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 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.<sup>245</sup> Under the COAG Agreement, State Premiers and the Northern Territory and ACT Chief Ministers agreed to introduce complementary legislation for the

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<sup>244</sup> Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005*

<sup>245</sup> A copy of the COAG agreement is available at <http://www.coag.gov.au/meetings/270905/>.

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purpose of introducing preventative detention for a period of up to 14 days and to also introduce search powers.<sup>246</sup>

## 5.2 Law Council's Concerns with this Expansion of Power

This significant expansion of law enforcement and intelligence gathering powers has not gone unnoticed by the Australian community and has attracted the sustained criticism of a number of independent national and international review bodies, including the Sheller Committee (a special committee established to review Australia's anti-terrorism laws in 2006), the PJCIS, the UN Human Rights Committee, the UN Committee Against Torture (CAT Committee) and the Special Rapporteur on Human Rights and Terrorism.<sup>247</sup>

For example, in its recent concluding observations on Australia, the CAT Committee expressed concern over the lack of judicial review and the character of secrecy surrounding the imposition of preventative detention and control orders.<sup>248</sup> 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;*<sup>249</sup>

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.<sup>250</sup>

The Law Council shares these concerns, which echo concerns previously expressed by independent review bodies within Australia.<sup>251</sup>

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 sanctioned unnecessary infringements on fundamental rights.

However, as the Haneef and Ul-Haque cases demonstrate,<sup>252</sup> 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.

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<sup>246</sup> 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)*.

<sup>247</sup> 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].

<sup>248</sup> Committee Against Torture, *Concluding Observations – Australia*, CAT/C/AUS/CO/1, 15 May 2008 at [10].

<sup>249</sup> Committee Against Torture, *Concluding Observations – Australia*, CAT/C/AUS/CO/1, 15 May 2008 at [10].

<sup>250</sup> Committee Against Torture, *Concluding Observations – Australia*, CAT/C/AUS/CO/1, 15 May 2008 at [10].

<sup>251</sup> 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.

<sup>252</sup> See above notes 39 and 45.

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The application of Australia's anti-terror laws by the AFP and other agencies in the Haneef case suggests a significant misunderstanding has developed within those agencies about what they are lawfully authorised to do when protecting the community from the threat of terrorism.<sup>253</sup>

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 3WE of the *Crimes Act*, a regular, non-terrorist specific provision of the criminal law.<sup>254</sup> To lawfully arrest Dr Haneef under this section, the AFP 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, the Law Council is concerned 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 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.*<sup>255</sup>

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 public inquiry into the handling of the Haneef Case undertaken by Mr Clarke revealed a number of shortcomings in the handling of the case by government agencies, including that:<sup>256</sup>

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<sup>253</sup> 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 website of the Clarke Inquiry into the Handling of the Haneef Case <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Home>

<sup>254</sup> 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.

<sup>255</sup> 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).

<sup>256</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008.

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- many of the officers involved did not fully understand or have sufficient experience in exercising their statutory obligations. This was particularly evident in respect 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 DPP to the AFP that there was sufficient evidence to charge Dr Haneef was 'obviously wrong and should never have been given'; and
  - that certain police officers had become suspicious about Dr Haneef and had lost objectivity.

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

The *Anti-Terrorism Act (No 2) 2005* (Cth) introduced Part 1AA, Division 3A into the *Crimes Act 1914* (Cth). 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.'<sup>257</sup>

Division 3A empowers police officers<sup>258</sup> to request a person to provide an officer with the following details:<sup>259</sup>

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

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

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<sup>257</sup> Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005*.

<sup>258</sup> 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.

<sup>259</sup> *Crimes Act 1914* (Cth) s 3UC

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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.<sup>260</sup>

- 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 terrorist related item or a serious offence related item, that item may be seized.<sup>261</sup>

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 terrorist act; or if the person is in a prescribed security zone.<sup>262</sup>

An area can be prescribed as a security zone on the application of a police officer to the Minister.<sup>263</sup>

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

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 terrorist act that has occurred.<sup>264</sup> 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.<sup>265</sup>

### 5.3.1 Law Council Concerns

The Law Council shares concerns raised by the Law Institute of Victoria<sup>266</sup> and the New South Wales Bar Association<sup>267</sup> in respect of the powers invested in police officers by this Division to conduct random searches in declared 'specified security zones'.

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<sup>260</sup> *Crimes Act 1914* (Cth) s 3UD. Subsection 3UD(2)-(4) sets out the conditions which apply to the conduct of a search.

<sup>261</sup> *Crimes Act 1914* (Cth) s 3UE. See also section 3UF-3UG which regulates how seized things are to be dealt with.

<sup>262</sup> *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.

<sup>263</sup> *Crimes Act 1914* (Cth) s 3UI.

<sup>264</sup> *Crimes Act 1914* (Cth) ss 3UJ(3)-(4).

<sup>265</sup> 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.

<sup>266</sup> See for example, Law Institute of Victoria Submission, *UN Special Rapporteur Report on Australia's human rights compliance while countering terrorism* (03 May 2007).

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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.<sup>268</sup>

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.<sup>269</sup>

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.<sup>270</sup>

### 5.3.2 Law Council Recommendations

The Law Council recommends that the Government:

1. Repeal Division 3A of Part 1AA of the *Crimes Act*.
2. If this recommendation is not adopted, that the Government amend Division 3A to require the Minister to regularly (such as daily or weekly) consider whether to revoke a declaration made under section 3UJ.

## **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*. This section provides that once a person has been arrested for a terrorism offence, he or she may be detained for the purpose of investigating (a) whether the person committed the offence for which he or she was arrested and/or (b) whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed.<sup>271</sup>

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<sup>267</sup> For further information on the New South Bar Association, including their Human Rights Committee who has undertaken work in respect of Australia's anti-terrorism laws, visit their website at <http://www.nswbar.asn.au/>.

<sup>268</sup> 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.'

<sup>269</sup> 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.

<sup>270</sup> Report of the Special Rapporteur 2006 at [10]-[16].

<sup>271</sup> *Crimes Act 1914* (Cth) s23CA.

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The maximum period for which a person may be detained without charge under section 23CA is called the 'investigation period'. If the person is detained, they must be released (either unconditionally or on bail) within the investigation period or brought before a judicial officer within that period.

The maximum length of the investigation period in terrorism cases is set at four hours,<sup>272</sup> unless a magistrate extends the period. A magistrate may extend the investigation period any number of times, but the total of the periods of extension cannot be more than 20 hours.<sup>273</sup>

The means that the maximum allowable length of the investigation period in relation to terror suspects is 24 hours.

This is considerably longer than the maximum allowable length of the investigation period for ordinary suspects. In the case of ordinary crimes, the initial four hour investigation period may only be extended once, and only for a period not exceeding eight hours.

In either case, the calculation of the investigation period does not take into account so called 'dead time' during which police are unable to, or choose not to, question the suspect they have in detention.

Subsection 23CA(8) of the *Crimes Act* lists all the activities which are deemed to be dead time and are thus excluded from the calculation of the investigation period in terrorism cases. This list includes: time taken to transport the suspect to the place of questioning; time taken for the suspect to sleep; time taken for the suspect to talk with his or her lawyer or to await the arrival of his or her lawyer; time taken to conduct an identification parade or conduct a forensic procedure; time taken to make certain applications to the Court and any time during which the suspect can not be questioned because he or she is intoxicated or receiving medical attention.

All these activities are also regarded as dead time for the purposes of calculating the investigation period in relation to ordinary criminal cases.

However the last item on the subsection 23CA(8) dead time list, at sub-paragraph (m), is unique to terrorism cases.

Sub-paragraph 23CA(8)(m) provides that that the investigation period in terrorism cases does not include any 'reasonable time', approved by a magistrate or justice of the peace, during which the questioning of a person is 'reasonably suspended or delayed'.

To exclude time from the investigation period on this ground, the police must make an application to a magistrate under section 23CB stating the length of time that should be specified as dead time and why it is reasonable that it should be declared as such. Under sub-paragraph 23CB(5)(c), the reasons which may be given include the following:

- the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person;
- the need to allow authorities in or outside Australia time to collect information relevant to the investigation on the request of the investigating official;

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<sup>272</sup> If the person in custody is a minor or Aboriginal or Torres Strait Islander the maximum period is 2 hours.

<sup>273</sup> See *Crimes Act 1914* (Cth) s23DA.

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- the fact that the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the investigating official's time zone;
  - the fact that translation is necessary to allow the investigating official to seek information from a place outside Australia and/or be provided with such information in a language that the official can readily understand.

The magistrate or justice of the peace may then issue a certificate specifying a period of allowable dead time if he or she is satisfied that:<sup>274</sup>

- it is appropriate to do so, having regard to the application and the representations (if any) made by the person, or his or her legal representative, about the application, and any other relevant matters; and
- the offence is a terrorism offence; and
- detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and
- the investigation into the offence is being conducted properly and without delay; and
- the person, or his or her legal representative, has been given the opportunity to make representations about the application.

The time taken to make or dispose of such an application is also counted as dead time.<sup>275</sup> This means that if the judicial officer hearing the dead time application adjourns the matter, even for a period of days, then this adjournment period itself automatically counts as dead time.

No cap is placed on the maximum allowable period of dead time.

#### 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.<sup>276</sup>

For that reason, sub-paragraph 23CA(8)(m), 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 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.<sup>277</sup>

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<sup>274</sup> *Crimes Act 1914* (Cth) s23CB(7).

<sup>275</sup> *Crimes Act 1914* (Cth) s23CA(h).

<sup>276</sup> Explanatory Memorandum to the *Anti-Terrorism Bill 2004*, available at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0FBB770363CE89F1CA256F720031198A/\\$file/04052em.rtf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0FBB770363CE89F1CA256F720031198A/$file/04052em.rtf).

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However, many groups expressed concern that, even with this cap, the dead time allowed for 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 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 for 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'.<sup>278</sup>

Notwithstanding the Government's assurances, the Senate Legal and Constitutional Affairs Committee recommended that if police wanted to extend the investigation period in order to take account of dead time arising from time zone differences they should have to apply to a judicial officer for prior approval.<sup>279</sup>

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.

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.

#### 5.4.3 Law Council Concerns

The Law Council raised its concerns with these provisions when they were introduced in 2004.<sup>280</sup> It has also had the opportunity to raise its concerns with Part 1C of the *Crimes Act* in the context of the Haneef case, in particular through its written and oral submissions to the Clarke Inquiry established to look into the handling of the case and whether there is any need for reform of the relevant legal provisions involved.<sup>281</sup> In the course of these submissions, the Law Council has made a number of detailed recommendations for reform, which are listed below.

The Haneef case, which has been briefly summarised earlier in this Paper, 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 run counter to the established principles of the Australian criminal justice system and can result in a denial of fundamental rights.

The findings made in the Clarke Inquiry into the Haneef case confirmed many of the Law Council's concerns with Part 1C of the *Crimes Act*. Mr Clarke's findings confirmed, for example, that it is not just the content of these provisions, but also the way they interact

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<sup>277</sup> See Second Reading Speech for *Anti-Terrorism Bill 2004*, accessed at :

[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/anti\\_terrorism04/info/secondreading.doc](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/info/secondreading.doc)

<sup>278</sup> 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/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/anti\\_terrorism04/report/report.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/report/report.pdf)

<sup>279</sup> Report of Senate Legal and Constitutional Affairs *Inquiry into the provisions of the Anti-Terrorism Bill 2004* Recommendation 1.

<sup>280</sup> See Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill 2004* (26 April 2004).

<sup>281</sup> The terms of reference of the Inquiry, along with public submissions and speeches can be found on the Clarke Inquiry website <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Home>. The Inquiry is due to report on its findings on 21 November 2008.

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with the pre-existing provisions of the *Crimes Act*, that gives rise to concern. As will be described in further detail below, the Law Council strongly supports Mr Clarke's recommendation that the provisions of Part 1C of the *Crimes Act 1914* be reviewed and the mechanisms for judicial oversight and protections for individual rights be strengthened.<sup>282</sup> The Law Council is pleased to note that in response to this recommendation, the Commonwealth Government has requested the Attorney-General's Department to conduct a review of the relevant provisions in Part 1C, and their interaction with section 3W of the *Crimes Act*, taking into account the issues raised in the Clarke Inquiry.<sup>283</sup>

The Law Council's concerns with Part 1C of the *Crimes Act* can be summarised as follows:

1. Indefinite detention without charge

The dead time provisions in Part 1C of the *Crimes Act* allow for an indefinite period of detention without charge.

The length of the investigation period allowed under sections 23CA and 23DA is capped at 24 hours. However, this does not operate as a safeguard against prolonged detention without charge because allowance for reasonable 'dead time' means that the 24 hours of questioning may be spread out over a period of weeks.

In addition, there is no clear limit in sub-paragraph 23CA(8)(m) and section 23CB on how many times police can approach a judicial officer to specify certain time periods as dead time.

Further, the threshold test that police need to satisfy in order to obtain an extension of the detention period is low. The conduct of ongoing routine investigative activities is enough to justify prolonged detention.

As a result, once police have arrested a suspect in relation to a terrorist offence, Part 1C effectively allows police to seek an unlimited number of extensions to the lawful detention period.

These concerns were confirmed in the case of Dr Haneef.

By the time Dr Haneef had been charged with a criminal offence he had been detained without charge for over 12 days, during which time he had been interrogated for over 20 hours.<sup>284</sup> Even after the magistrate, upon each application, declared a finite period of allowable dead-time, the maximum period of Dr Haneef's detention without charge remained unknown. It is understood that this was because the possibility of further successful applications was never foreclosed.

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 under section 23CB 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

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<sup>282</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, Recommendation 3.

<sup>283</sup> Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef - December 2008 available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008) (accessed 3 August 2009).

<sup>284</sup> The exact timeline of events in the Haneef case is difficult to discern from publicly available information. Counsel for Dr Haneef prepared a time line of events in their submission to the Clarke Inquiry. This submission is available at <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP7E8B9817D98B7C87CA257481001C2414>. Submissions from relevant Government Departments also shed light on this time line, and where publicly available, these submissions can also be found at the above website.

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default, becomes an extension of the investigation period. This is what occurred in the Haneef case between 11 July and 13 July 2007.

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.

The absence of a limit on the maximum period of detention without charge, may also result in a delay in charges being laid as there is no incentive for law enforcement officers to charge a suspect, even if at the time of arrest or after initial questioning police form an opinion that they have sufficient information to warrant a terror-related charge.

This can have serious consequences for a person's liberty because while a person is detained under section 23CA they have no opportunity to apply for and be released on bail.

In Dr Haneef's case it appears that police held him in custody for 12 days before charging him on the basis of information that was available to them on the first day of his arrest. Section 23CA was, in effect, primarily used to deny Dr Haneef a timely bail hearing.<sup>285</sup>

In his report, Mr Clarke reported that the officers involved in utilising these provisions had little relevant experience or training with respect to the applications and processes required under section 23CA, which led to some confusion as to the correct process for seeking extensions of 'dead time'.<sup>286</sup> Mr Clarke further reported that the Haneef case demonstrated that the provision for judicial oversight in the provisions was inadequate; as it did not protect against the potential for indefinite detention without charge and it did not adequately protect the procedural rights of the person being detained.<sup>287</sup>

## 2. The absence of a cap or absolute limit on the period of detention under section 23CA

The Law Council is of the firm view that there is need for a finite limit on how long a person can be held without charge. This need is not met by the involvement of a judicial officer in determining what 'reasonable' dead time is. This is due in part to the difficulty a detained suspect faces in attempting to properly challenge assertions made by police and also to the low threshold test required to establish that the period of dead time sought is reasonable.

Under section 23CB(5), in their application for a dead time declaration police are able to cite routine investigative activities as supporting a need for dead time. For example, the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia) may be listed as grounds for a dead time application. This is indeed what occurred in the context of the Haneef case.

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<sup>285</sup> A hearing under section 23CB of the *Crimes Act 1914* (Cth) is not akin to a bail hearing because the magistrate has no capacity under that section to consider releasing a suspect subject to conditions of a kind which might mitigate against the risks allegedly posed by the suspect, include the risk of flight. In deciding under section 23CB whether it is necessary to continue to detain the suspect, the magistrate must weigh any risks posed by the suspect against the prospect of unconditional release. Therefore, a person detained in custody has a much better prospect of successfully applying for bail than of successfully resisting a dead time extension application under section 23CB.

<sup>286</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p.252.

<sup>287</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p. 251-253.

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In his report into the Haneef Case, Mr Clarke shared the Law Council's concern regarding the absence of a cap on the period of detention potentially authorised by section 23CA(8)(m) and observed that:

*Perhaps the most obvious deficiency in Part 1C of the Crimes Act is the absence of a cap on, or limit to, the amount of dead time that may be specified as a consequence of the introduction of s23CA(8)(m) and therefore the amount of time a person arrested for a terrorism offence can be detained in police custody.*

*I acknowledge that investigations of terrorism offences might generally be more difficult and complex than investigation of the crimes for which Part 1C provided before the introduction of terrorism offences in Part 5.3 of the Criminal Code in 2002, but the absence of a cap in relation to terrorism offences only serves to highlight the deficiency. ...*

*... I believe the concept of uncapped detention time is unacceptable to the majority of the community and involves far too great an intrusion on the liberty of citizens and non-citizens alike. In the United Kingdom, which has experienced a number of terrorist acts, there is a cap, albeit after a fairly lengthy period. There is a powerful argument in favour of remedying the situation in Australia – not only to limit the length of detention but also to ensure that an investigation is carried out expeditiously and with a sense of the need to act with urgency.<sup>288</sup>*

Mr Clarke considered various suggested time limits for detention under section 23CA(8)(m) and said that 'if pressed' he would suggest the cap be set at seven days.<sup>289</sup>

### 3. Additional concerns with s23CB

As noted above, section 23CB empowers a police officer to make an application to a magistrate specifying a period of time to be declared as dead time. In addition to the concerns described above, the Law Council finds the following features of section 23CB to be problematic:

- Although sub-paragraph 23CB(7)(e) requires the magistrate 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 23CB 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 the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.
- Given the significance an application made under section 23CB has for the liberty of the person in detention, the Law Council is of the view that such applications should be made to a Supreme Court Judge, or at least a judicial officer, rather than permitting such applications to be determined by a justice

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<sup>288</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p. 249.

<sup>289</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p. 248-249.

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of the peace or bail justice. This concern was shared by Mr Clarke in his report on the Haneef case, where it was observed that:

*“judicial oversight for section 23CA(8)(m) applications should remain, but should be conducted by a more senior judicial officer such as a county court judge.”<sup>290</sup>*

#### 5.4.4 Law Council Recommendations

The Law Council recommends that the Government:

1. Amend section 23CA to impose a maximum cap on the amount of dead time allowed to be disregarded from the investigation period pursuant to subparagraph 23CA(8)(m). (Currently, section 23CB requires an officer to seek advanced judicial certification of any period to be disregarded from the investigation period pursuant to subparagraph 23CA(m). This certification must include details of the specific time period to be disregarded. This requirement should remain even if a finite limit is placed on the maximum period of time that can be disregarded pursuant to subparagraph 23CA(m));
2. Amend section 23CB to ensure police only have one opportunity to apply to a judicial officer to declare a specified period as reasonable dead time for the purposes of calculating the investigation period;
3. Amend section 23CB to preclude a judicial officer from adjourning an application made under section 23CB for more than a specified number of hours, or alternatively, amend sub-paragraph 23CA(8)(h) to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must included in the calculation of the investigation period;
4. Amend subsection 23CB(5) to require the investigating official to certify in any application for a period to be declared dead time that he or she is not satisfied that there is sufficient information to support a terrorism charge against that suspect;
5. Amend sections 23CB and 23DA to require that if a suspect is not legally represented when an application is made under section 23CB or section 23DA, the police should be required 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;
6. Subject Part IC of the *Crimes Act* to regular, independent review, for example review by an appointed panel of independent experts with a clear mandate to review the content, operation and effectiveness of all of Australia’s anti-terrorism measures, including the dead time provisions.<sup>291</sup>

### **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 Commonwealth *Criminal Code* (Division 105 and 104 respectively). Under Divisions 104 and 105, a person’s liberty can be controlled or

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<sup>290</sup> The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p. 252.

<sup>291</sup> 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).

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restricted *without* the person being charged or convicted of or even suspected of committing a criminal offence.

When introducing these exceptional measures, the Australian 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.<sup>292</sup> 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.<sup>293</sup>

### 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:<sup>294</sup>

- 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).<sup>295</sup>

A control order is made by an issuing court (for example a Federal Court).<sup>296</sup> Before making an order, the court must be satisfied either:<sup>297</sup>

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<sup>292</sup> 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.

<sup>293</sup> See later discussion re *Thomas v Mowbray* (2007) 237 ALR 194.

<sup>294</sup> *Criminal Code Act 1995* (Cth) s104.5(3).

<sup>295</sup> *Criminal Code Act 1995* (Cth) s104.5(3).

- 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.<sup>298</sup> This may be done ex parte without having to notify the person concerned of the application.<sup>299</sup> If the AFP officer elects to confirm the order, the person subject to the order must be notified and may appear and give evidence before the issuing court.<sup>300</sup> The issuing court may then revoke, confirm or vary the interim control order.<sup>301</sup>

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.<sup>302</sup>

### 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.<sup>303</sup>

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.<sup>304</sup>

There are two types of preventative detention orders (1) initial preventative detention orders of up to 24 hours, issued by senior members of the AFP<sup>305</sup> 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.<sup>306</sup>

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.<sup>307</sup> 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

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<sup>296</sup> An issuing court is defined in s101.1 *Criminal Code Act 1995* (Cth) to include the Federal Court, the Federal Family Court or the Federal Magistrates Court.

<sup>297</sup> *Criminal Code Act 1995* (Cth) s104.4 (interim order); s104.16 (confirmed order).

<sup>298</sup> *Criminal Code Act 1995* (Cth) 104.2.

<sup>299</sup> *Criminal Code Act 1995* (Cth) 104.3.

<sup>300</sup> *Criminal Code Act 1995* (Cth) s104.12.

<sup>301</sup> *Criminal Code Act 1995* (Cth) s104.14.

<sup>302</sup> *Criminal Code Act 1995* (Cth) s104.4 (interim order); s104.16 (confirmed order).

<sup>303</sup> *Criminal Code Act 1995* (Cth) ss 105.8 and 105.12

<sup>304</sup> *Criminal Code Act 1995* (Cth) s105.4.

<sup>305</sup> *Criminal Code Act 1995* (Cth) s 105.8(1).

<sup>306</sup> A Judge, Federal Magistrate, Administrative Appeals Tribunal member or retired judge.

<sup>307</sup> *Criminal Code Act 1995* (Cth) s 105.14.

- making the order will substantially assist in preventing a terrorist act occurring; and
- 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.<sup>308</sup>

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.<sup>309</sup>

### 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.<sup>310</sup> Since their introduction in 2005, no preventative detention order has 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,<sup>311</sup> and once in the case of David Hicks,<sup>312</sup> 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 3 of the *Constitution*,<sup>313</sup> 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

<sup>308</sup> *Criminal Code Act 1995* (Cth) ss 105.8, 105.12 and 105.18.

<sup>309</sup> 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).

<sup>310</sup> An example of such a report can be found at the AFP website, see [http://www.afp.gov.au/\\_data/assets/pdf\\_file/62633/Preventative\\_Control06\\_07.pdf](http://www.afp.gov.au/_data/assets/pdf_file/62633/Preventative_Control06_07.pdf)

<sup>311</sup> *R v Thomas* [2006] VSCA 165 (18 August 2006). For further details of the Jack Thomas case see above note 42. See also *Thomas v Mowbray* (2007) 237 ALR 194 and discussion below at note 281.

<sup>312</sup> 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 single 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, represents 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.

<sup>313</sup> In *Thomas v Mowbray* (2007) 237 ALR 194 Mr Thomas challenged the constitutional validity of the control order regime in two key respects. First, he argued that the Commonwealth Parliament did not have legislative power to enact the control order regime because it was not connected to any of the subjects that the Commonwealth Parliament is permitted to legislate on. Secondly he contended that the regime required the judiciary to exercise a type of decision making power, (namely the power to decide whether restrictions should be imposed on the liberty of a person who has not been convicted of a criminal offence), that is inconsistent with the exercise of judicial power. Under the *Australian Constitution*, except where it is incidental to and consistent with the exercise of their judicial functions, it is considered a violation of the separation of powers doctrine for non-judicial functions to be conferred on federal judges. The majority of the High Court upheld the validity of the control order regime. It found that the legislation was supported by power to make laws with respect to the defence of Australia, and that this included the power to make laws in response to international terrorism. The majority also found that the type of power the control orders regime vested in the judiciary was not contrary to the *Australian Constitution*.

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of recommendations for reform, before and after the constitutional challenge.<sup>314</sup> Its concerns can be summarised as follows:

1. 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,<sup>315</sup> 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.

2. 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 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 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.*<sup>316</sup>

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

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<sup>314</sup> See for example 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 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).

<sup>315</sup> Part 2.4 of the *Criminal Code Act 1995* (Cth).

<sup>316</sup> Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006).

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chance' to restrict the liberty of persons of interest where there is insufficient evidence to then 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.

### 3. 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.<sup>317</sup>
- 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 review 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,<sup>318</sup> the application for either an initial or continued preventative detention order is made *ex parte* by members of the AFP.<sup>319</sup> 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 so as to challenge the issuing of an order.
- Preventative detention orders also restrict detainees' right to legal representation by only allowing detainees access to legal representation for the limited purpose of obtaining advice or giving instructions regarding the issue of the order or the treatment of the subject while in detention.<sup>320</sup> 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.

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<sup>317</sup> *Criminal Code Act 1995* (Cth) s104.5(3).

<sup>318</sup> *Criminal Code Act 1995* (Cth) s 105.37

<sup>319</sup> *Criminal Code Act 1995* (Cth) ss 105.7 and 105.11.

<sup>320</sup> *Criminal Code Act 1995* (Cth) s105.37.

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- 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'.

#### 4. The absence of regular 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*.<sup>321</sup> This, coupled with inadequate access to information and limited access to legal representation, make 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 Australian 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 *Administrative Decisions (Judicial Review) Act 1977*;
- consider appointing 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.<sup>322</sup>
- consider appointing a panel of independent reviewers with a mandate to review *all* of Australia's anti-terrorism measures, including those in Divisions 104 and 105 of the *Criminal Code* and report regularly to Parliament on their continued necessity, operation and effectiveness.<sup>323</sup>

As noted above, in June 2009 the Commonwealth Government introduced the *National Security Legislation Monitor Bill 2009*, which if passed would establish an independent body, the National Security Legislation Monitor, to review Australia's anti-terrorism laws. The Monitor would have a broad mandate to review Australia's anti-terrorism laws, including those relating to control orders and preventative detention orders, however it would not perform the function of a Public Interest Monitor or the UK Independent Reviewer of Terrorism Laws in respect to applications for and the making of control orders or preventative detention orders.

#### 5.5.5 Law Council Recommendations

The Law Council recommends that the Government:

1. Repeal the control order and preventative detention order regime in Divisions 104 and 105 of the *Criminal Code*.

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<sup>321</sup> *Administrative Decisions (Judicial Review) Act 1997* (Cth) Schedule 1 s3 (dab), (dac).

<sup>322</sup> 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).

<sup>323</sup> 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).

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2. If the provisions are to remain, ensure that amendments are made to:
- (a) prescribe a maximum period for which a person can be held under successive continued preventative detention orders in Division 105 (preferably 28 days).
  - (b) ensure a person who is the subject of control order or preventative detention is provided with all the information and evidence that forms the basis of the application for such order, or at the very least, that the court should be empowered to exercise discretion in this regard;
  - (c) ensure a person subject to a preventative detention order is entitled to attend an application hearing and present his or her case;
  - (d) 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;
  - (e) 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*;
  - (f) appoint an independent body such as a Public Interest Monitor (PIM) with access to all material upon which an application for control orders and/or preventative detention orders is based;
  - (g) appoint an independent reviewer or a panel of independent reviewers with a clear mandate to review all of Australia's anti-terrorism measures, including the control order and preventative detention order regime and report regularly to Parliament on their continued necessity and effective operation.

## 5.6 Questioning and Detention powers of ASIO

### 5.6.1 What measures were introduced and why?

As noted above, in February and March 2002 the Government introduced the *SLAT Bill* and related Bills into Parliament, including the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*. The purpose of the Bill was to amend the *ASIO Act 1979* by expanding the special powers available to ASIO to deal with terrorism.

When enacted the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* amended the *Australian Security Intelligence Organisation Act 1979* (*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* also introduced secrecy provisions into the legislation which prohibit:

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- 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 AAT member) for questioning (known as a 'questioning warrant'); or<sup>324</sup>
- 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').<sup>325</sup>

The person subject to a questioning or 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.<sup>326</sup> Before applying for such a warrant, ASIO must first obtain the consent of the Minister.<sup>327</sup>

The Minister may authorise the Director General of ASIO to seek a questioning warrant when he or she is satisfied that:<sup>328</sup>

- 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:<sup>329</sup>

- 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:

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<sup>324</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34 E.

<sup>325</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34G.

<sup>326</sup> See *Australian Security and Intelligence Organisation Act 1979* (Cth) s34AB.

<sup>327</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34D, 34F.

<sup>328</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34D.

<sup>329</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34F.

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- 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.

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'.<sup>330</sup>

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.

While in detention, the person is prevented from contacting anyone not specified in the warrant.<sup>331</sup> Contact is permitted, however, with the Inspector-General of Intelligence and Security and the Ombudsman. Further, the warrant may specify that the person may contact 'his or her lawyer' or someone with a particular familial relationship, such as 'his or her spouse' without naming that person as such.

The maximum period a person can be detained for the purpose of questioning by ASIO is 168 hours, or seven days.<sup>332</sup>

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.<sup>333</sup> 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.<sup>334</sup> For example, in 2004 -2005, 11 questioning warrants were issued, involving 10 people.<sup>335</sup> Two of the persons questioned under the warrants in 2004-2005 were subsequently charged with the offence of providing false or misleading information.<sup>336</sup> 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 Act 1995*, and with five counts of false and misleading statements under section 34G(5) of the ASIO Act.<sup>337</sup> On 11 June 2005 Lodhi was committed to stand trial on all charges and was subsequently convicted of the majority of these offences.<sup>338</sup> The second was Abdul

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<sup>330</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34E, 34G

<sup>331</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34F(5),(6).

<sup>332</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s34G(4).

<sup>333</sup> *ASIO Act 1979* s94(1A).

<sup>334</sup> ASIO, Annual Report to Parliament 2007-2008 (tabled October 2008) p. 122 available at <http://www.asio.gov.au/Publications/content/CurrentAnnualReport/pdf/ASIOAnnualReport0708.pdf> (accessed 4 August 2009).

<sup>335</sup> ASIO, Annual Report to Parliament 2004-2005 pp.41-42 available at [http://www.asio.gov.au/Publications/Content/AnnualReport04\\_05/pdf/asio\\_annual\\_report\\_to\\_parliament\\_0405.pdf](http://www.asio.gov.au/Publications/Content/AnnualReport04_05/pdf/asio_annual_report_to_parliament_0405.pdf)

<sup>336</sup> ASIO, Annual Report to Parliament 2004-2005 pp.41-42 .

<sup>337</sup> ASIO, Annual Report to Parliament 2004-2005 pp.41-42.

<sup>338</sup> 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. See above note 38.

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Rakib Hasan, who in July 2005 was charged with providing false and misleading information under section 34G of the ASIO Act.<sup>339</sup> Mr Hasan is due to stand trial along with five other accused later this year.<sup>340</sup>

ASIO's questioning and detention powers have also been subject to review by the Senate Legal and Constitutional Review Committee (SLCRC)<sup>341</sup> and the PJCIS.<sup>342</sup> Both Committees have noted the controversial nature of the powers<sup>343</sup> 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 recommendations, including those that recommended confidential access to legal representation of a person's choice,<sup>344</sup> were never incorporated into the Act.

### 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 Australian 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.

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.<sup>345</sup>

In April 2009, these concerns were shared by the UN Human Rights Committee 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 recommend 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.*<sup>346</sup>

The Law Council's concerns with these provisions are outlined below.

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<sup>339</sup> ASIO, Annual Report to Parliament 2004-2005 pp.41-42 .

<sup>340</sup> Pre-trial hearings in this case commenced in February 2008 in the Supreme Court of NSW and are continuing. The trial is expected to commence in late 2008. As at 27 October 2008, a jury selection process was underway. See also 'Six plotted violent jihad, court told' *The Australian Newspaper* (27 October 2008).

<sup>341</sup> Senate Legal and Constitutional Review Committee, *Report on the ASIO Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002.

<sup>342</sup> PJCIS, *Report on ASIO's Questioning and Detention Powers*, (November 2005).

<sup>343</sup> PJCIS, *Report on ASIO's Questioning and Detention Powers*, (November 2005) at [1.3].

<sup>344</sup> 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.

<sup>345</sup> For example see 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).

<sup>346</sup> 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].

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1. 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’.

2. 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, Division 3 of the ASIO Act authorises the arrest of individuals for the purpose of questioning<sup>347</sup> 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.<sup>348</sup> 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 person's nominated legal advisor.

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. This offence is one of strict liability if the disclosure is made by a legal adviser of the person subject to a warrant.

Access to relevant information may be further restricted by regulation<sup>349</sup> or by the provisions of the *National Security Information (Civil and Criminal Proceedings) Act 2006* (Cth).

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,<sup>350</sup> but that safeguard is rather hollow in the circumstances.

This is because ASIO is exempt from the statutory grounds of judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. 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

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<sup>347</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ss34E, 34G.

<sup>348</sup> 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.

<sup>349</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s34ZT.

<sup>350</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s34J(f).

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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.

### 3. Limited access to a lawyer of choice

It is permitted, in certain circumstances, for persons questioned and/or detained under a Division 3 warrant to contact a lawyer of their choice.<sup>351</sup> However, this contact can be tightly controlled and limited by the authority issuing the warrant or the officers exercising authority under the warrant.<sup>352</sup>

For example, section 34ZO allows the authority issuing the warrant 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*.

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.'<sup>353</sup>

The Law Council considers that any person compelled to answer questions pursuant to a warrant must be entitled to access a legal adviser 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.<sup>354</sup>

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 legal adviser, there are no practical means to challenge any ill-treatment.

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<sup>351</sup> 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.

<sup>352</sup> For example, subsection 34G(5) *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 person's choice. A questioning and detention warrant may also specify a time when the person is permitted to contact the person identified as a lawyer.

<sup>353</sup> *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 advisers' conduct is unduly disrupting the questioning, the authority may direct the removal of the legal adviser from the place where the questioning is occurring.

<sup>354</sup> 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].

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The right to communicate with the Inspector-General of Intelligence and Security and the Ombudsman,<sup>355</sup> 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.

#### 4. 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,<sup>356</sup> 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.<sup>357</sup> 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 and detention warrant is not admissible in evidence against the person in other criminal proceedings ('use immunity'),<sup>358</sup> 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 and detention warrant is capable of being used to prove that person has committed a criminal offence. The mandatory presence of a police 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.<sup>359</sup>

#### 5.6.4 Law Council Recommendations

1. The Law Council recommends that Division III of the *ASIO Act* be repealed and replaced with an alternative approach to gathering information about terrorist-related and other serious offences.
2. Such an alternative approach should accord with other recognised criminal investigation procedures (for example, the compulsory questioning regime of the Australian Crime Commission)<sup>360</sup> and contain the following features:
  - (a) questioning should be limited to a defined period of four hours with a four hour extension;

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<sup>355</sup> Section 34K permits the person to contact the Inspector General of Intelligence and Security, the Ombudsman and a person referred to in *Australian Federal Police Act 1979* s40SB(3)(b) while the person is in custody or detention.

<sup>356</sup> A prescribed authority is a person appointed 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.

<sup>357</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34G(1), (3) & (6).

<sup>358</sup> *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34L.

<sup>359</sup> 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* (Dated 16 October 2006) at [7] available at [http://www.igis.gov.au/annuals/06-07/annex\\_4\\_statement\\_of\\_procedures.cfm](http://www.igis.gov.au/annuals/06-07/annex_4_statement_of_procedures.cfm).

<sup>360</sup> 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.

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- (b) any further extension beyond this should require judicial approval from the authority issuing the warrant for questioning; and
    - (c) a person being questioned should be entitled to legal representation during the process.
  3. 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 Division 3 of the *ASIO Act*:
    - (a) the types of offence for which evidence can be gathered under a warrant should be limited;
    - (b) 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;
    - (c) 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 by the officer exercising authority under the warrant;
    - (d) a legal adviser of the person's choice should be entitled to be present during the entire questioning process;
    - (e) persons detained or questioned should be entitled to make representations through their lawyer to the prescribed authority;
    - (f) 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;
    - (g) the period of detention under a questioning and detention warrant should be a single period incapable of extension; and
    - (h) 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.
  4. As ASIO questioning and detention powers rely on administrative protocols to guide the conduct of officers exercising warrants,<sup>361</sup> 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.

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<sup>361</sup> Such protocols are issued by the Director General of Security under s34C(1) of the *Australian Security Intelligence Organisation Act 1979*.

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## 6. Miscellaneous 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 *National Security Information (Civil and Criminal Proceedings) Act 2004* 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)* 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)* was introduced, ushering in 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'.<sup>362</sup>

The necessity of these measures to address the threat posed by international terrorism has been questioned by many in the Australian community, including the Law Council.

The impact these laws have had on individual rights, in particular the right to a fair trial and the right to free speech and expression, has also generated concern.

The Law Council's concerns with these anti-terrorism measures are summarised below.

### 6.2 National Security Information and Court Proceedings

#### 6.2.1 What measures were introduced and why?

The *National Security Information (Criminal Proceedings) Bill 2004* (the *NIS Bill*) was introduced against the backdrop of an Australian Law Reform Commission (ALRC) Inquiry into measures to protect classified and security information in the course of investigations and proceedings.<sup>363</sup> The ALRC's background paper recognised that tensions exist between the rights guaranteed in Australian and international law regarding the right to a fair trial and the operation of mechanisms designed to protect classified and security sensitive information.

A number of organisations, including the Law Council made submissions to the ALRC, arguing that there were well established mechanisms for protecting sensitive information, such as the protection of informants, suppressing the names of parties or witnesses, or

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<sup>362</sup> See *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* s9A(1).

<sup>363</sup> On 2 April 2003, the 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. See ALRC, *Protecting Classified and Security Sensitive Information*, Background Paper, July 2003.

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orders restricting or limiting publicity associated with the proceedings.<sup>364</sup> 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.<sup>365</sup> 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. The ALRC again invited submissions and comments on the views presented in its paper.

Before the Commission published its final report, the Commonwealth Government introduced the *NIS Bill* and the *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.<sup>366</sup>

However, while both the ALRC and the Commonwealth Government recognised the need for the introduction of legislation that deals 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 NIS Bill.<sup>367</sup>

On 16 June 2004, the Senate referred the provisions of the *NIS Bill* and the *National Security Information (Security Proceedings) (Consequential Amendments) Bill 2004* 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.*

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<sup>364</sup> 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).

<sup>365</sup> ALRC, Media Release, Courts need new laws to protect national security information, 5 February 2004.

<sup>366</sup> ALRC, Media release, Justice system must adapt to meet terror challenges: ALRC, 23 June 2004.

<sup>367</sup> Cf the final recommendations of the ALRC in the final report *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98) (23 June 2004) with the provisions of the *National Security Information (Criminal Proceedings) Bill 2004* (Cth).

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*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.*<sup>368</sup>

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.<sup>369</sup>

In 2004 the Bill was passed (without the inclusion of the Committee's key recommendations) as the *National Security Information (Civil and Criminal Proceedings) Act 2004* (the *NIS Act*).

The Act 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 relating to the disclosure of information in the proceedings that is likely to prejudice national security.<sup>370</sup> A person who receives such a notice must apply to the Secretary for a security clearance.<sup>371</sup> 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 likely 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.<sup>372</sup> In the circumstances the Court may recommend that the defendant retain a different legal representative.<sup>373</sup>

Part 3 of the *NIS Act* sets up a procedure for conducting certain proceedings in closed court. Under the Act, prosecutors and defendants in criminal proceedings must notify the Attorney-General if they know that one of the witnesses they intend to call will disclose sensitive information in the course of the proceedings.<sup>374</sup> When this occurs, the Attorney-General may issue a certificate of non-disclosure, preventing, for example, a particular witness from giving evidence on the grounds that it would be prejudicial to national security.<sup>375</sup>

Where a certificate has been issued, and the proceedings relate to a trial or extradition proceedings, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or calling of witnesses.<sup>376</sup> Under the Act, the defendant and the defendant's legal representatives can be excluded from this hearing.

Before considering whether to make a non-disclosure order, the court must consider whether the relevant information is admissible according to the normal rules of evidence and if so,<sup>377</sup> whether:<sup>378</sup>

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<sup>368</sup> 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.

<sup>369</sup> 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).

<sup>370</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s39(1).

<sup>371</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s39(2)

<sup>372</sup> 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. *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s39(3).

<sup>373</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* s39(5)(b)(ii).

<sup>374</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) ss24-25.

<sup>375</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s26(2).

<sup>376</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s28(4) - (5).

<sup>377</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s31(7).

<sup>378</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s31(1)-(4).

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- the disclosure of the information or presence of the witness would constitute a risk of prejudice to national security, having regard to the Attorney-General's certificate;
  - an order to prevent disclosure or calling of a witness would have a substantial adverse effect on the defendant's right to a fair hearing, and
  - any other matters it considers relevant.

When considering whether the disclosure would constitute a risk to national security, the court must consider the certificate of non-disclosure issued by the Attorney-General as *conclusive evidence* that disclosure of the information in the proceedings is likely to be prejudicial to 'national security'.<sup>379</sup> Once a court has made a non-disclosure or witness exclusion order, it becomes an offence to contravene the order.<sup>380</sup>

### 6.2.2 Law Council Concerns

The Law Council has a number of concerns with the *NIS Act*, particularly in so far as the legislation establishes a system of security clearances for lawyers and permits closed court proceedings in certain circumstances. These concerns, along with a number of specific recommendations for reform, have been made known in a number of forums<sup>381</sup> and can be summarised as follows:

#### 1. Security clearance system threatens the right to a fair trial

In the view of the Law Council, the security clearance system for the legal profession under the Act threatens the right to a fair trial in two ways. First, it 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. Secondly, it threatens the independence of the legal profession by 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 similarly undermined.

#### 2. No justification for security clearance requirements for lawyers

No evidence provided by the former Government indicates that lawyers breach requirements of confidentiality imposed either by agreement or by the Courts.

In the absence of a plausible justification for the security clearance system, perceptions arise 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.

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<sup>379</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) ss27(1) and (2). NB 'National security' is defined very broadly in the *National Security Information (Civil and Criminal Proceedings) Act 2004* as "Australia's defence, security, international relations, law enforcement interests or national interests". It encompasses political, military, economic, intelligence, policing, technological and scientific interests.

<sup>380</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) s42.

<sup>381</sup> For example see Law Council of Australia 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).

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The Law Council is not persuaded that the existence of a pool of security-cleared lawyers would promote state security or reduce the likelihood that sensitive information would leak into the community. For example, although legal representatives are subject to a security check process, jurors and court officials are not. It is difficult to see how such a system would protect sensitive information or promote state security when key people involved in the process with no security clearance status could receive such information.

### 3. Implications for Legal Aid Funding

The system of security clearances for lawyers provided by *National Security Information (Civil and Criminal Proceedings) Act 2004* also has implications for persons applying for legal aid funding in Commonwealth matters. Pursuant to the *Commonwealth Legal Aid Guidelines* (March 2008), a legal representative acting for a legally aided person cannot maintain carriage of a matter (where the Attorney-General has issued a relevant a security notification) unless they already have or can quickly apply for a security clearance.<sup>382</sup> If the legal representative does not have or cannot obtain a security clearance, then a Legal Aid Commission can only continue to pay the legal representation for 14 days from the date a security notification was issued. The effect on the legally aided person is to disbar a legal representative from acting for them in proceedings unless that representative is eligible to obtain a national security clearance. This detracts significantly from the guarantee in article 14(3) of the ICCPR that all persons have access to a legal representative of their choosing, and that such representation be provided by the State in cases where the person does not have sufficient means to pay for it.

### 4. Closed court provisions abrogate fair trial rights

The Law Council is concerned that subsection 31(8) of the *NIS Act* restricts the court's discretion to determine whether proceedings should be closed to the public, resulting in a disproportionate restriction on the right to a public trial. The relevant provisions of section 31 provide:

- (7) *The Court must, in deciding what order to make under this section, consider the following matters:*
- (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;*

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<sup>382</sup> *Commonwealth Legal Aid Guidelines* (March 2008) available at <http://www.ag.gov.au/www/agd/rwpattach.nsf> (accessed on 28 August 2008). Guideline No 7 provides:

(2) *In a matter relating to Australia's national security, payment in respect of assistance, under or in accordance with a Grant of Legal Assistance, after the date on which national security notification is given in the matter may only be made in respect of assistance provided by a legal representative if the assistance was provided at a time:*

(a) *no later than 14 days after national security notification was given in the matter; or*  
(b) *when the representative had lodged, and was awaiting the determination of, an application for a security clearance mentioned in:*

- (i) *if the matter is a criminal proceeding — subsection 39 (2) of the NSI Act; or*
- (ii) *if the matter is a civil proceeding — subsection 39A (2) of the NSI Act; or*

(c) *when the representative had been given a security clearance mentioned in subparagraph (b) (i) or (ii) as the case may be.*

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(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 *NIS 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*,<sup>383</sup> it continues to raise questions as to whether such measures constitute a proportionate response, that is the least restrictive means, to protect against the disclosure of security sensitive information.

These concerns are exacerbated by Part 3 of the *NIS Act* which permits the exclusion of a defendant or legal representative from the hearing to determine whether certain information should be banned from disclosure. This offends against the right of the accused to be present at the hearing of matters concerning his or her criminal liability.

Further, the relevant provisions of the Act restrict the defendant's right to access information that may be used against him or her in criminal proceedings. The Attorney-General's certificate bans the disclosure of the information until the court has conducted its closed hearing. This can occur at the beginning of the trial at the earliest. This precludes the use of the information in several important pre-trial steps in the criminal process, including applications for bail, committal hearings and pre-trial disclosure.

While it may be necessary for the court to restrict public access to a hearing in the interest of national security, the Law Council is of the view that restricting a party or their legal representative from examining and making representations to the court about the prosecution's attempts to restrict access to certain information goes beyond that which is necessary in the interests of national security.

### 6.2.3 Law Council Recommendations

1. The Law Council recommends the repeal of the security clearance process contained in section 39 of the Act.
2. If this recommendation is not adopted, the Law Council recommends that section 39 be amended in the following ways:
  - (a) insert a requirement that, prior to the Secretary of the Attorney General's Department issuing a notice requiring a lawyer to undergo a security clearance, the Secretary must first seek the consent of the affected lawyer to the security clearance process;
  - (b) If, on any grounds, the lawyer refuses to submit to the security clearance process, section 39 should then set out a process where the Secretary of the

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<sup>383</sup> 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 [41]-[49], per Spigelman CJ with whom Barr and Price JJ agreed.

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Attorney General's Department makes application to a competent court for an order for a notice to be given to the applicable lawyer.

Under this proposed process, the affected lawyer would be permitted to make submissions during the application. Given the application would not be directly relevant to the substantive proceeding itself, it could be heard in a different court – such as the Federal Court or a State or Territory Supreme Court.

3. Relevant prescribed factors to be considered by the Court during such an application should include:
  - (a) The lawyer's period in active practice without either previous criminal convictions or adverse findings in disciplinary matters sufficient to demonstrate both proven good character and reliability;
  - (b) The lawyer's previous experience in handling such information;
  - (c) The effectiveness of the implied undertaking to only use such information for the purposes of defending an accused in the relevant court proceedings

The onus would rest with the Secretary of the Attorney General's Department to demonstrate the factual basis of his/her objection to the lawyer receiving any such information.

4. The Law Council recommends that the following amendments be made to Part III of the Act:
  - (a) Repeal subsection 31(8) and remove the requirement that the court should give greatest weight to national security rather than an accused person's right to a fair trial;
  - (b) Only allow the court to exclude defendants from closed hearings (for an application for a non-disclosure order) in limited, specified circumstances.
  - (c) Include a provision that requires the court, when making an order to exclude a witness from the proceedings, to be satisfied that the exclusion of the witness would not impair the ability of the defendant to make his or her defence.

## **6.3 Classification of Terrorist Material**

### 6.3.1 What changes were introduced and why?

The *Classification (Publications, Films and Computer Games) Act 1995* (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 is responsible for classifying publications, films and computer games. The Classification 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.

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Prior to 2007, the classification regime provided that material must be refused classification if, amongst other things, it *promotes, incites or instructs in matters of crime or violence*.<sup>384</sup>

In 2007 the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 (Cth)* was introduced, amending 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.<sup>385</sup> In his Second Reading Speech, the then Attorney-General the Hon Mr Ruddock 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.*<sup>386</sup>

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'.<sup>387</sup> 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.<sup>388</sup>

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
- directly or indirectly provides instruction on doing a terrorist act; or
- directly praises doing a terrorist act where there is a 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*.<sup>389</sup>

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.<sup>390</sup>

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<sup>384</sup> See *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* Schedule 1.

<sup>385</sup> See Explanatory Memorandum to *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 (Cth)*.

<sup>386</sup> The Hon Mr Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 21 June 2007, p. 3.

<sup>387</sup> *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* s9A(1).

<sup>388</sup> 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)*.

<sup>389</sup> See s9A(4) *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

<sup>390</sup> See s 9A(3) *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.

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### 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.<sup>391</sup> 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.

#### 1. 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;
- any examples of material which would not be considered to promote, incite or instruct crime or violence but which should be banned on the basis that it advocates the doing of a terrorist act.

The Law Council believes that the test under the pre-existing provisions was already appropriate and sufficient to ensure that materials with a real potential to increase the risk of a terrorist act were denied classification.

For example, the Law Council is of the view that under both the current provisions and the previous provisions *praise* for an act of crime or violence might lead to a refusal to provide classification. However under the previous provisions the critical question would have been *whether the 'praise' was such that it promoted or incited crime or violence*, while under the new regime, the critical question is *whether the 'praise' creates the mere risk that a person (regardless of age or mental impairment) might be influenced to commit a terrorist attack*.

The case of *NSW Council for Civil Liberties Inc v Classification Review Board* provides an example of the scope of the pre-existing classification regime and its ability to respond to terrorist related material.

In November 2006 the Federal Court of Australia 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*.<sup>392</sup> The applicant, the NSW Council for Civil Liberties, contended that the Review Board erroneously applied those provisions of the Act and the National Classification Code which pertain to the making of classification decisions.

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<sup>391</sup> 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 renamed as 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 HREOC to the Attorney-General's Department on the Material that Advocates Terrorist Acts Discussion Paper, (29 May 2007) p. 3.

<sup>392</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108

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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'.<sup>393</sup>

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'.<sup>394</sup> 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'.<sup>395</sup>

In coming to this conclusion, the Review Board specifically referred to section 101.1 of the *Criminal Code* which create an offence of engage in a 'terrorist act'.<sup>396</sup> The Review Board was satisfied that the objective purpose of *Join the Caravan* was to promote and incite actions of precisely this kind.<sup>397</sup>

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'.<sup>398</sup> 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.<sup>399</sup>

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 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 there has been no judicial consideration of the new terrorist-specific provisions in the *Classification Act*, and there is no readily available information indicating that such provisions have been used by the Classification Board.

## 2. Broad and ambiguous nature of amendments

As well as being unnecessary, the breadth and discretionary nature of the 2007 amendments unduly burden public debate in a manner which is incompatible with freedom of expression. This is largely due to the use of ambiguous and imprecise terms and the confusing nature of the tests for refusing classification.

First, 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 risk that such praise might lead a person (regardless of his or her age or any mental impairment) to engage in a terrorist act'.<sup>400</sup>

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<sup>393</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at[3]

<sup>394</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at[12]

<sup>395</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at[12]

<sup>396</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at[15]

<sup>397</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at[15]

<sup>398</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [18].

<sup>399</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at [20].

<sup>400</sup> See *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* s9A(2)

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This appears to require decision makers to consider the lowest societal common denominator when considering how material will be processed, comprehended and acted upon by the public – an almost impossible test to apply.

The Law Council believes that assessing material on the basis of how it *might* be received and understood by the most suggestible members of the community, even where it is not specifically designed to target or play upon their vulnerabilities, creates an unacceptably wide net in which a broad range of material could potentially fall. 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.

Secondly, the lack of precision in the term ‘advocates’ effectively provides the Classification Boards with a broad discretion to determine which material should be banned from the Australian community. The term is defined to include ambiguous and imprecise notions such as ‘counsels or urges doing a terrorist act’, without requiring the actual occurrence or even real risk, that a person would engage in a terrorist act.

The problematic nature of this definition of ‘advocates’ has been noted by the Security Legislation Review Committee and the Senate Legal and Constitutional Affairs Committee in other contexts.<sup>401</sup> Both Committees recommended that, at the very least, paragraph (c) of the definition should be amended to require a *substantial* risk that the material in question might lead someone to engage in terrorism.

The definition of ‘advocates’ was also reviewed by the UN Special Rapporteur who considered the term in the context of proscribing terrorist organisations. The UN Special Rapporteur expressed concern that:

*this definition lacks sufficient precision and has the potential to cover statements which, in a very generalized or abstract way, somehow support, justify or condone terrorism.*<sup>402</sup>

Thirdly, 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.

The new classification provisions provide that 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:

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<sup>401</sup> See Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.6]; Report of Senate Legal and Constitutional Affairs Committee *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* (30 July 2007).

<sup>402</sup> Report of the UN Special Rapporteur 2006 at p. 12.

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1. Repeal the changes introduced to the *Classification Act* by the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*.
  2. If this recommendation is not adopted, amend section 9A as follows:
    - (a) Amend subparagraph 9(A)(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 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 *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 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 *Video Link Evidence Act* explains that the provisions will 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.

The *Video Link Evidence Act* also introduced amendments to 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*
- (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:*

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- (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); or an offence against Part 5.4 of the *Criminal Code* (harming Australians); or an offence against section 24AA or 24AB of the *Crimes Act 1914* (offences against the government).

The Law Council notes that in December 2008 the Commonwealth Government introduced the *Foreign Evidence Amendment Bill 2008*. This Bill is yet to be passed by Parliament. The amendments it proposes concern the admission of foreign business records. It also includes a presumption that foreign testimony complies with the requirements contained in section 22 of the Act.<sup>403</sup> The Bill does not propose to amend sections 15YV or 25A of the *Foreign Evidence Act*.

#### 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 will be admitted in Australian courts.

##### 1. 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*';<sup>404</sup> 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*'.<sup>405</sup>

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.

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<sup>403</sup> For further information see Law Council of Australia submission to Senate Legal and Constitutional Affairs *Inquiry into Foreign Evidence Amendment Bill 2008*, (19 February 2009).

<sup>404</sup> *Crimes Act 1914* (Cth) s15YV(1).

<sup>405</sup> *Crimes Act 1914* (Cth) s15YV(2).

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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 block a defendant from using the same kind of evidence, 'in the interest 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'<sup>406</sup> protected by the fair trial right guarantees in articles 14(1) and 14(3)(e) of the ICCPR.<sup>407</sup> The Law Council is of the view that the 'interests of justice' standard should be common to the courts' ability to refuse applications for evidence via video link from either party.

## 2. 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.*

The new section 25A introduced by the *Video Link Evidence Act* expressly removes the question of foreign evidence in proceedings related to 'designated offences' such as terrorism offences from the reach of section 25.

Under the new 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 is the same narrow standard 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.<sup>408</sup> 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.

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<sup>406</sup> 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.*

<sup>407</sup> This view was shared by a number of groups, including HREOC. 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.

<sup>408</sup> 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.

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#### 6.4.4 Law Council's Recommendations

The Law Council recommends that the Government:

1. 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.
2. Repeal section 25A of the *Foreign Evidence Act*.
3. If recommendation 2 is not adopted, 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.

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## 6. Summary of Key Recommendations

### 6.1 General Recommendations

1. A mechanism for ensuring regular, comprehensive, independent review of all of Australia's terrorism laws should be created. Such a mechanism could take the form of a panel of independent experts with a clear mandate to regularly report to Parliament on the operation, effectiveness, continued necessity and human rights implications of Australia's anti-terrorism laws.

### 6.2 Definition of Terrorist Act and Terrorist-Related Offences

2. Recommended reforms to Part 5.3, Division 100 of the *Criminal Code* (terrorist act offences):
  - (a) Review the definition 'terrorist act' in section 100.1 in light of the findings of the UN Special Rapporteur to ensure that the Australian definition is consistent with internationally accepted definitions of 'terrorist act'.
  - (b) Remove the reference to 'threat of action' and other references to 'threat' from the definition of 'terrorist act' in section 100.1(1).
  - (c) 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 repealing those offences.
  - (d) Repeal Schedule 1 of the *Anti-Terrorism (No1) Act 2005* and re-insert the requirement that 'terrorist act' in sections 101.2, 101.4, 101.5, 101.6 of the *Criminal Code* refer to a specific terrorist act.
3. Recommended reforms to Part 5.3, Division 103 of the *Criminal Code* (financing terrorism):
  - (a) Amend section 103.1 by
    - (i) inserting 'intentionally' after 'the person' in paragraph (a) and removing the note; and
    - (ii) replacing the term 'recklessness' with knowledge in paragraph 103.1(b).
  - (b) Amend section 103.2 by
    - (i) replacing the term 'recklessness' with knowledge in paragraph 103.2(b).
4. Recommended reforms to section 15AA of the *Crimes Act*
  - (a) Repeal section 15AA.
5. Recommended reforms to Part 5.1, Division 80 of the *Criminal Code* (sedition offences):
  - (a) Repeal the sedition offences in Division 80.
  - (b) If the recommendation is not adopted, that the Government:

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- (i) Amend section 80.2 to expressly require that to be guilty of an offence, the person must have intended that the 'urged' force or violence would occur.
  - (ii) Amend section 80.2 to require knowledge to be proven in relation to the physical elements of the offences in section 80.2.
  - (iii) Provide an exemption to the offences in section 80.2 for statements made for journalistic, educational, artistic, scientific, religious or public interest purposes.
  - (iv) Subject the sedition offences in Division 80 to regular, independent review for example review by an appointed panel of independent experts with a clear mandate to review the content and operation of all Australia's anti-terrorism laws, and report regularly to Parliament.

### 6.3 Terrorist Organisations and Related Offences

- 6. Recommended reforms to Part 5.3, Division 102 of the *Criminal Code* (terrorist organisations):
  - (a) Repeal the current procedure for proscribing organisations as terrorist organisations by regulation pursuant to section 102.1(1).
  - (b) If this recommendation is not adopted, amend the proscription process to include the following features:
    - (i) 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;
    - (ii) clear and publicly stated criteria for proscription;
    - (iii) detailed procedures for revocation, including giving a proscribed organisation the right to apply for review of that decision;
    - (iv) 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.
  - (c) Repeal the terrorist organisation offences in Division 102.
  - (d) If this recommendation is not adopted, Division 102 should be amended as follows:
    - (i) repeal the association offence in section 102.8 of the *Criminal Code*;
    - (ii) repeal the membership offence in section 102.3 or, at the very least, amend the definition of 'membership' 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;
    - (iii) amend the offence provisions in sections 102.2, 102.5, 102.6 and 102.7 to require *knowledge* rather than *recklessness* as to whether the organisation was a terrorist organisation.

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## 6.3 Investigation Powers of Law Enforcement and Intelligence Agencies

7. Recommended reforms to Division 3A of Part 1AA of the *Crimes Act* (search and seizure powers):
  - (a) Repeal Division 3A.
  - (b) 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 made under section 3UJ.
8. Recommended reforms to Part 1C of the *Crimes Act* (the dead time provisions):
  - (a) Amend section 23CA to impose a maximum cap on the amount of dead time allowed to be disregarded from the investigation period pursuant to subparagraph 23CA(8)(m). (Currently, section 23CB requires an officer to seek advanced judicial certification of any period to be disregarded from the investigation period pursuant to subparagraph 23CA(m). This certification must include details of the specific time period to be disregarded. This requirement should remain even if a finite limit is placed on the maximum period of time that can be disregarded pursuant to subparagraph 23CA(m).)
  - (b) Amend section 23CB to ensure police only have one opportunity to apply to a judicial officer to declare a specified period as reasonable dead time for the purposes of calculating the investigation period;
  - (c) Amend section 23CB to preclude a judicial officer from adjourning an application made under section 23CB for more than a specified number of hours, or alternatively, amend sub-paragraph 23CA(8)(h) to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must included in the calculation of the investigation period;
  - (d) Amend subsection 23CB(5) to require the investigating official to certify in any application for a period to be declared dead time that he or she is not satisfied that there is sufficient information to support a terrorism charge against that suspect;
  - (e) Amend sections 23CB and 23DA to require that if a suspect is not legally represented when an application is made under section 23CB or section 23DA, the police should be required 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.
  - (f) Subject Part 1C of the *Crimes Act* to regular, independent review, for example review by an appointed panel of independent experts with a clear mandate to review the content, operation and effectiveness of all of Australia's anti-terrorism measures, including the dead time provisions.
9. Recommended reforms to Divisions 104 and 105 of the *Criminal Code* (control orders and preventative detention orders):
  - (a) Repeal Divisions 104 and 105.
  - (b) If this recommendation is not adopted, ensure that amendments are made to:

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- (i) prescribe a maximum period for which a person can be held under successive continued preventative detention orders in Division 105 (preferably 28 days).
  - (ii) ensure a person who is the subject of control order or preventative detention is provided with all the information and evidence that forms the basis of the application for such order, or at the very least, that the court should be empowered to exercise discretion in this regard;
  - (iii) ensure a person subject to a preventative detention order is entitled to attend an application hearing and present his or her case;
  - (iv) 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;
  - (v) 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*;
  - (vi) appoint an independent body such as a Public Interest Monitor (PIM) with access to all material upon which an application for control orders and/or preventative detention orders is based;
  - (vii) appoint an independent reviewer or a panel of independent reviewers with a clear mandate to review all of Australia's anti-terrorism measures, including the control order and preventative detention order regime, and report regularly to Parliament on their in continued necessity and effective operation.
10. Recommended reforms to Division 3 of the *ASIO Act 1979* (questioning and detention powers):
- (a) Repeal Division III of the *ASIO Act* and replace it with an alternative approach to gathering information about terrorist-related and other serious offences.
  - (b) Such an alternative approach should accord with well recognised criminal investigation procedures (for example, the compulsory questioning regime of the Australian Crime Commission) and contain the following features:
    - (i) questioning should be limited to a defined period of four hours with a four hour extension;
    - (ii) any further extension beyond this should require judicial approval from the authority issuing the warrant for questioning; and
    - (iii) a person being questioned should be entitled to legal representation during the process.
  - (c) If these recommendations are not adopted, the Law Council recommends the introduction of the following safeguards into Division 3 of the *ASIO Act*.
    - (i) limit the types of offence for which evidence can be gathered under a warrant;

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- (ii) ensure the person the subject of a Division 3 warrant is informed at the time of arrest of the reasons for the warrant being issued, including information specifying the grounds for issuing the warrant;
  - (iii) ensure all persons the subject of a Division 3 warrant have access to a lawyer of their choice. That access should not be subject to limitation by the officer exercising authority under the warrant;
  - (iv) ensure a legal adviser of the person's choice is entitled to be present during the entire questioning process;
  - (v) ensure persons detained or questioned are entitled to make representations through their lawyer to the prescribed authority;
  - (vi) recognise that all communications between a lawyer and his or client are confidential and provide adequate facilities to ensure the confidentiality of communications between lawyer and client;
  - (vii) limit the period of detention under a questioning and detention warrant to a single period incapable of extension; and
  - (viii) amend section 34L 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.
- (d) Publicise 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.
11. Recommended reforms to the *NIS Act* (security clearances and closed court proceedings):
- (a) Repeal of the security clearance process contained in section 39 of the Act.
  - (b) If this recommendation is not adopted amend section 39 in the following ways:
    - (i) insert a requirement that, prior to the Secretary of the Attorney General's Department issuing a notice requiring a lawyer to undergo a security clearance, the Secretary must first seek the consent of the affected lawyer to the security clearance process;
    - (ii) If, on any grounds, the lawyer refuses to submit to the security clearance process, section 39 should then set out a process where the Secretary of the Attorney General's Department makes application to a competent court for an order for a notice to be given to the applicable lawyer.
- Under this proposed process, the affected lawyer would be permitted to make submissions during the application. Given the application would not be directly relevant to the substantive proceeding itself, it could be heard in a different court – such as the Federal Court or a State or Territory Supreme Court.
- (c) Relevant prescribed factors to be considered by the Court during such an application should include:

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- (i) The lawyer's period in active practice without either previous criminal convictions or adverse findings in disciplinary matters sufficient to demonstrate both proven good character and reliability;
  - (ii) The lawyer's previous experience in handling such information;
  - (iii) The effectiveness of the implied undertaking to only use such information for the purposes of defending an accused in the relevant court proceedings

The onus would rest with the Secretary of the Attorney General's Department to demonstrate the factual basis of his/her objection to the lawyer receiving any such information.

- (d) Repeal subsection 31(8) and remove the requirement that the court should give greatest weight to national security rather than an accused person's right to a fair trial;
- (e) Only allow the court to exclude defendants from closed hearings (for an application for a non-disclosure order) in limited, specified circumstances.

12. Recommended reforms to the *Classification Act* (classification of terrorist material):

- (a) Repeal the changes introduced to the *Classification Act* by the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*.
- (b) If this recommendation is not adopted, adopt the following changes to the existing provisions of the *Classification Act*:
  - (i) amend subparagraph 9(A)(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'.
  - (ii) amend the definition of 'advocates' by deleting the words 'or indirectly' from subsection 9A(2)(a) and (b) and deleting subsection 9A(2)(c) which deals with praise of terrorist acts.

13. Recommended reforms to section 15YV of the *Crimes Act* (use of video evidence):

- (a) Amend section 15YV of the *Crimes Act* to include:
  - (i) the use of a single standard governing the courts' discretion to allow evidence via video link – regardless of which party makes the application, and
  - (ii) 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.

14. Recommended reforms to the *Foreign Evidence Act* (use of foreign evidence):

- (a) Repeal section 25A.
- (b) If this recommendation is not adopted, enact an express ground for the court to refuse an application for use of foreign evidence where the court is not

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satisfied that the evidence in question was not obtained through the use of torture or inhuman and degrading treatment.

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## **Attachment A Profile Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- 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 of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

## Attachment B Relevant Law Council Submissions

Date	To	Title
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
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
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	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
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

Date	To	Title
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
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
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")
17 November 2006	Senate Legal and Constitutional Affairs Committee	Anti-Money Laundering and Counter-Terrorism Financing Bill 2006
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

Date	To	Title
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
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)
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.