Anti-Terrorism Laws Reform Bill

Senate Committee on Legal and Constitutional Affairs

August 2009

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Introduction

The Law Council is pleased to provide the following submission to the Senate Committee on Legal and Constitutional Affairs' Inquiry into the provisions of the *Anti-Terrorism Laws Reform Bill 2009* ('the Bill').

The Bill is a private members Bill introduced into the Senate by Senator Ludlam on 23 June 2009. In the Second Reading Speech, Senator Ludlam explained the purpose of the Bill as follows:

> *The purpose of this bill is to identify those laws and provisions [of Australia's anti-terrorism laws] that are so extreme, so repugnant, redundant or otherwise inappropriate that they should be abolished and don't even deserve the dignity of being subject to review by the long-awaited independent reviewer of terrorism laws.*[1]

The Bill seeks to amend:

(a) provisions in the *Criminal Code 1995* related to the definition of a terrorist act, the proscription of terrorist organisations, the offence of sedition, offences relating to interaction with terrorist organisations and the offence of reckless possession of a thing;

(b) provisions in the *Crimes Act 1914* relating to the detention of suspects; and

(c) provisions in the *Australian Security Information Organisation Act 1979* relating to the questioning and detention of terrorism suspects.

The Bill also seeks to repeal the *National Security Information Act 2004*.

Many of the amendments proposed in the Bill reflect recommendations for reform which the Law Council has made in previous submissions to this Committee, independent review bodies and other Parliamentary Committees tasked with evaluating Australia's anti-terrorism laws.[2] The Law Council supports those amendments accordingly.

The Law Council notes that shortly after this Bill was introduced, the Commonwealth Government introduced the *National Security Legislation Monitor Bill 2009* (NSLM Bill) into Parliament. The NSLM Bill seeks to establish an independent body, in the form of a National Security Legislation Monitor, to review Australia's anti-terrorism laws. The Law Council has welcomed the introduction of the NSLM Bill and has made a submission on its content to the Senate Committee on Finance and Administration.

However, the introduction of a National Security Legislation Monitor need not postpone the types of changes proposed in this Bill. The Law Council is of the view that while independent, comprehensive and regular review of Australia's anti-terror laws is urgently needed, so too are legislative reforms which address those aspects of the current laws that have already been identified as ineffective, unnecessary or inconsistent with established human rights principles. For this reason, the Law Council agrees with the rationale for introducing the Bill at this time.

The Law Council also notes that, since the introduction of this Bill, the Commonwealth Government has released a lengthy National Security Legislation Discussion Paper

[1] Senator Scott Ludlam, Second Reading Speech, Anti-Terrorism Reform Bill 2009

[2] The Law Council has prepared a document consolidating its advocacy in the area of anti-terrorism laws, which contains a list of recommendations for reform. See Law Council of Australia, *Anti-Terrorism Reform Project* available a http://www.lawcouncil.asn.au/initiatives/anti-terrorism_reform.cfm.

outlining its own proposed changes to Australia's anti-terror law. The Law Council also intends to make a submission in response to that Discussion Paper.

Amendments to the *Criminal Code Act 1995* (Cth)

Sedition offences

Item 1 of Bill seeks to repeal section 80.2 of the *Criminal Code*. This section currently contains the offences known as 'sedition offences'.

Law Council Response

The Law Council supports the repeal of the sedition offences in the Criminal Code.

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

The type of ancillary criminal conduct which the sedition offences seek to target is already adequately addressed by those sections of the *Criminal Code* which make it an offence to incite, conspire in, aid, abet, counsel or procure the commission of an offence.[3] For example, under subsection 11.4(1) of the *Criminal Code* a person who urges the commission of an offence, such as a person who urges another to commit or prepare for a terrorist act, is guilty of the offence of incitement.

To date no one has been prosecuted for sedition under Division 80 of the *Criminal Code.* This supports the assertion that the sedition offences in Division 80 serve no useful purpose.

The Law Council is concerned that, in addition to being unnecessary, the sedition offences in Division 80 are broadly drafted and rely on undefined and unqualified terms such as "assist" and "urge". The result is that the precise scope of the conduct captured by offence provisions is uncertain.

In the circumstances, the provisions have the potential to unduly burden freedom of expression and may have the effect of chilling legitimate political dissent.[4] In that respect the provisions would appear to be contrary to article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).

The availability of a 'good faith defence' to the sedition charges does not allay these concerns. The fact that a court may ultimately find, after charges have been laid and a prosecution commenced, that the particular conduct falls within the limited 'good faith' exception, does not diminish the fear of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the sedition offences.

[3] *Criminal Code Act 1995* (Cth) Part 2.4 -- Extensions of criminal responsibility.

[4] 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.

Definition of 'terrorist act'

The Bill seeks to repeal the current definition of 'terrorist act' in subsection 100.1(1) of the *Criminal Code* and replace it with the following:

terrorist act *means an action where:*

(d) the action falls within subsection (2) and does not fall within subsection (3) or subsection (3A); and

(e) the action is done with the intention of:

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

(ii) intimidating the public or a section of the public.

The Bill also seeks to repeal the existing subsections 100.1(2) and (3) and replace them with the following:

(2) Action falls within this subsection if it:

(a) causes a person's death; or

(b) endangers a person's life, other than the person taking the action; or

(c) causes serious harm that is physical harm to a person; or

(d) involves taking a person hostage; or

(e) creates a serious risk to the health or safety of the public or a section of the public.

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to involve taking a person hostage.

(3A) Action falls within this subsection if it takes place in the context of, and is associated with, an armed conflict (whether or not an international armed conflict).

(3B) For the purposes of this Division:

armed conflict *has the same meaning it has in Division 268.*

take a person hostage *means:*

(a) to seize or detain that person; and

(b) to threaten to kill, to injure, or to continue to detain, that person.

Law Council Response

The Law Council supports an amendment to the definition of "terrorist act" in s100.1 of the *Criminal Code* to the extent that it is required to:

- remove any reference to 'threat of action' in the definition of a "terrorist act"; and
- bring the definition in line with internationally accepted definitions of terrorism.

The meaning of "terrorist act" in the *Criminal Code* is central to Australia's anti-terror laws. It is pivotal to the definition of a terrorist organisation and the majority of terrorism offences. As a result, it also determines when a range of investigative and law enforcement powers are enlivened.

Since its introduction, the Law Council has considered the definition of 'terrorist act' to be problematic.[5] This view has been shared by a number of national and international review bodies,[6] as well as by members of the judiciary writing extra-judicially.[7]

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'.[8] 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 from doing any act (irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature).[9]

[5] 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).

[6] 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'); PJCIS Review 2006 [5.30]

[7] 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

[8] Report of UN Special Rapporteur 2006 at [7].

[9] 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.

The Law Council is of the view that the Australian definition of terrorist act in section 100.1 of the *Criminal Code* is broader than this internationally accepted definition.

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, the Australian definition includes *threats* of action, as well as completed acts. This not only inappropriately broadens the definition but, because of the interaction between s100.1(1) and s100.1(2), also renders the definition, in part, unintelligible.

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 section 100.1 of the *Criminal Code* oversteps the Security Council's characterisation of the term.[10] 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.[11]

The UN Human Rights Committee has also raised concerns with the definition, noting 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".[12]

Repeal of offence of possession of things connected with terrorist acts.

Item 5 of the Bill repeals section 101.4 of the *Criminal Code*. This section contains the offence of possession of a thing connected with terrorist acts.

Law Council Response

The Law Council has long called for the Government to review the necessity and effectiveness of the offences set out in sections 101.4, 101.5 and 101.6 of the *Criminal Code* and to consider repealing those offences.

The offences contained in each of those sections can be described as preventative in nature. They relate to preparatory acts and may be triggered well before any criminal intent has crystallised into an attempt or conspiracy to carry out an act of terrorism.

The offences relate to 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 they are done in connection with preparation for a terrorist act, regardless of whether any terrorist act actually occurs.[13] Further, following amendments

[10] Report of UN Special Rapporteur 2006 at [15].
[11] Report of UN Special Rapporteur 2006 at [16].
[12] 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].
[13] 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 a terrorist act and s101.6 makes it an offence to do another act in preparation for or planning a terrorist act.

to the *Criminal Code* in 2005, these preliminary acts can become an offence regardless of whether they are related to any specific terrorist act.[14]

These types of offences, which expose a person to sanction for actions undertaken before he or she has formed any definite plan to commit a criminal act, represent a departure from the ordinary principles of criminal law. As Chief Justice Spigelman observed in *Lodhi v The Queen*:

> *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 …* [15]

This extension of criminal responsibility to cover preparatory acts requires prosecutorial and law enforcement authorities to exercise a considerable degree of discretion when determining whether an otherwise legal act will be labelled criminal by virtue of its alleged "connection with the preparation for, the engagement of a person in, or assistance in a terrorist act'."

This broad prosecutorial discretion is further extended by the ambiguity of key terms in the offence provisions (such as 'thing', 'preparation' and 'assistance'), and the problems discussed above with respect to the definition of 'terrorist act'.

Some may argue that it is necessary to have widely drafted terrorism offences on the statute books so that law enforcement agencies have the room and flexibility to take a proactive and preventative approach. It is often assumed that no harm will ensue because ultimately the authorities are unlikely to resort to the terrorism provisions without evidence of a threat of the most serious nature. However, the Law Council believes that poorly defined, overly broad offence provisions can never be justified on the basis that, despite their potentially wide application, they are only intended to be utilised by the authorities in the most limited and serious of circumstances. 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.[16]

Proscribing a terrorist organisation

Items 8-10 seek to amend the procedure for proscribing a terrorist organisation currently contained in section 102.1 of the Code.

The amendments would repeal subsection 102.1(2) and insert new subsections 102.1(1AA)-(2AE), as well as a new subsection 102.1AA.

These new provisions would provide that:

[14] 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.*

[15] *Lodhi v The Queen* [2006] NSWCCA 121 at [66].

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

- an organisation that is notified that it is to be specified by regulation as a terrorist organisation has the right to oppose the proposed listing by applying to the Minister in the prescribed form (proposed s102.1(1AA);

- before making a regulation listing an organisation as a terrorist organisation the Minister must ensure that the organisation is notified of the proposed listing, and are notified of their right to oppose the listing (proposed s102.1(2)(a)-(b));

- before making a regulation listing an organisation as a terrorist organisation, the Minister must be satisfied on reasonable grounds that the organisation is (a) directly or indirectly engaged in, preparing, planning or assisting in 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) (proposed s102.1(2)(d));

- when making decision to list an organisation as a terrorist organisation, the Minister must seek advice from the Advisory Committee and take into account the recommendation of the Advisory Committee (proposed s102.1(SAA);

- once the Governor General has made a regulation listing an organisation, the Minister must ensure that the organisation is notified of the listing and the consequences of that listing, and that the listing is published on the internet, daily newspapers, the Gazette and in any other way required by regulation (proposed s102.1(2AB)); and

- a notice under proposed subsection 102.1(2AB) must also state that the decision to list a organisation can be reviewed by the Administrative Appeals Tribunal (AAT) and provide details as to the time in which an application for review may be made and by whom (proposed s102.1(2AE).

Proposed section 102.1AA will provide that an application may be made to the AAT for a review of a decision to list an organisation, and that regulations must provide for the procedures to be followed in such a review.

Proposed section 102.1AB establishes a Listing Advisory Committee to provide advice to the Minster when listing organisations as terrorist organisations. This Committee would comprise of at last five members, each to be appointed by the Minister in writing.[17] When appointing persons to the Committee, the Minister must be satisfied that the person has knowledge of or experience in either: human or civil rights, security analysis, public affairs, public administration, legal practice or a field specified in the regulations. [18]

Proposed section 102.1AC describes the functions of the Advisory Committee as follows:

- to advise the Minister on any proposed listing of an organisation; and

- to consider any application made to the Minister opposing the proposed listing of an organisation and make recommendation to the Minister as a result of its consideration.

[17] Proposed s102.1AB(2)-(3) of the *Criminal Code.*
[18] Proposed s102.1AB(6) of the *Criminal Code.*

When carrying out these functions, the Advisory Committee may engage in public consultations and call for submissions.[19] The Advisory Committee may also publicise its role.

Law Council Response

The Law Council supports the proposed amendments to the proscription process to the extent that they are designed to introduce greater transparency and to provide an opportunity for affected parties to be heard prior to proscription.

However, the Law Council submits that the proposed amendments do not go far enough to address the deficiencies with the current proscription process.

The Law Council's concerns with the proscription process have been raised in a number of forums[20].

The Law Council opposed the enactment of the listing provisions when they were introduced in their current form in March 2004. The basis of that opposition was the view that the Executive should not be empowered to declare that an organisation is a proscribed organisation without:

(a) prior judicial review and authorisation of the exercise of the power; and

(b) the opportunity for affected citizens to be heard.

The Law Council maintains its objections to the listing provisions on that basis.

Further, having now observed the listing provisions in operation for several years, the Law Council questions whether the provisions actually serve any intrinsic law enforcement purpose. Any attempt to understand the law enforcement rationale behind how and when organisations are identified for proscription is frustrated by the opaque and ad hoc manner in which the proscription power has been exercised.

The Law Council's concerns with the proscription process can be summarised as follows:

Lack of Transparency

On the basis of the broad definition of a terrorist organisation contained in section 102.1(2), a considerable number of organisations across the globe are potentially eligible for proscription. Nonetheless, at the time of writing only 17 organisations were listed.[21] 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.

[19] Proposed s102.1AC(2) of the *Criminal Code.*

[20] 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).

[21] 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.

There are no publicly available, clear criteria to explain how organisations are chosen and evaluated for listing as a terrorist organisations. This adds to the lack of transparency and accountability in the proscription process.

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*.

Denial of Natural Justice and inadequate avenues for revue

A further problem with the operation of the current proscription regime is that it does not afford affected parties the opportunity to be heard prior to a listing and provides inadequate avenues for review post listing.

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 Parliamentary Joint Committee on Intelligence and Security (PJCIS) which has, when reviewing the listing of terrorist organisations, 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.[22]

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, 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.[23] 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.[24]

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[22] 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

[23] 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).

[24] 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

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

Advocacy as a Basis for Listing

Subsection 102.1(2)(b) of the Criminal Code was inserted by the *Anti-terrorism Act (No 2) 2005* (Cth) and permits the Attorney-General to list an organisation if satisfied that the organisation "advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)." Section 102.1(1A) explains that 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).

The Law Council submits that power to proscribe an organisation on the basis of advocacy alone is unjustified and unnecessary.

The Law Council is not opposed to laws which criminalise incitement to violence or other criminal acts. However, the Law Council submits that s102.1(2)(b) and s102.1(1A) extend well beyond criminalising incitement. At their broadest, those provisions potentially criminalise the activities of a broad group of people who are not directly or indirectly supportive of acts of terrorism but are merely associated with someone who, although not engaged in the planning or execution of terrorist acts, has expressed encouragement for such conduct.

If it can not be demonstrated that an organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur) then the organisation should not be outlawed as a terrorist organisation and its members exposed to serious criminal penalties.

The Government has agued that the provision allowing advocacy as a basis for proscription is aimed at "early intervention and prevention of terrorism."[25] The Law Council submits that disproportionate restraints on freedom of association and speech will not achieve this aim and, in fact, are likely to prove counter-productive. The members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although 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.

Without s 102.1(2)(b), the Executive is already empowered to prosecute an individual for inciting violence and for a range of terrorist related offences. Without s 102.1(2)(b) the Executive is already empowered to proscribe any organisation which is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). The Law Council believes

Islamic Jihad (PIJ) as a Terrorist Organisation under the *Criminal Code Amendment Act* 2004', Tabled 16 June 2004.

[25] Australian Government submission to the PJCIS review of security and counter-terrorism legislation, p.6

that any further power risks the unjustified curtailment of the rights of Australians to freedom of speech and association.

A further problem with subsection 102.1(1A) is that it does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole. According to the explanatory memorandum 'advocacy' may include "all types of communications, commentary and conduct'. The Law Council is concerned that the listing provisions fail to precisely identify:

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

If the provision is to remain, the Law Council submits that the uncertainty over when responsibility for 'advocacy' is transferred from an individual to an organisation for the purposes of listing must be clarified.

On the basis of the Law Council concerns with section 102.1 outlined above, the Law Council recommends the following amendments:

- Repeal the current procedure for proscribing organisations as terrorist organisations by regulation pursuant to section 102.1(1).

- 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 to 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.

Training a terrorist organisation or receiving training from a terrorist organisation

Item 10 of the Bill would repeal the existing section 102.5 of the *Criminal Code* which contains the offences of training a terrorist organisation or receiving training from a terrorist organisation.

The Bill would replace this section with a new section 102.5 which would contain the following two offences:

(1) A person commits an offence if:

(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

(2) A person commits an offence if:

(a) the person intentionally provides training to, or intentionally receives training from, an organisation; and

(b) the organisation is a terrorist organisation; and

(c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

Law Council Response

The Law Council concurs with the need to amend section 102.5, which is unclear and unworkable in its current form.

However, the Law Council is of the view that the section should require *knowledge* rather than *recklessness* as to whether the organisation was a terrorist organisation, and therefore submits that sub-section 102.5(2) should be repealed, rather than amended as suggested.

Providing support to a terrorist organisation

Item 11 of the Bill amends section 102.7 of the *Criminal Code* which contains offences relating to providing support to a terrorist organisation.

The Bill would amend section 102.7 as follows (with amendments in bold)

(1) A person commits an offence if:

(a) the person intentionally provides to an organisation ***material*** *support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in this Division; and*

(aa) the person intends that the material support or resources provided will be used by the organisation to engage in such an activity;

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

(2) A person commits an offence if:

(a) the person intentionally provides to an organisation ***material*** *support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in this Division; and*

(aa) the person is reckless as to whether the material support or resources provided will be used by the organisation to engage in such an activity;

(b) the organisation is a terrorist organisation; and

(c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

(3) In this section:

material support does not include the mere publication of views that appear to be favourable to an organisation or its objectives.

Law Council Response

The Law Council notes that the Clarke Inquiry into the handling of the Haneef Case considered the interpretation of section 102.7 of the *Criminal Code* and found that it was highly confusing and created a risk of judicial error.[26] Mr Clarke expressed particular concern about the difficulties which would be encountered when attempting to direct juries as to the correct physical and mental elements of the offence and recommended that section 102.7 of the *Criminal Code* be amended to remove these uncertainties.[27]

The Law Council submits that 102.7 should be repealed.

However, if the section is to remain, the Law Council supports an amendment to the section designed to clarify that the assistance provided must be 'material' assistance and, at the very least, more than the mere publication of views that appear to be favourable to an organisation or its objectives.

As above, the Law Council is of the view that the section should require *knowledge* rather than *recklessness* as to whether the organisation was a terrorist organisation.

Associating with a terrorist organisation

Item 16 of the Bill repeals section 102.8 of the *Criminal Code* which contains the offence of associating with a terrorist organisation.

Law Council Response

[26] The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008. p.260.
[27] Ibid.

The Law Council supports the proposal to repeal this section.

Under section 102.8 of the *Criminal Code* 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. [28] 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.

The Law Council submits that 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 this is unnecessary because existing principles of accessorial liability already provide for an expansion of criminal responsibility to cover attempts, 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.

When reviewing the association offence in section 102.8 the Security Legislation Review Committee concluded:

> *The breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions, has led the SLRC to conclude that considerable difficulties surround its practical application. Some of these difficulties include the offences' potential capture of a wide-range of legitimate activities, such as some social and religious festivals and gatherings and the provision of legal advice and legal representation. Further, the section is likely to result in significant prosecutorial complications.* [29]

The Law Council shares the view of the Security Legislative Review Committee. The Law Council submits that the association offence is neither a necessary nor proportionate means of preventing terrorist activity in Australia. The elements of the association offence are so difficult to define and the scope of the offence so broad that it applies indiscriminately to large sections of the community without any clear justification.

The exemptions in sub-sections 102.8(4) and 102.8(6) do not allay these concerns.

For example, the 'assurance' offered by 102.8(6), namely that the offence does not apply to the extent (if any) that it would infringe the constitutional doctrine of freedom of political communication, offers little practical guidance as to the limits of the offence. The sub-section appears to suggest that the offence provision could be applied in a manner which breaches the implied freedom and that the actual ambit of the offence can only be determined by challenging its constitutionality. [30]

[28] *Criminal Code (Cth)* s102.8(2).
[29] Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at para [10.75].
[30] Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at para [10.66].

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

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, but it may generate sufficient interest on the part of law enforcement authorities to support an application for a search warrant, a telephone interception warrant, other surveillance measures and even arrest and detention.

Amendments to the Crimes Act

Schedule 2 of the Bill contains amendments to the *Crimes Act 1914* (Cth).

Repeal of section 15AA

Item 1 of the Bill would repeal section 15AA of the *Crimes Act,* which provides that a bail authority must not grant bail to a defendant charged with or convicted of a terrorism offence[31] (and certain other offences listed in section 15AA(2)) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

Law Council Response

The Law Council supports the proposal to repeal this section.

The Law Council objected when section 15AA was inserted into the Crimes Act on the basis that the Australian Government had 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

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 were 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.

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

[31] Pursuant to s3 of the *Crimes Act,* a 'terrorism offence' means:
(a) an offence against Subdivision A of Division 72 of the *Criminal Code*; or
(b) an offence against Part 5.3 of the *Criminal Code*.

bail can jeoapardise the fair trial rights of the accused, including the right to be tried without undue delay.[32]

The issue of whether lengthy delay between arrest and trial can amount to exceptional circumstance has attracted judicial consideration. For example, in *R v Vinayagamoorthy & Yathavan*[33] 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 of 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..*[34]

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.[35]

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.* [36]

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,*

[32] This right is protected by article 14(3)(c) of the *International Covenant of Civil and Political Rights* ('ICCPR').
[33] 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].
[34] *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* (2007) 212 FLR 326 at [19]-[20].
[35] *Application for Bail by Shane Kent* [2008] VSC 431 at [13]
[36] *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.

> *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.*[37]

A similar result followed an application for bail by co-accused Shoue Hammoud[38] and Amer Haddara.[39]

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 United Nations Human Rights Committee (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.[40]

The 'dead time' provisions in Part 1C

Items 2-7 of Schedule 2 of the Bill amend the provisions relating to the detention of terrorist suspects prior to charge currently contained in Part 1C of the *Crimes Act.*

Item 2 would insert a new section 23BA into Part 1C, which would provide that a person who is detained under this Division must be informed of his or her rights.

Item 4 would repeal paragraph 23CA(8)(m).

Item 7 would repeal subsection 23DA(2), which provides that when an investigating official is applying for an extension of the investigation period, he or she must make such an application to a magistrate, or if a magistrate cannot be found to a judge of the peace.

Item 7 would replace this subsection with the requirement that an application to extend the investigation period be made to a judge of the Federal Court.

Law Council Response

The Law Council raised concerns about these provisions of Part 1C of the *Crimes Act* when they were introduced in 2004.[41]

In 2007, the Haneef case confirmed the validity of the Law Council's concerns, which can be summarised as follows:

- Indefinite detention without charge

[37] *Application for bail by Ezzit Raad* [2007] VSC 330 at [6].
[38] *Hammoud v DPP* [2006] VSC 516
[39] *Application for Bail by Amer Haddara* [2006] VSC 8.
[40] 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].
[41] See Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill 2004* (26 April 2004).

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.

The time taken to make and dispose of a dead time applications 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.

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.[42]

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'.[43] 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. [44]

[42] 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.

[43] The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p.252.

[44] The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p. 251-253.

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.

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 to 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.* [45]

- Insufficient protection of suspect's right to be heard

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. For example, if a person is not yet legally represented he or she 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 that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.

- Judicial oversight

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 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*." [46]

[45] The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p. 249.
[46] The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008, p. 252.

Despite these concerns, the Law Council has not advocated for the repeal of section 23CA(8)(m) as is proposed in the Bill.

Instead the Law Council recommends the following changes to the relevant provisions:

- 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));

- 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;

- 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 be included in the calculation of the investigation period;

- 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;

- Amend section 23CB to require that applications must be made to a Supreme Court Judge, or at least a judicial officer, rather than permitting such applications to be determined by a justice of the peace or bail justice; and

- Subject Part IC of the *Crimes Act* to regular, independent review, for example review by an independent reviewer with a clear mandate to review the content, operation and effectiveness of all of Australia's anti-terrorism measures, including the dead time provisions.[47]

Amendments to the ASIO Act

Questioning and Detention Powers

Schedule 3 of the Bill contains amendments to the questioning and detention powers vested in the Australian Security and Intelligence Organisation (ASIO) under Part 3 Division 3 of the *Australian Security and Intelligence Organisation Act 1979* (Cth) ('the ASIO Act').

[47] 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).

Item 2 would insert new paragraphs 34F(6)(c) and (d) into the Division. Section 34F deals with the procedure for requesting a questioning and detention warrant. Subsection 34F(6) currently provides that if the person has already been detained under an earlier questioning and detention warrant, the Minister must take this into account when deciding whether to consent to a request for a further warrant. The Minister must only consent if he is she is satisfied that the result is justified by information that is additional or materially different to that provided at the time the earlier warrants were issued.

The new paragraphs would add the additional requirement that the Minister be satisfied that the offence to which the warrant is sought was committed after the end of the person's period of detention for the first arrest or arose in different circumstances to those of the offence to which the earlier warrant relate. [48] The Minister must also be satisfied that any questioning of the person under the proposed warrant does not relate to the offence to which any earlier warrant relates or the circumstances in which such an offence was committed.[49]

Item 5 of the Bill amends existing subsection 34G(4) of the ASIO Act. This subsection describes the period for which a person may be detained under a questioning and detention warrant authorised pursuant to section 34G. Paragraph 34G(4) currently provides that the maximum period of detention permitted by the warrant is 168 hours starting when the person was first brought before a prescribed authority under the warrant.

The proposed amendments would change this maximum period to 24 hours.

A related amendment is proposed for section 34S which currently provides that a person cannot be detained for more than 168 hours continuously. This would be amended to cap the maximum time period of detention at 24 hours.

Item 6 of the Bill would repeal subsection 34K(10) which currently provides that 'a person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention'.

Item 8 of the Bill repeals section 34ZP, which currently permits the questioning of a person under a warrant issued under this Division in the absence of a lawyer of the person's choice.

Item 9 of the Bill repeals section 34ZR, which currently permits a prescribed authority to remove a person's parent or other representative from the place where questioning is occurring, if the authority considers the representative's conduct is unduly disrupting questioning of the subject.

Item 10 of the Bill repeals subsection 34ZS(2) which makes it an offence to disclose information relating to the issue of a warrant under the Division within two years after the expiry of the warrant.

Item 11 of the Bill repeals subsection 34ZT which currently permits regulations to be made that prohibit or regulate access to information by lawyers acting for a person in connection with proceedings for a remedy relating to a warrant issued under this Division or the treatment of the person in connection with such a warrant.

[48] Proposed s35F(6)(c) of the *ASIO Act.*
[49] Proposed s35F(6)(d) of the *ASIO Act.*

Law Council Response

The Law Council supports the proposed amendments in so far as they seek to improve access to a detainee's legal representative of choice and to limit the time that a person may be detained under Division 3 of the *ASIO Act*.

However, the Law Council recommends that Division III of the *ASIO Act* should be repealed in its entirety and replaced with an alternative approach to gathering information about terrorist-related and other serious offences.

Such an alternative approach should accord with other recognised criminal investigation procedures (for example, the compulsory questioning regime of the Australian Crime Commission)[50] and contain the following features:

(e) questioning should be limited to a defined period of four hours with a four hour extension;

(f) any further extension beyond this should require judicial approval from the authority issuing the warrant for questioning; and

(g) a person being questioned should be entitled to legal representation during the process.

If these recommendations are not adopted and the current questioning and detention regime is retained, the Law Council recommends the introduction of the following safeguards into Division 3 of the *ASIO Act*:

(h) the types of offence for which evidence can be gathered under a warrant should be limited;

(i) 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;

(j) 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;

(k) a legal adviser of the person's choice should be entitled to be present during the entire questioning process;

(l) persons detained or questioned should be entitled to make representations through their lawyer to the prescribed authority;

(m) 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;

(n) the period of detention under a questioning and detention warrant should be a single period incapable of extension; and

(o) 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.

[50] 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.

Amendments to the National Security Information Act

Schedule 4 of the Bill repeals the whole of the *National Security Information (Criminal and Civil Proceedings) Act 2004.*

Law Council Response

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. [51]

Security Clearances for lawyers

In the view of the Law Council, the security clearance system for lawyers which is prescribed in 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. For example, 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 security notification) unless they already have or can quickly apply for a security clearance.[52] 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. 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.

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 undermined.

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[51] 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).

[52] *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.

Criminal defence lawyers were well used to dealing with confidential information in a variety of circumstances prior to the emergence of the *NSI Act*. No evidence was provided by the Government to indicate that, in the experience of courts or disciplinary tribunals, lawyers frequently or infrequently breached requirements of confidentiality imposed either by agreement or by the Courts.

In the absence of a plausible justification for the security clearance system, the perception arises that the primary purpose of the system is to provide the executive arm of government with the ability to select the legal representatives permitted to appear in matters involving classified or security sensitive information.

Closed court provisions

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;*
>
> *(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*,[53] concerns persists that it is not a proportionate response, that is the least restrictive means available, to address the risk that information may be released which compromises national security.

These concerns are exacerbated by Part 3 of the *NIS Act* which permits the exclusion of a defendant or legal representative from a hearing to determine whether the disclosure of

[53] 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.

certain information should be prohibited. 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 prohibits 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.

Despite these concerns, the Law Council has not advocated for the repeal of the *NIS Act* as is proposed in the Bill.

Instead the Law Council recommends the following amendments to the Act:

- The repeal of the security clearance process contained in section 39 of the Act.
- If this recommendation is not adopted, the Law Council recommends that section 39 be amended so as to give the Court a greater role in both determining whether a notice should be issued and reviewing a decision to refuse a legal representative a security clearance.

  One way in which the Law Council has proposed this could be achieved is:

  (a) the Secretary should be obliged to apply to a court for leave to give a notice to a legal representative under s.39 of the Act;

  (b) the application should be supported by affidavit(s) that set out the basis for the Secretary's contention that before or during a proceeding an issue is likely to arise relating to a disclosure of information in the proceeding that is likely to prejudice national security;

  (c) the application by the Secretary should be made *ex parte* and *in camera.* This would allow the court to assess properly the nature of the information which was said to prejudice national security, without that information otherwise being disclosed;

  (d) the court should give leave to the Secretary to issue the notice if the Secretary established a *prima facie* case that an issue was likely to arise relating to a disclosure of information in the proceeding that was likely to prejudice national security.

  (e) a legal representative who receives an adverse decision with respect to his or her application for a security clearance should have a right of appeal against that decision;

  (f) the right of appeal should be expressly set out in the Act;

(g) in the appeal the Attorney-General should have the burden of establishing on the balance of probabilities that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security;

(h) the appeal should be held *in camera*;

(i) the appeal should be conducted, if possible, so as to ensure that, during the hearing, the information concerned is not disclosed;

(j) if it is not possible to conduct the appeal without the information concerned being disclosed, then the court should have the power to make appropriate orders for the conduct of the appeal in order to protect that information;

(k) in the event that the Attorney-General failed to establish that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security, the appeal should be allowed and the legal representative should be entitled to have the information concerned disclosed to him or her in the course of acting for the defendant/client.

- 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.

Attachment A: Profile of the Law Council of Australia

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.