

Rationale and Accountability

- 2.1 This chapter discusses the justification for specialist anti-terrorism laws and the case for ongoing oversight by an Independent Reviewer.

Introduction

- 2.2 The introduction of specialist terrorism offences and stronger border controls is a direct response to the threat of 'international terrorism', posed by Al-Qa'ida and affiliated individuals and organisations. The definition of terrorism in the *Criminal Code* is directed to all forms of terrorism but it has been the threat of 'Islamist terrorism', which has been the primary concern since 2001. This has put Arab and Muslim Australians under significant pressure.
- 2.3 It is important at the outset to state that the Committee rejects the idea that Islam is inherently in conflict with democracy or that being a practising Muslim is inherently in conflict with living in modern Australian society.
- 2.4 The Committee acknowledges that there is an important distinction between the vast majority of Muslim Australians and the very small number of people who believe that terrorist violence can be justified in the 'defence of Islam'. It is crucial that this distinction be clearly articulated and established in the public

mind. Muslims have been the victims of terrorist attacks in the United States, Europe, India and in the Middle East. And, while Al-Qa'ida's political message resonates with many, its 'tactics have attracted only the fringe'.¹ As Dr Mohamed Waleed, Co Convenor of the Australian Muslim Civil Rights Network (AMCRAN) said during this review:

The Muslim community wants to prevent terrorism as much as other Australians, if not more.²

- 2.5 Political leaders, civil society organisations and faith leaders must take a responsible, coordinated and sensitive position if we are to combat the threat of terrorist violence and promote democratic ways of expressing dissent. The media also has an important role to play in providing balanced reporting.³ The impact of counter-terrorism policy on Arab and Muslim Australians is discussed in Chapter 3.

Modern terrorism

- 2.6 The terrorist challenge of today is inspired by the political and religious rhetoric of Al-Qa'ida. The development of this form of terrorism is a complex phenomenon. It has a long history and an array of different drivers that have made public debate and informed media coverage difficult.⁴ The background to Al-Qa'ida is discussed in more detail in the Committee's 2006 report of the *Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations*.⁵
- 2.7 Al-Qa'ida gained its strength in the war against the Soviet occupation of Afghanistan and later positioned itself as a self-styled vanguard of an array of Islamist movements. Al-Qa'ida uses the language of religion to appeal across national borders to

1 Maha Assam, *Al-Qa'ida Five Years On: The Threat and the Challenges*, Middle East Programme, Briefing Paper, Chatham House, September, 2006.

2 AMCRAN, *Transcript*, 1 August 2006, p.52.

3 Dr Shahram Akbarzadeh and Dr Bianca Smith, *The Representation of Islam and Muslims in the Media (The Age and Herald Sun Newspapers)*, School of Political and Social Inquiry, Monash University, November 2005.

4 *From dawa to jihad, The various threats from radical Islam to the democratic legal order*, General Intelligence and Security Service, Ministry of the Interior and Kingdom Relations, The Netherlands, The Hague, December, 2004, p.22.

5 Available at: www.apf.gov.au/house/committee/pjcis/al_qaida_ji/index.htm

groups opposed to western presence and influence in Muslim countries and to create a common enemy. It misuses the fundamental precepts of Islam drawing on a variety of justifications, including an ultra orthodox version of Salafism, to justify the use of violence to achieve its political goals.⁶

The continuing influence of Al-Qa'ida's world view

- 2.8 Although the operational structure and capacity of Al-Qa'ida to directly organise and fund terrorist operations is reduced, its wider influence has not diminished. In its current form, Al-Qa'ida is probably more influential as an ideological reference point, a source of inspiration and a model for militant groups that reject 'western' cultural and economic values.⁷
- 2.9 The perpetrators of the bombings in Madrid in 2004 and London in 2005 fall more into this category. These events have brought home the risk of 'home grown' terrorism organised through loose personal networks. Preparation for such attacks may involve training overseas in countries such as Pakistan, Afghanistan and Iraq but it does not necessarily involve direct operational control by Al-Qa'ida or an affiliated militant group.
- 2.10 Earlier assumptions that terrorist attacks would not take place on the soil of western countries have had to be abandoned. The attack on the US on 11 September 2001; the bombing of the Madrid railway system in 2004 and the London Underground on 7 July 2005, and a second attempt on 21 July, are potent reminders of the risk and consequences of terrorist violence. These events and, in particular the bombings in Bali in 2002 and 2005; the Australian embassy in Jakarta in 2004 and recent prosecutions are a reminder that Australia is not immune from these influences.

6 Salafism has its origins in late 19th century and early 20th century reformers and thinkers such as Afghani, Abduh and Ridah, who 'sought answers to the political and cultural crisis in which they perceived the Islamic world to be as a result of Western colonialism'; *From dawa to jihad, The various threats from radical Islam to the democratic legal order*, General Intelligence and Security Service, Ministry of the Interior and Kingdom Relations, The Netherlands, The Hague, December, 2004, p.24.

7 Jane's Terrorism and Insurgency Centre, *Al-Qa'ida*, 19 August 2005.

Characteristics of Islamist terrorism

- 2.11 There is a general view that terrorism today has characteristics that distinguish it from the experience of terrorism in the past that:
- was by organised groups with explicit localised political demands;
 - targeted key political figures or senior government officials or institutions; and
 - sought to minimise 'civilian' deaths, for example, telephoning in warnings if attacking a public place in order to minimise the alienation of the public from their cause.
- 2.12 Recent experience of terrorist attacks has been that it is:
- perpetrated by people often operating through loose personal networks, rather than identifiable organisations with a clear command structure;
 - aimed at maximising civilian casualties and tend to focus on the 'soft targets' (airports, railway stations, night clubs);
 - has an international dimension, in the sense that perpetrators are likely to receive training or get financial support from sources in other countries; and
 - is adaptable to new security measures and makes use of modern technologies.
- 2.13 The use of terrorism as a political strategy is not new but the tactics of this form of modern terrorism do differ in some respects from previous campaigns. While these characteristics are broad generalisations they are a useful description of methods, which present new challenges to intelligence and law enforcement authorities. Moreover, while terrorist tactics can take many forms, the heavy reliance on suicide bombing, as a more effective means of inflicting mass civilian casualties, makes this form of terrorism especially confronting.

Violent radicalisation

- 2.14 A range of factors have been suggested as making a person more susceptible to violent radicalisation but overall the conclusion is that there is no simple clear profile of a suicide bomber. This was the conclusion of British authorities after 7 July; it is the generally

held view across Europe and the conclusion of Australian authorities based on experience in this country.⁸

- 2.15 Perpetrators may be male or female (although they tend more often to be young men) and can come from a variety of social, economic, religious, ethnic and cultural backgrounds. They may be born and raised in the country that is attacked, be settled migrants with citizenship or non-nationals who have crossed borders for the specific purpose of organising an attack.⁹ The involvement of recent converts from different ethnic and religious backgrounds has also become the subject of debate.¹⁰
- 2.16 While some have been influenced by a 'radical cleric' others are more 'self radicalised' by watching videos of violent conflicts from Chechnya, Iraq, Palestine and Afghanistan. The internet is clearly an important tool for dissemination of materials, including Al-Qa'ida recruitment videos.
- 2.17 While demographic profiles do not provide an answer there are some common threads. A strong identification as part of the wider *Umma* and perceived injustices toward Muslims overseas, especially in places of conflict, is a frequently self proclaimed motivation for suicide attackers.
- 2.18 The Australian Security Intelligence Organisation (ASIO) has observed that:
- Most extremists are influenced by foreign events – some in Australia view the Coalition action in Iraq as an attack on all Muslims. Others believe they do not fit into Australian society or into the society of their parents. Despite a strong

8 *Report of the Official Account of the Bombings in London on 7 July 2006*, available at: <http://www.homeoffice.gov.uk/documents/7-july-report.pdf>; *Report into the London Terrorist Attacks on 7 July 2005*, Intelligence and Security Committee, Cm 6785 at http://www.cabinetoffice.gov.uk/publications/reports/intelligence/isc_7july_report.pdf; *Government Response to the Intelligence and Security Committee Report into the London Terrorist Attack on 7 July 2005*, Cm 6786 May 2006 at: http://www.cabinetoffice.gov.uk/publications/reports/intelligence/govres_7july.pdf; Commission of the European Communities, *Terrorist Recruitment: addressing the factors contributing to violent radicalisation*, Communication from the Commission to the European Parliament and the Council (Com (2005) 313 final), Brussels, 21 September 2005.

9 *Islamist Terrorism: The International Context*, Peter Varghese, Director-General of the Office of National Assessments, Security in Government Conference, Canberra, 11 May 2006.

10 For example, *Western converts to radical Islam: the global jihad's new soldiers?*, Jane's Intelligence Review, August, 2006; Dr Waleed Aly, *Know your enemy, the converts with troubled pasts*, Weekend Australian, 28 August 2006, p. 27.

cultural sense of the importance of community and family, some individuals choose to lean heavily on their perceptions of conflict as a battle between Muslims and infidels. This perception engenders a sense of isolation and rejection which is difficult for moderate elements in the Australian Muslim community to counteract – and moderates are perceived as part of the problem by the extremists.¹¹

- 2.19 While Muslim community leaders have a vital role to play, the responsibility to combat terrorism is one shared by all sections of the Australian community. In the aftermath of the London bombings understanding the causes and process of violent radicalisation has become more of a focus in the United Kingdom and Europe. The Committee is aware of inter-governmental cooperation on these topics but is generally disappointed by the lack of research on the subject in Australia. Intelligence and policing efforts are clearly very important, but an effective counter-terrorism strategy must also operate at the social, economic and political level. A rigorous analysis of the nature of violent radicalisation in Australia would help to inform those strategies. The Social Cohesion Package is discussed in Chapter 3.

Recommendation 1

The Committee recommends that the Government support/sponsor a study into the causes of violent radicalisation in Australia to inform Australia's counter terrorism strategy.

Justification for specialist terrorism offences

- 2.20 Australia has a four level alert system of low, medium, high and extreme.¹² Since 11 September 2001 the threat level for Australia has remained at medium. It has been argued that the fact that

11 ASIO, *Report to Parliament 2004 -2005*, Commonwealth of Australia, Canberra, 2005, p. 17.

12 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.

Australia's threat level has remained the same over the last five years is evidence of a relatively lower threat to this country and provides an insufficient justification for specialised terrorism offences.¹³ In particular, that the methods, tactics and conduct labelled 'terrorist' are adequately catered for by pre-existing Commonwealth and State criminal law.

- 2.21 It is correct that Australian criminal law was not silent on terrorist crimes before the events of 11 September 2001.¹⁴ And, in principle, it is desirable to use conventional offences that carry appropriate penalties whenever it is possible to do so. However, the Commonwealth Director of Public Prosecutions (CDPP) has stressed that it is:

...crucial to recognise terrorism as a separate offence and form of offending distinct criminal activity that should be addressed by specific provisions.¹⁵

- 2.22 During hearings the Australian Federal Police (AFP) said that:

The AFP's operational experience is that those involved in suspected terrorist offences are often very different to other groups that the AFP deals with, such as organised crime groups. The unpredictable nature of the activities involved and the potentially catastrophic effect on the community requires legislation to enable the proactive targeting of terrorist threats and early intervention.¹⁶

- 2.23 Until the enactment of the *Security Legislation Amendment (Terrorism) Act 2002 (No.2)*, Commonwealth criminal law did not explicitly recognise the nature of terrorism as a serious crime against the community; address conduct preparatory to a terrorist act or provide national coverage. On this basis, the Committee accepts that new terrorism offences were necessary to provide a more comprehensive response. This was also the view of the Sheller Committee.¹⁷

13 Mr Lex Lasry QC, *Submission 12*, p. 2.

14 For example, conspiracy to murder, kidnapping, hostage taking and the offences against United Nation's personnel, commonwealth public officials and internationally protected persons, which recognise the likely targets of terrorism. For a useful compilation of terrorism law in Australia see Justice Peter McClellan, *Terrorism and the Law*, 2006.

15 CDPP, *Transcript*, 1 August 2006, p. 28.

16 AFP, *Transcript*, 1 August 2006, p.18.

17 Mr Sheller AO QC, *Transcript*, 31 July 2006, p.3.

Global terrorism policy

- 2.24 The United Nations Security Council (UNSC) has declared terrorism a threat to international peace and security. The Secretary-General of the United Nations (UN) has said that:
- Terrorism is a threat to all that the United Nations stands for: respect for human rights, the rule of law, the protection of civilians, tolerance among peoples and nations, and the peaceful resolution of conflict.¹⁸
- 2.25 Since 2001 the UNSC has adopted resolutions under Chapter VII of the Charter of the United Nations, expressing the determination of the UN to combat terrorist violence.¹⁹ For example:
- 1373 (2001) does not define terrorism but requires States to, *inter alia*, ensure that financing, planning, preparation or perpetration of terrorist acts or support for terrorist acts are established as serious criminal offences in domestic law;²⁰
 - 1624 (2005) called on States to, *inter alia*, prohibit by law incitement to commit a terrorist act or acts and prevent such conduct.²¹
- 2.26 On 8 September 2006, the General Assembly adopted the Global Counter Terrorism Strategy, which calls for implementation of counter terrorism treaties and resolutions as part of a comprehensive strategy.²²
- 2.27 The UNSC has affirmed that measures adopted to combat terrorism must be consistent with existing international law on human rights, refugees and humanitarian law.²³ In 2004, the Secretary-General emphasised that:
- In our struggle against terrorism, we must never compromise human rights. When we do we facilitate achievement of one of the terrorist's objectives. By ceding the moral high ground

18 United Nations, *In larger freedom: towards development, security and human rights for all*, www.un.org/largerfreedom/chap3.htm

19 United Nations Security Council Report (UNSCR) 1373; 1535; 1624.

20 Paragraph 2(1) (e) UNSCR 1373 adopted 28 September 2001.

21 Paragraph 1 (a) and (b), UNSCR 1624 (2005) adopted on 14 September 2005.

22 UN Global Counter Terrorism Strategy and Plan of Action is available at <http://www.un.org/terrorism/strategy/>

23 For example, paragraph. 3 (f) UNSCR 1373; statement annexed to resolution 1456 (2003); and preamble and paragraph. 4 UNSCR 1624 (2005).

we provoke tension, hatred and mistrust of government among precisely those parts of the population where terrorists find recruits.²⁴

- 2.28 And, again in 2006, as part of the Global Counter Terrorism Strategy, the UN General Assembly agreed that international cooperation and any counter-terrorism measures must comply with States obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law and international humanitarian law.²⁵
- 2.29 To the extent that new terrorism offences implement Australia's obligations they should be seen as part of global counter-terrorism policy, which sits within a wider framework of international law. However, we recognise that there are elements of the new laws that depart from traditional criminal law principles, raise potential constitutional issues and require careful scrutiny.
- 2.30 Offences rely on a broad definition of terrorism and terrorist organisation and some offences arise before any criminal intent has crystallised into an attempt to carry out the act of violence. In other words, many of the new offences are aimed at preventing a terrorist act from taking place and raise important issues of principle and practice. As Mr Sheller pointed out:
- ...the aim of this legislation is to prevent terrorist activity. On the whole, criminal law is not concerned so much with prevention, in terms of imposing penalty, as with dealing with the result of criminal activity.²⁶
- 2.31 The logic of a preventive approach and the difficulty of predicting who is likely to commit acts of terrorism require a wider use of intelligence gathering and earlier intervention by the police. During hearings the AFP confirmed that:
- Our approach to terrorism investigations on the whole is based on early detection and early prevention proactivity. We are not in the position to allow these types of offences to run

24 United Nations, *In larger freedom: towards development, security and human rights for all*, www.un.org/largerfreedom/chap3.htm

25 Paragraph 3, Global Counter Terrorism Resolution, United Nations General Assembly, 8 September 2006.

26 Mr Carnell, IGIS, *Transcript*, 31 July 2006, p.3.

to their conclusion, as we may, for example, in a drug importation to maximise the collection of evidence.²⁷

Democratic freedoms, counter-terrorism measures and public safety

- 2.32 The Sheller Committee adopted as its starting point the view that the protection of the collective right of security and the rights of the individual are not mutually exclusive, but interrelated obligations. This should be an uncontentious proposition in a constitutional democracy based on the rule of law.
- 2.33 The importance of retaining a rational and proportionate response has been frequently stated over the past five years. In his 2004 - 2005 Annual Report, the Inspector-General of Intelligence and Security (IGIS) noted that there is:
- A vital public interest in ensuring that any new measures to protect national security which have been implemented, or are presently being contemplated, should not be unduly corrosive of the values, individual liberties and mores on which our society is based.²⁸
- 2.34 There are pragmatic reasons for maintaining the basic principles of the criminal justice model based on the rule of law. The requirement for specificity is to ensure that a person knows what may and may not be done; and, appropriate safeguards minimise the risk of misapplication or unintended consequences that bring the law into disrepute. Laws which are excessive or difficult to understand and to implement increase the actual risk and perception of arbitrariness.
- 2.35 While Australian authorities operate at a good standard of professionalism, they are not infallible and normal human error can lead to individual cases of injustice and a false sense of security in the community.²⁹ History teaches us that while a strong response is necessary, real injustices can be produced by being unmeasured or overzealous.

27 AFP, *Transcript*, 1 August 2006, p. 20.

28 IGIS, *Annual Report 2004-2005*, Commonwealth of Australia, 2005, p.2.

29 For example similar discussion of terrorism measures under United Kingdom law. *Anti-terrorism, Crime and Security Act 2001 Review: Report*, Privy Counsellor Review Committee, House of Commons, December 2003.

- 2.36 It was appropriate, therefore, that the Sheller Committee was concerned that legislation should not be vague or overbroad; that offences which target ancillary conduct are sufficiently linked to intention or terrorist activity; that the presumption of innocence and the right to fair trial is preserved; and the normal functioning of the community should not be interfered with any more than is absolutely necessary.

Investigations and prosecutions in Australia

- 2.37 By the end of July 2006, the AFP had conducted 479 investigations since the introduction of the new laws in mid 2002.³⁰ Twenty-five people have been charged with terrorism related offences under the new Chapter 5.3 (Terrorism) of *Criminal Code*. This represents approximately five percent of investigations resulting in prosecution.
- 2.38 The *sub judice* convention requires the Parliament to exercise its discretion not to comment upon cases while proceedings are on foot.³¹ We note only that, at the time of this report, of those twenty-five cases, three cases have been completed and others are at various stages. In addition, two people have been charged under alternative provisions.³² Not all of those prosecuted are Muslim or have been part of a terrorist organisation or network.
- 2.39 The Attorney-General's Department (AGD) argued that the Senate Legal and Constitutional and Legislation Committee (SLCLC) gave extensive consideration to the legislation in 2002. In their view, further refinements are appropriate only if there are demonstrable 'problems' with the legislation.³³ It was also suggested that because a number of cases are before the courts there is insufficient information on which to base proposals for

30 AFP, *Transcript*, 1 August 2006, p.19.

31 The *sub judice* convention respects the institutional separation appropriate in a democracy; the independence of the judiciary and the right to fair trial of the accused.

32 Mr Jack Roche pleaded guilty on 28 May 2004 to one count of conspiring to destroy or damage by explosives the official premises of an internationally protected person with intent to endanger the life of that person contrary to paragraph 8(3C)(a) of the *Crimes (Internationally Protected Persons) Act 1976* and subsection 86 (1) of the *Crimes Act 1914*. Mr Howells pleaded guilty on 10 January 2006 to one count each of threatening to destroy by explosives and by fire the official premises of an internationally protected person contrary to subsections 8(4) and 8(3B) of the *Crimes (Internationally Protected Persons) Act 1976*.

33 AGD, *Transcript*, 1 August 2006, p.1.

amendment.³⁴ We do not accept this as a reason for the Parliament not to consider issues that can already be identified. To do so would make redundant the mandate given by the Parliament to this Committee.

- 2.40 The Committee believes that the recommendations of the Sheller Report and the additional recommendations resulting from the parliamentary review are moderate and sensible refinements. The aim is to improve specificity and proportionality, especially in relation to offences that carry long terms of imprisonment.
- 2.41 That said, new issues may emerge over time and through the experience of current prosecutions and future terrorist activity. It is for these reasons that we have also considered the value of a more integrated approach to post enactment review (see below).

Post enactment review: the case for an Independent Reviewer

- 2.42 The Sheller Committee argued that, given the limited elapse of time, a further three year review of the first legislative package should be conducted by an independent committee. Alternatively, that the Government should consider appointing a single independent reviewer based on the United Kingdom (UK) model. It was suggested that the further review could be established by statute and coincide with the review of the *Anti Terrorism Act (No.2) 2005 (Cth)* in 2010, which could be expanded to take in the entire body of terrorism law.
- 2.43 The Committee has considered whether there is a case for independent post enactment review of terrorism laws generally. The question was prompted by a number of factors:
- the breadth and significance of anti-terrorism measures;
 - the fragmented nature of review so far; and
 - the ongoing importance of counter terrorism policy into the future.
- 2.44 Since 2001 the Parliament has passed over thirty separate pieces of legislation dealing with terrorism and security and approved very

34 AGD, *Transcript*, 1 August 2006, p.1.

significant budget increases to fund new security measures. Australia now has a substantial legal framework and institutional capacities to provide a coordinated and comprehensive governmental response to the problem of terrorism.

- 2.45 The new terrorism law regime differs from the traditional criminal justice model. As Chief Justice Spigelman has observed:
- The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.³⁵
- 2.46 For example, new terrorism offences rely on the definition of a terrorist act or terrorist organisation and are cast broadly to cover, among other things, possession of things and documents. Offences that criminalise conduct preparatory to an act of terrorism, arise before criminal intent has been formed and without the need to prove a connection to a specific terrorist act. While ancillary offences, such as attempt and conspiracy, have long been part of the criminal law these offences significantly extend the criminal law.
- 2.47 The *Criminal Code* now also includes offences that criminalise a person's status and terrorist organisation offences may be applied to a body of persons who are not listed under the proscription regime. Finally, since 2005, powers to preventively detain a person and to seek control orders have been made available to law enforcement authorities.³⁶ The significance of these reforms and the distinctive nature of the terrorism law regime should not be underestimated and, in our view, warrants ongoing oversight.
- 2.48 The Committee is also concerned to ensure that the departure from traditional criminal law principles, adopted on an exceptional basis to aid the fight against terrorism, does not become normalised. There is a real risk that the terrorism law regime may, overtime, influence legal policy more generally with potentially detrimental impacts on the rule of law.
- 2.49 Over the past five years a number of different approaches to post enactment review have been trialled. Each review has been established in response to the exigencies of the time, with specific terms of reference relevant to the particular legislation:

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

36 *Jabbour v Thomas* [2006] FMCA 1286

- the first package of terrorism and security legislation was made subject to an independent and subsequently PJCIS review after three years, recognising the significance of the reforms and the need to ensure democratic accountability;³⁷
- Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* (compulsory questioning and detention) was passed subject to a three year sunset clause and review. This Committee reported to the Parliament in November 2006. A new sunset clause coupled with further review is scheduled for 2016.³⁸
- *Anti Terrorism Act 2005 (No.2) (Cth)* (ATA) will be reviewed under the auspices of Council of Australian Government (COAG). In the meantime, Schedule 7 of the ATA, which revised the law of sedition, was referred to the Australian Law Reform Commission (ALRC) for inquiry;³⁹
- the provisions that govern the listing of terrorist organisations under Division 102 of the *Criminal Code* will be reviewed by the PJCIS in 2007.⁴⁰

2.50 The limited mandate of each review mechanism has prevented a more holistic assessment of the terrorism law framework. Thus, questions relating to operational practices of police, the interpretation of new powers and the scope and application of offence provisions; the conduct of trials and the management of prisoners are interrelated but have fallen outside the terms of reference.⁴¹

37 Subsection 4(6) of the *Security Legislation Amendment (Terrorism) Act 2002*; paragraph 29 (1) (ba) of the *Intelligence Services Act 2001*; subsection 4 (9) of *Security Legislation Amendment (Terrorism) Act 2002* require the PJCIS to conduct the current one off review.

38 Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act 1979*, November 2005.

39 On 1 March 2006, the Attorney-General, referred to the Australian Law Reform Committee terms of reference for a review of the operation of Schedule 7 of the *Anti Terrorism Act (No.2) 2005 (Cth)* and *Part IIA of the Crimes Act 1914*.

40 Section 102.1A(2) of the *Criminal Code*.

41 For example, *Anti Terrorism Act 2004 (Cth)*, which increased maximum questioning and detention times by police for terrorist offences; *Anti Terrorism Act (No.2) 2004 (Cth)*, which provides for the transfer of prisoners on security grounds, by order of the Attorney General, between States and Territories; *Anti Terrorism Act (No.3) 2004 (Cth)*, which, among other things, provides for the confiscation of travel documents and prevents persons from leaving Australia; *National Security Information (Criminal and Civil*

- 2.51 From a community perspective, the operation of terrorism law cannot be divorced from the way in which police, intelligence agencies, prosecutors and courts and prison authorities do their work. During this review, witnesses (government and non-government) have raised important issues relating to substantive and procedural issues which, strictly speaking, arise under other statutory regimes or have been introduced since the passage of the 2002 legislation.⁴²
- 2.52 Some of these matters, for example, prisoner classification, fall outside Commonwealth legislative power but which the Commonwealth has a clear interest. The Scrutiny of Bills Committee and the SLCLC scrutinise new Bills; the Senate Estimates process provide an opportunity to scrutinise budget expenditure; and, the PJCIS has an ongoing role in the oversight of the Australian intelligence community. There are also a number of statutory office holders whose jurisdiction also overlaps with aspects of counter terrorism policy.⁴³
- 2.53 Overall the machinery of governance is well developed in Australia. But the current system is fragmented, limiting the capacity for independent, ongoing and comprehensive examination of how terrorism laws are operating. At the same time, it is clear that executive agencies must keep terrorism legislation under review and respond to new developments.⁴⁴
- 2.54 The majority of witnesses supported the proposal for further review of terrorism laws. For example, the Western Australian Government supported the idea for a legislative based timetable for continuing review, which it said, would be consistent with the COAG agreement to a five year legislative review of the ATA No.2. It was also suggested that:

As an alternative approach the Committee might consider the mechanism in Western Australia's *Terrorism (Extraordinary*

Proceedings) Act 2004 (Cth), which provides a regime for non-disclosure of security sensitive information.

42 PIAC, *Submission 6*, p.3.

43 The IGIS has a mandate to oversight the legality and probity of the Australian Intelligence Community's activities and deals with individual complaints. The Commonwealth Ombudsman deals with complaints concerning the administration of Commonwealth law generally and has jurisdiction to investigate complaints concerning the AFP. Neither of these bodies has the power to proactively monitor the implementation of counter terrorism laws.

44 AGD, *Transcript*, 1 August 2006, p. p. 6-7.

Powers) Act 2005 and the Terrorism (Preventative Detention) Bill 2005 for review twelve months after enactment and three yearly thereafter. The review must review the operation and effectiveness of the Act, whether its provisions are appropriate having regard to its object, and whether it should continue in operation. A report based on the review must also be tabled before each House of Parliament.⁴⁵

- 2.55 This is one possible approach which recognises that terrorism law, although it approximates the criminal law as closely as possible, is a distinct regime.

Independent Reviewer

- 2.56 The Committee favours a model that takes a holistic approach to terrorism laws with a statutory mandate to report annually to the Parliament. This suggests a single independent appointee, rather than periodic review by an independent committee.
- 2.57 A single appointee would overcome the existing fragmentation by providing a consistent and identifiable focal point for the community and the executive agencies. The appointment should be someone of high standing who commands respect and is trusted as an impartial and informed source of information and analysis. He or she must be free to set their own priorities and have access to all relevant information, including security sensitive information where necessary.
- 2.58 The appointee would work cooperatively with agencies, the other relevant office holders such as the IGIS and Commonwealth Ombudsman. The role will not replace the need for authorities to consult with local communities on policy or operational matters or replace the role of the legislature.
- 2.59 AGD suggested that the parliamentary committee system is more inclusive and effective than an individual reviewer.⁴⁶ There is some merit in this argument, but for the reasons outlined, we believe that there is now a case for independent ongoing oversight of these laws. However, it will be important that the independent review report to the Parliament and that there is a clear role of the Parliament in examining those reports.

45 West Australian Government, *Submission 15*, p.1

46 AGD, *Transcript*, 1 August 2006, p. 8.

- 2.60 During hearings reference was made the UK model. In the UK, the various terrorism acts are subject to independent parliamentary oversight. An independent reviewer has a mandate to review the implementation of terrorism laws and to report annually to the Parliament.⁴⁷ His reports have proved to be a valuable contribution to the debates on terrorism law in the UK and provided the public, the Government and the Parliament with valuable information, insights and suggestions for reform.⁴⁸ In principle, the approach in the UK serves as a useful reference point for the development of an Australian model.
- 2.61 However, there are adaptations that will bring the model more into alignment with Australian practice. For example, Joint Committee on Public Accounts has a statutory responsibility to examine all reports of the Auditor General which are tabled in the Parliament. This model ensures that the legislature has a clear and unambiguous role in exercising its oversight and scrutiny functions on important matters of public administration.⁴⁹ The Committee considers that this approach serves as a useful model and one that should be adopted in the context of anti terrorism laws.

Conclusion

- 2.62 Since 2001 there has been a prolific legislative response to the threat of international terrorism. The Commonwealth Parliament has passed over thirty pieces of anti terrorism and security legislation that extend the criminal law and expand the powers of intelligence and law enforcement agencies. The new terrorism law regime carries heavy penalties and introduces significant changes to the traditional criminal justice model. While it is the role of the courts to interpret and apply the existing law it is the Parliament that is responsible for the policy. To date post enactment review has been sporadic and fragmented with a focus on specific pieces of legislation rather than the terrorism law regime as a whole. This has limited the opportunity for comprehensive evaluation and

47 Section 126 of the *Terrorism Act 2000 (UK)*; subsection 14(3) of the *Prevention of Terrorism Act 2005*; note also that the Privy Councillors review the whole of the *Anti Terrorism, Crime and Security Act 2001(UK)* (ATCSA).

48 Reports of the Independent Reviewer are available at:
<http://security.homeoffice.gov.uk/counter-terrorism-strategy/legislation/parliamentary-oversight/?version=5>

49 *Public Accounts and Audit Committee Act 1951 (Cth)*.

highlights the need for an integrated approach to ensure ongoing monitoring and refinement of the law where necessary.

Recommendation 2

The Committee recommends that:

- **the Government appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia;**
- **the Independent Reviewer be free to set his or her own priorities and have access to all necessary information;**
- **the Independent Review report annually to the Parliament;**
- **the *Intelligence Services Act 2001* be amended to require the PJCIS to examine the reports of the Independent Review tabled in the Parliament.**