

International Terrorism

- 5.1 This Chapter deals with Divisions 100 - 102 of the *Criminal Code*, which set out the:
- definition of a terrorist act,
 - definition of a terrorist organisation; and
 - personal and terrorist organisation offences.

Definition of Terrorism

International law background

- 5.2 Broadly speaking, international counter-terrorism law dates from the 1970s.¹ The United Nations General Assembly Ad Hoc Committee on Terrorism was established in 1996², and throughout the 1990s, the UN

1 Conventions on Offences Committed on Board Aircraft, 1963; Suppression of Unlawful Seizure of Aircraft, 1970; for the Suppression of Unlawful Acts against the Safety of Civilian Aviation, 1971; on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973, against the Taking of Hostages, 1979; on the Physical Protection of Nuclear Material, 1980; for the Suppression of Unlawful Acts of Violence at Airports, Protocol 1988; for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf, Protocol 1988.

2 United Nations General Assembly 51/210 of 17 December 1996.

adopted a number of resolutions and instruments intended to create a more comprehensive set of standards to deal with international terrorism (see below).³ There are thirteen international conventions and protocols that deal with specific terrorist methods and tactics. See Appendix A.

- 5.3 Nevertheless, the definition of ‘terrorism’ remains contentious and efforts within the UN to reach agreement on a comprehensive international legal definition have so far been unsuccessful.⁴ There are, however, a number of definitions of terrorism used in the domestic legal systems of comparable countries, which provide useful points of reference.
- 5.4 As noted in Chapter 2, the UNSC has affirmed that measures adopted to combat terrorism must be consistent with existing international law on human rights, refugees and humanitarian law.⁵ It is important, therefore, that the definition of terrorism does not conflict with the law of armed conflict, human rights and refugee law.

Definition of terrorism in Australian law

- 5.5 Terrorism in Commonwealth law is defined as an act or threat that is intended to:
- advance a political, ideological or religious cause; and
 - coerce or intimidate an Australian or foreign government or the public (or section of the public), including foreign public.

The conduct falls within the definition if it:

- causes serious physical harm to a person or serious damage to property;
- causes death or endangers a persons life;

3 A Declaration on Measures to Eliminate Terrorism was adopted in 1994 (GA 49/60); further treaty action resulted in the Conventions on the Making of Plastic Explosives for the Purpose of Identification, 1991; for the Suppression of Terrorist Bombing, 1997; and for the Suppression of the Financing of Terrorism, 1999.

4 *Report of the Ad Hoc Committee*, Ninth session (28 March – 1 April 2005), United Nations General Assembly Official Records, Sixtieth Session, Supplement No.37 (A/60/37), p. 25. See also Resolution 42/159 of the United Nations General Assembly December 1987. For discussion on the definition of terrorism generally, see Ben Golder and George Williams, *What is ‘Terrorism’? Problems of Legal Definition*, UNSW Law Journal, Volume 27 (2), p.273.

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

- creates a serious risk to the health and safety to the public (or section of the public), or
 - seriously interferes, disrupts or destroys:
 - ⇒ an electronic information, telecommunications or financial system; or
 - ⇒ an electronic system used for the delivery of essential government services, used for or by an essential public utility, or transport system.
- 5.6 Conduct that constitutes, ‘advocacy’, ‘protest’, ‘dissent’ and ‘industrial action’ are exceptions *provided* the activity is not intended to:
- cause death or endanger the life of a person; or
 - create a serious risk to health or safety to the public (or section of the public).
- 5.7 The Australian definition has been criticised as imprecise, so that it will only acquire meaning through its practical application by prosecutorial authorities. Nevertheless, the Gilbert and Tobin Centre for Public Law argued during the Sheller Inquiry and again before us, that the definition, as amended, is one of the best in the common law world.⁶ The AGD has argued for its simplification.⁷

Sheller Committee Recommendations

- 5.8 The Sheller Committee recommended that:
- the requirement to prove an ‘intention to advance a political, religious or ideological cause’ be retained’;
 - the exceptions of ‘advocacy’, ‘protest’, ‘dissent’ and ‘industrial action’ be retained;
 - ‘threat’ of an act of terrorism should be a separate criminal offence; and
 - the concept of harm should include psychological harm.

6 Professor George Williams and Dr Andrew Lynch, Gilbert and Tobin Centre of Public Law, University of New South Wales, *SLR Submission 25*, p.2; *Submission 18*, p.1

7 AGD, *SLR Submission 14*, p.12.

Breadth of Australian terrorism laws

- 5.9 It is uncontroversial that terrorism law has developed rapidly since September 11 with over thirty pieces of legislation passed by the Commonwealth Parliament. Terrorism law now consists of a complex array of conventional and specialised criminal offences and expanded intelligence gathering⁸ and police powers⁹, which collectively rely on the definition of a terrorist act. In addition to the core criminal offences, new regimes of preventative detention and control orders have been introduced.¹⁰
- 5.10 The National Counter Terrorism Plan adopts the Commonwealth definition of a ‘terrorist act’, and State and Territory counter-terrorism law also rely on the Commonwealth definition¹¹ as a basis for special police investigative powers, including powers to conduct covert counter terrorist operations.¹²
- 5.11 The Sheller Committee recognised that the definition of a ‘terrorist act’ is pivotal within this overall scheme. Any change to the definition will influence the scope of offences and powers afforded to the
-

8 For example, ASIO’s special powers of compulsory questioning and detention to strengthen intelligence gathering in respect of terrorism offences: Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*; terrorism offence means an offence against Division 72 or Part 5.3 of the Criminal Code. Under section 4 of the ASIO Act a ‘terrorism offence’ is a particular form of ‘political violence’.

9 For example, the *Anti-Terrorism Act 2005 (No. 2)* amended the *Crimes Act 1914* to increase AFP powers to stop, question and search persons in relation to terrorist acts in a Commonwealth place or a declared prescribed security zone; and to issue a notice to produce information and documents from operators of aircraft or ships, which relate to the doing of a terrorist act; and amended the *Australian Protection Service Act 1987* to confer powers on the Australian Protective Services to arrest without warrant in relation to terrorist bombing offences and terrorism offences – powers previously conferred only on sworn police officers.

10 *ATA No.2 2005* inserted new Division 104 Control Orders and Division 105 Preventive Detention into the *Criminal Code*.

11 Section 4 of the *Terrorism (Community Protection) Act 2003 (Vic)* replicates the Commonwealth definition; s. 3 of the *Terrorism (Police Powers) Act 2002 (NSW)* excludes threats of a terrorist act; s. 22A of the *Crime and Misconduct Act 2001 (Qld)* reflects the substance of the Commonwealth definition but is drafted slightly differently; s. 3 of the *Terrorism (Preventative Detention) Act 2005(SA)* adopts the Commonwealth definition but s. 2 of the *Terrorism (Police Powers) Act 2005 (SA)*, does not include threats of a terrorist act; s. 5 of the *Terrorism (Extraordinary Powers) Act 2005 (WA)*, replicates the definition. Unlike the other jurisdictions, in the Northern Territory, there is a specific offence of terrorism rather than a general definition of a ‘terrorist act’. The offence predates September 11, 2001 and defines terrorism in more general terms. See section 50 of the *Northern Territory Criminal Code 1983*. To paraphrase, the section defines terrorism as the use or threat of violence to achieve government action or put the public in fear, and prevent or dissuade the public from doing something it is legally entitled to do.

12 For example, section 27N of the *Terrorism (Police Powers) Act 2002 (NSW)*.

Commonwealth law enforcement and intelligence agencies. Importantly, it would also affect the scope of State and Territory laws.

Advancing a political, religious or ideological cause

- 5.12 CDPP argued for the simplification of the definition including the removal of the requirement to prove an intention to advance a political, religious or ideological cause.¹³ It was said, that some serious crimes (e.g. bombing a building) may be motivated by hate or revenge. For example, by a disgruntled person or mentally ill former employee. Secondly, that proving the intention to advance a political, religious or ideological cause confuses the fault element with motive and does not sit well in traditional criminal law policy.
- 5.13 The Sheller Committee did not accept the proposition and recommended that the element be retained.¹⁴ Submitters and witnesses to this inquiry have strongly supported the Sheller Committee recommendation, including the Western Australian Government.¹⁵ The argument in favour of retaining this element is because distinguishes 'terrorism' from other types of serious crime motivated by revenge, selfishness or insanity.
- 5.14 During hearings Mr Carnell, the IGIS and a member of the Sheller Committee stated that:
- ...However, it is indeed a definition that is meant to capture what is particular about terrorism - if you like, the high end. There may be certain other conduct which borders on it or may not neatly fit in, but it will be readily enough dealt with using existing criminal law. The representations we had from the representatives of the Western Australian government made it clear that in making the constitutional referral of power to the Commonwealth - and it was a text referral - it was important that the definition of a terrorist act be at the high end... and only capture, those acts that we would readily agree constitute terrorism.
- 5.15 In considering this question, the Committee has had regard to how the question is dealt with in international law, comparable jurisdictions and general policy rationale for creating a special species of terrorism law.

13 CDPP, *SLR Submission No.15*, p.9.

14 Sheller Report, p.15.

15 Sheller Report, p.55; UnitingCare, *Submission No. 11*, p.4; HREOC, *Submission 3*, p.2.

- 5.16 The recognition that terrorism is the use of violence for political ends has a long history in the UK, which has been influential in international law and comparable jurisdictions.¹⁶ In 1996, Lord Lloyd of Berwick observed that terrorism offences had been adopted in the UK because terrorism is generally regarded as an attack on society itself and democratic institutions.¹⁷ A terrorism offence has an added element of seeking to promote a politically motivated objective.¹⁸
- 5.17 Following Lord Lloyd of Berwick's review, which placed terrorism law on a permanent footing, the definition of terrorism was elaborated to better express the seriousness of the offence and its social and political dimensions.¹⁹ The proposition that this would make terrorism offences harder to prove was rejected. It was also observed that, in any case, an alternative offence will be available. In other words, the issue is whether a crime is labelled terrorism or prosecuted under the normal criminal law.
- 5.18 The *Terrorism Act 2000* (UK) defines terrorism as the use or threat of [serious violence, property damage, threats to life, risk to health or safety or disruption of electronic systems] that is '*designed to influence the government or to intimidate the public or a section of the public*' and '*is made for the purpose of advancing a political, religious or ideological cause*'.²⁰
- 5.19 An intention to advance a political cause is also part of the law of terrorism in New Zealand, Canada and South Africa:
- In New Zealand, the *Terrorism Suppression Act 2002*, defines a terrorist act as one that is carried out for the purpose of advancing an ideological, political, or religious cause;²¹

16 For example, section 20 *Prevention of Terrorism Act (Temporary Provision) Act 1974* (UK) defined terrorism as 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.

17 Rt Hon Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Volume 1, CMD3420, p. xi.

18 Rt Hon Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Volume 1, CMD3420 p. xi

19 Rt Hon Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Volume 1, CMD3420, p. 28; the inquiry recommended that terrorism be defined to mean the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social, or ideological objectives.

20 Subsection 1(1) *Terrorism Act 2000* (UK).

21 Subsections 5 (1) (2) (3) of the *Terrorism Suppression Act 2002* (NZ).

- Canada has defended its inclusion of 'political, religious or ideological cause' arguing that to remove it would 'transform the definition from one that is designed to recognise and deal strongly with terrorism to one that is not distinguishable from a general law enforcement provision in the Criminal Code'.²²
- the definition of 'terrorist act' in South African law was extensively reworked after public and parliamentary debate over the original extremely broad definition. The South African definition now includes an element of advancing a political, ideological or religious cause.²³

5.20 Reference has been made to US and French law²⁴ as preferable to the existing Australian definition.²⁵ The US definition, which was amended immediately after September 11 has itself been described as

22 Department of Justice, Background: Amendments to the Anti Terrorism Act' [18/04/02], as cited *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]*, Bills Digest No.126 2001-2002, Department of Parliamentary Library, p.23; see also the UN Human Rights Committee has commented, in respect of Canada that it should refine its definition to ensure that individuals are not targeted on political, religious or ideological grounds Concluding Observations of the Human Rights Committee Canada (Advanced unedited version) CCPR/C/CAN/CO/5, 2 November, 2005.

23 The *Anti Terrorism Bill 2003* was withdrawn and reintroduced as the *Protection of Constitutional Democracy Against Terrorist and Related Activities Bill 2003*; Ben Golder and George Williams, *What is Terrorism? Problems of Legal Definition*, UNSW Law Journal, Volume 27 (2), p. 284.

24 Note that the French approach pre dates September 11. The principle provisions are found in the *Penal Code* Article 412-1 (as amended in Law 96-647 of 22 July 1996). Offences which constitute acts of terrorism are those which are committed intentionally and undertaken by an individual or collective with the purpose of seriously disturbing the public order through intimidation or terror. Article 412 provides that: An attack consists of the commission of one or more acts of violence liable to endanger the institutions of the Republic or violate the integrity of the national territory; *Counter Terrorism Legislation and Practice: A survey of Selected Countries*, UK Foreign and Commonwealth Office, October 2005, p.9.

25 AGD, *SLR Submission 14*, p.12.

vague and broad.²⁶ We note also that the Federal Bureau of Investigation (FBI) defines terrorism as the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in *furtherance of political or social objectives*.²⁷

- 5.21 Both the United Nations Office on Drugs and Crime and Commonwealth Secretariat note that there are, broadly speaking, two ways to approach the definition of a terrorist act and great variety between jurisdictions.²⁸ One model includes the requirement that the act is made for the purpose of advancing a political, ideological, or religious cause and the other does not. The United States or France are examples of jurisdictions that do not include the purposive element. However, in most common law jurisdictions inclusion of the purpose is a common formulation. And, although purpose does not appear in international treaties²⁹, the link between terroristic violence and political, religious and ideological purposes permeates the international materials on this subject.³⁰
- 5.22 There is no suggestion that the inclusion of the purposive element places Australia in breach of any international legal obligation. Nor is it suggested that it would pose a problem for the application of the double criminality test under extradition law. There was no

26 AGD, *SLR Submission 14*, p.12; in the US the federal crime of terrorism means an offence that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct and in violation of criminal offences under the US Code (ss US Code, Title 18, Chapter 113B, Section 2332b(5)). International terrorism and domestic terrorism are separately defined but share the core elements of: violence and acts dangerous to human life, which violate US criminal law (or any State); appear to be intended to intimate or coerce a civilian population; or influence government policy by intimidation or coercion; or affect the conduct of government by mass destruction, assassination, or kidnapping; In October 2001, the US passed the *Uniting and Strengthening American by Providing appropriate tools Required to Intercept and Obstruct Terrorism Act of 2001* (the Patriot Act), which amended section 2331 of Title 18 of the US Code; Ronald Dworkin, *The Threat to Patriotism*, (2002) 49(3) *New York Review of Books*, p.44.

27 *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]*, Bills Digest No. 126 2001-02, Department of Parliamentary Library, p. 20.

28 UN Office on Drugs and Crime, *Legislative Guide to the Universal Anti Terrorism Conventions and Protocols*, UN, New York, 2003, p.9; Commonwealth Secretariat, *Model Legislative Provisions on Measures to Combat Terrorism*, September 2002, p.p.4-6.

29 See, for example, International Convention for the Suppression of the Financing of Terrorism (1999); International Convention for the Suppression of Terrorist Bombing (1997).

30 General Assembly's 1995 Declaration on Measures to Eliminate International Terrorism (A/Res/49/60); Report of the Sixth Committee, Measures to eliminate international terrorism, 30 November 2005, p.4 (A/60/419).

suggestion that, for example, the UK, Canada, New Zealand or South Africa has experienced practical difficulties with satisfying the element.

- 5.23 The Committee understands that the AGD's proposal is prompted by the *Mallah case*, which involved the reckless making of a threat to bomb the ASIO building.³¹ During hearings, a distinction was drawn between a threat to bomb, for example, a court building out of personal frustration, and a terrorist attack. The Committee was advised that the former would be dealt with as an offence against a Commonwealth officer.³²
- 5.24 It is not uncommon for someone to threaten and, in rare cases, to seek to carry out serious acts of violence against government instrumentalities. Any person who commits or threatens to commit such acts should not escape prosecution. The question is whether the label 'terrorism' should attach to that conduct.
- 5.25 There are arguments for and against the inclusion of the element of 'political, ideological and religious cause' but, on balance, we agree with the Sheller Committee that it's important to retain this distinguishing element. The case for a special terrorism law regime is made out on the basis that terrorism is qualitatively different from other types of serious crime. Terrorist violence is typically directed toward the public to create fear and promote political, religious or ideological goals. We believe that terrorist violence is seen by the public as something distinctive from other serious crime. A serious criminal offence committed for personal reasons, no matter how heinous, does not fall into that category and should be prosecuted under separate offence provisions.

31 *R v Mallah [2005] NSWSC 358 (11 February 2005)*; Mr Mallah was acquitted of two counts of doing an act in preparation for an act of terrorism (s.101.6). He was found guilty of the lesser charge of recklessly making a threat of cause serious harm to a Commonwealth official(s) under section 147.2 and sentenced to two years six months. The maximum penalty available was 7 years.

32 CDPP, *Transcript*, 1 August 2006, p.35.

Recommendation 7

The Committee recommends that the requirement that the person intends to advance a political, religious or ideological cause be retained as part of the definition of terrorism.

Advocacy, protest, dissent and industrial action

- 5.26 The definition of a terrorist act creates an exception for lawful or unlawful 'advocacy', 'protest', 'dissent' and 'industrial action' *provided* the activity is not intended to cause serious physical harm, death; endanger someone's life or create a serious risk to health and safety of the public or a section of the public.³³ AGD argued that the exception is an unnecessary complication.³⁴
- 5.27 The Committee notes that the original formula was highly contentious. In 2002, the AFP gave evidence that policing of protest or industrial actions would rely on existing public order laws, and not upon terrorism offences.³⁵ Nevertheless, the formula was amended to improve public confidence in the legislation.
- 5.28 The definition has now been subject to judicial interpretation. In *R v Faheem Khalid Lodhi*, Justice Wood stated that the proper construction of the definition of 'terrorist act' is as follows:

A terrorist act is an action that is done (or a threat of action that is made) with each of the intentions specified in subparagraphs (b) and (c). The action must possess one or more of the features specified in sub-s(2) provided that it does not have the features specified in sub-s(3). The latter excludes advocacy, protest, dissent or industrial action that is not intended to cause the consequences detailed in the subsection. The breadth of the definition is such that advocacy, protest, dissent or industrial action may be action that falls within sub-s(2), and be capable of founding a terrorist act, if it is not unaccompanied by the intention specified in sub-s3(b)(i)(ii)(iii) and (iv).³⁶

33 Subparagraphs 100.1 (3)(a)(b)(i)(ii)(iii)(iv) of the *Criminal Code*.

34 AGD, *SLR Submission 14*, p.12.

35 *SLCLC Report*, May 2002, p. 36-39.

36 Unreported New South Wales Supreme Court, 14 February 2006, Whealy J at 98.

5.29 Justice McClellan has also commented:

It is apparent that the definition of a 'terrorist act' is capable of catching conduct that does not fall within popular notions of a terrorist act. In particular, the definition only protects advocacy, protest, dissent and industrial action that are not *intended* to have certain results. Given that much protest and industrial action involves mass gatherings, it may be hard to know what the relevant intention of an individual may be...³⁷

5.30 On this view, the definition is inherently problematic. However, the experience in the UK, which does not contain an exception for advocacy, dissent, protest and industrial action, suggests that Australia should retain its current formula. It has been argued in the UK that special police powers have been used in situations that should have been dealt with, if at all, as a public order matter.³⁸ The US definition has also been criticised as deficient because it lacks an exception for advocacy, dissent, protest or industrial action.³⁹

5.31 The inclusion of the exception provides clarity for intelligence and police authorities that these powers are not intended to hinder freedom of assembly, association and expression. Similar formulas have been included in the model laws promoted by the Commonwealth Secretariat, and, as far as we are aware, have general acceptance.⁴⁰

5.32 That said, this still leaves open the potential for the exception to be interpreted in a permissive rather than in a restrictive manner. In our

37 Justice McClellan, *Terrorism and the Law*, 2006, p. 9; subsection 5.2(3) of the Criminal Code relevantly provides that: A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

38 Use of power during the 2005 Labour Party conference (including the arrest of an 82 year old heckler) as report by the *The Scotsman*, 3 October 2005; the arrest of a pedestrian for walking along a cycle path in Dundee as reported, *The Times*, 17 October 2005; the stop and search of an 11 year old girl participating in peaceful protest at an RAF bases as reported, *The Sunday Times*, 18 December, 2005; the detention of a 21 year old student for taking photos of the M3 motorway for a web design company as reported, *This is Hampshire*, 20 October, 2005.

39 Ben Golder and George Williams, *Balancing National Security and Human Rights. Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*, *Journal of Comparative Policy Analysis*, Vol.8, No.1, 43-62, March 2006, p. 47.

40 Options 1 and 2 contain the formula: (3)(b) is committed in pursuance of a protest, demonstration or stoppage or work, shall be deemed not to be a terrorist act within the meaning of this definition, so long and so long only as the act is not intended to result in any harm referred to in paragraphs, (a)(b)(c) or(d) of subsection (2); Commonwealth Secretariat, *Model Legislative Provisions on Measures to Combat Terrorism*, September 2002, p.5-6.

view, in the normal course of events, a serious criminal offence, which occurs in the course of advocacy, protest, dissent or industrial action, should be dealt with by the ordinary criminal law. The alternative approaches do not provide much improvement. To remove the exception entirely would remove an important limitation on the definition of terrorism and statement of policy; and, a blanket exception would provide a defence to terrorist acts. Although the provision is clearly not free from problems we concur with the Sheller Committee that the provision be left as is.

Recommendation 8

The Committee recommends that the current exemption for advocacy, protest, dissent and industrial action be retained as part of the definition of terrorism.

Psychological harm

- 5.33 The Sheller Report recommends that ‘psychological harm’ be included in the definition. During the Sheller Inquiry, the Government proposed that paragraphs 2(a) and 3(b)(i) in the definition of a terrorist act be deleted so that the definition of harm in the Dictionary to the Criminal Code applies, and the paragraphs extend to cover harm to a person’s mental health. The Government supports the recommendation.⁴¹
- 5.34 In 2002 the definition of a terrorist act included psychological harm but was removed because psychological harm was considered remote from commonly understood forms of terrorism. Notwithstanding these earlier uncertainties, a number of organisations have supported the Sheller Report recommendation. For example, Uniting Care, the Law Institute of Victoria and the Gilbert and Tobin Centre of Public Law agree that psychological harm can be as great a concern as physical harm.⁴²

41 AGD, *Submission 14*, p.5.

42 UnitedCare (NSW.ACT), *Submission 11*, p. 3; Law Institute of Victoria, *Submission 2*, p.6; Gilbert and Tobin Centre of Public Law, *Submission 4*, p.2.

5.35 However, the implications of including psychological harm are not entirely clear. The Government of Western Australia has expressed its concern about the recommendation noting that inclusion of psychological harm will significantly extend the definition of terrorist act. In particular, the Government of Western Australia recommends that:

In any event, this recommendation to include psychological harm should be considered in the context of what, if any, other amendments are made to the definition of 'terrorist act', and whether distinctions are to be drawn between the actual consequences of actions and the contemplated consequences of actions, which have not occurred which are, say, planned or threatened.⁴³

5.36 The Committee also notes definitions of terrorism do not generally include a reference to psychological harm. For example, psychological harm does not form part of the definition of terrorism in European Union Council Framework Decision on combating terrorism, which speaks of death and attacks upon the physical integrity of the person.⁴⁴ Nor does it form part of the definition of terrorism in the International Convention on the Suppression of the Financing of Terrorism, which also refers to death and serious bodily injury.⁴⁵

5.37 While there is general appeal in aligning the notion of harm with the *Criminal Code*, popular notions of terrorism involve, for example, terrorist bombings intended to kill and cause serious physical harm. The issue is more problematic than seeking a simple internal consistency with the *Criminal Code*, and in our view, requires more consideration.

43 Government of Western Australia, *Submission 15*, p.2.

44 Article 1 European Union Framework Decision on Combating Terrorism of 13 June 2002.

45 Article 2(b) of the International Convention on the Suppression of the Financing of Terrorism.

Recommendation 9

The Committee recommends that psychological harm not be included in the definition of a terrorist act. Alternatively, that the Government consult with the States and Territories on this issue and give consideration to the question in light of other amendments to the definition.

Threat to commit a terrorist act

5.38 The Sheller Report recommended that 'threat' to carry out a terrorist act be removed from the definition and inserted as a separate personal terrorism offence in Division 101. The Government of Western Australia gave strong support to the recommendation:

Any changes to the definition of 'terrorist act' which remove ambiguity and uncertainty, resulting from 'action' and 'threat of action' being combined in the definition, are supported.⁴⁶

5.39 Similarly, the Gilbert and Tobin Centre of Public Law supported to the recommendation:

It is important that threats of terrorist acts are criminalised but agree it is clearer and more straightforward for threats to be covered by a separate offence rather than be included as part of the definition of terrorist act.⁴⁷

5.40 The Committee agrees that a clearer distinction between a threat and an act of terrorist violence would improve clarity and can be achieved without obstructing the policy objective. We understand that this will require consultation and agreement with the States and Territories.

Recommendation 10

The Committee recommends that 'threat' of terrorist acts be removed from the definition of terrorism and be dealt with as a separate offence.

46 Government of Western Australia, *Submission 15*, p.2.

47 Gilbert and Tobin Centre of Public Law, *Submission 4*, p.2.

International organisations

5.41 European and international counter-terrorism law recognise that international governmental organisations (such as the United Nations) may be targets of terrorism.⁴⁸ Australian law already provides for a range of offences against the United Nations and associated personnel, which give effect to the Convention on the Safety of United Nations and Associated Personnel.⁴⁹ This item has not been widely canvassed and it is unclear why the Australian definition does extend to cover international organisations.

Recommendation 11

The Committee recommends that the definition of terrorism recognise that international organisations may be the target of terrorist violence.

Terrorism and the law of armed conflict

5.42 In the 'global war on terror' the distinction between terrorism law and the law of armed conflict has often given rise to confusion and remains contentious. We believe that it is important to retain the distinction as clearly as possible. There are three issues:

- whether conduct is a legitimate part of an armed conflict and regulated by the law of armed conflict;
- where the conduct may be described as terroristic, and committed by parties to an armed conflict and therefore a war crime;
- where the conduct is carried out by other individuals, organisations or groups who are not party to an armed conflict and therefore subject to criminal law.

5.43 Internally, terrorist activity is not regulated by the law of armed conflict but is a matter of criminal law unless the activity is of such a nature as to amount to an armed conflict. In a conflict situation, whether the activity is terrorism and therefore a war crime or a matter

48 See Convention for the Suppression of the Financing of Terrorism (1999), European Union Framework Decision on Combating Terrorism (2002), and the recital to the 2005 Council of Europe Convention on the Prevention of Terrorism.

49 Division 71 of the *Criminal Code*.

for the criminal law depends on whether the law of armed conflict applies to the situation and to the actors.

5.44 International Committee of the Red Cross (ICRC) has clarified that:

When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply.

5.45 The law of armed conflict prohibits all acts aimed at spreading terror among the civilian population,⁵⁰ and specifically prohibits 'measures of terrorism' and 'acts of terrorism,'⁵¹ and treats this conduct as a war crime. ICRC identify the following breaches of the law of armed conflict as terrorist offences: attacks on civilians and civilian objects;⁵² indiscriminate attacks,⁵³ attacks on places of worship,⁵⁴ attacks on works and installations containing dangerous forces,⁵⁵ the taking of hostages,⁵⁶ and murder of persons no longer taking part in hostilities.⁵⁷

5.46 The purpose of these prohibitions is to reinforce the 'principle of distinction', that is, while attacks on the military and military installations are legitimate if it is to achieve a military objective, targeting civilians and acts which place civilians in excessive danger violate the laws of war.

5.47 An *a priori* question is whether the laws of armed conflict apply to the situation and to the parties. The answer to this question will depend on the facts of the situation.⁵⁸ There have been various attempts to articulate the relationship between the law of armed conflict and terrorism law at the international level.⁵⁹

50 Art. 51, paragraph 2, Protocol I and Art.13, paragraph 2, Protocol II.

51 The Fourth Geneva Convention (Art. 33) states that 'Collective penalties and likewise all measures of terrorism are prohibited'. Additional Protocol II (Art.4) prohibits acts of terrorism against persons not or no longer taking part in hostilities.

52 Art. 51, paragraph 2, and 52, Protocol I; and Art. 13, Protocol II.

53 Art. 51, paragraph 4, Protocol I.

54 Art. 53, Protocol I; and Art. 16, Protocol II.

55 Art. 56, Protocol I; and Art. 15, Protocol II.

56 Art.75 Protocol I; Art.3 common to the four Conventions; Art.4, paragraph 2b, Protocol II.

57 Art.75 Protocol I; Art.3 common to the four Conventions; Art.4, paragraph 2a, Protocol II.

58 Shaw M QC, *International Law* (5th Ed), Cambridge University Press, UK, 2003.

59 Pre-ambular paragraph 11 EU Framework Decision on Combating Terrorism states that: Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions of armed

5.48 The issue arises in the present discussion because of the breadth of the definition of terrorism, which includes acts of terrorism against foreign governments and publics; and the application of extended geographical jurisdiction. There is always an element of discretion left to authorities to decide which offence is the most appropriate to be applied. However, in this context, it would be appropriate for the Parliament to signal that it does not intend to apply the law of terrorism where the law of armed conflict applies to a situation and where the conduct either attracts combatant immunity or is, in fact, a war crime. Individuals, organisations or groups not covered by the law of armed conflict may be dealt with according to the criminal law.⁶⁰

Recommendation 12

The Committee recommends that to remove doubt the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict.

Personal terrorism offences – Division 101

5.49 Division 101 contains a series of personal terrorism offences, which include:

- an act of terrorism (s.101.1);

forces of a State in the exercise of their official duties are not governed by this Framework Decision. International Convention for the Suppression of the Financing of Terrorism, adopted at New York on 9 December 1999; entered into force on 10 April 2002 Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism includes conduct that is ‘...intended to cause serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict’.

⁶⁰ Section 83.01 (1) of the *Canadian Criminal Code* also includes: ‘...but, for greater certainty, does not include an act or omission that is committed during armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or convention international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law; in New Zealand the definition of a terrorist act provides that: an act is not a terrorist act if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with the rules of international law applicable to the conflict.’

- providing or receiving training (s.101.2);
- possessing things connected with terrorist acts (s.101.4)
- collecting or making documents likely to facilitate terrorist acts (s.101.5);
- doing an act in preparation for or planning terrorist acts (s.101.6).⁶¹

5.50 The Sheller Committee rejected complaints that personal offences contained in Division 101 are drafted in vague terms.

Hoax offences

5.51 The CDPP gave evidence that the current definition of terrorism would not cover 'threats' made without motivation to advance a political, religious or ideological cause or to coerce or intimidate government. The Sheller Report recommended that a separate hoax offence be added to Part 5.3.⁶²

5.52 The Macquarie Dictionary defines a threat as a 'declaration of intention' to do something whereas a 'hoax' is a 'deception of a public authority'.⁶³ During hearings the CDPP confirmed that:

A hoax is not joined at the hip to a terrorist act at all, because there is just nothing in the nature of a terrorist act in the contemplation of the person who has made the hoax call, written the hoax letter or whatever. It would be separate from a terrorist act and therefore you would expect that it did not incur anything like the penalty that a terrorist act obviously has in the legislation. We would have it separate from it and down from it in seriousness.⁶⁴

5.53 We also note that the Government has agreed that a hoax is conceptually distinct from a threat.⁶⁵ The Committee concurs with the view that a hoax should not be part of the definition of terrorism and it should not attract the same penalty as a threat or act of terrorism.

61 Sections 101.2, 101.4, 101.5 and 101.6 *Criminal Code Act*.

62 The Sheller Committee took Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism as a reference point and said, that a hoax should require a 'credible' and 'serious' threat to commit a terrorist act, where the evidence does not support a finding of an intention to commit a terrorist act.

63 *The Macquarie Dictionary (3rd Ed)*, 2001, p.1016 and 2204.

64 CDPP, *Transcript*, 1 August 2006, p.31-32.

65 AGD, *Submission 14*, p.6.

- 5.54 The Law Institute of Victoria did not support the Sheller recommendation because, it said, proving the *mens rea* requirement for a hoax is difficult.⁶⁶ We did not find this argument persuasive as hoax offences are already part of the criminal law.⁶⁷

Recommendation 13

The Committee recommends that a separate hoax offence be adopted but that penalties reflect the less serious nature of a hoax as compared to a threat of terrorism.

Terrorist organisation offences – Division 102

- 5.55 Division 102 contains additional offences, which relate to the conduct of a person who is in some way connected or associated with a ‘terrorist organisation’. Terrorist organisation offences do not rely on the organisation in question being listed by regulation.
- 5.56 There are two different definitions of terrorist organisation. Under section 102.1 (a) ‘terrorist organisation’ means an organisation that is:
- (a) directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
 - (b) specified by the regulations (ss.102.1(2)(3) and (4)).
- 5.57 For the purpose of listing by regulation the Minister must be satisfied on reasonable grounds that the organisation:
- (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or

66 Law Institute of Victoria, *Submission 2*, p.11.

67 For example, the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002* (Cth) and the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth) inserted hoax offences into the *Criminal Code* (Cth). It is an offence punishable by up to 10 years imprisonment to make bomb hoaxes: sections 471.10 (postal service) and 474.16 (carriage service); 471.11 (postal service); 474.15 (carriage service) 470.1 of the *Criminal Code*.

(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

5.58 Under section 102.1(1A) an organisation *advocates* the doing of a terrorist act if the organisation:

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

(b) directly or indirectly provides instruction on the doing of a terrorist act; or

(c) 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) to engage in a terrorist act.

Advocacy

5.59 The Sheller Committee considered the implications of ‘advocacy’, as a basis for listing an organisation and identified the following issues:

- there is no definition of ‘counsel’ or ‘urges’;
- the definition applies to indirect as well as direct actions;
- ‘risk’ is a low standard;
- it is unclear in what circumstances advocacy will be attributed to the organisation rather than the individual;
- a member of an organisation could be liable for terrorist organisation offences because of the conduct of a single member or a leader with whom they disagree.

5.60 The Sheller Committee did not recommend the repeal of the whole of section 102.1 (1)(1A) but only paragraph 102.1 (1A) (c). Alternatively, that ‘risk’ is amended to ‘substantial risk’ to clarify the threshold for listing under that paragraph. The Government does not accept the recommendation on the grounds that amendments at this time would be premature and have yet to be tested by the courts.⁶⁸ In addition, the Government has expressed concerns that elevating the requirement in paragraph (c) to a ‘substantial risk’ could:

...undermine the operational effectiveness of the provision which is aimed at early intervention and prevention of terrorism.⁶⁹

- 5.61 Section 102.1 (1A) was inserted into the *Criminal Code* by the ATA No.2.⁷⁰ In 2005, AGD explained the rationale for including 'advocacy':

Where the organisation has arranged for the distribution of a book that tells young people that it is their duty to travel overseas and kill Australian soldiers stationed in another country. Another [example] might be where the organisation puts a message on a web site following a terrorist act stating that it was a brave act that should be repeated.⁷¹

- 5.62 The Explanatory Memorandum states that:

The definition of advocates is not restricted in terms of the manner in which the advocacy occurs. It covers all types of communications, commentary and conduct. The definition recognises that such communications and conduct are inherently dangerous because it could inspire a person to cause harm to the community. This could be the case where it may not be possible to show that the organisation intended that a particular terrorism offence be committed or even intended to communicate the material to that particular person. Accordingly, the definition is not limited to circumstances where a terrorist act has in fact occurred, but is available whether or not a terrorist act occurs.

An organisation may advocate the doing of a terrorist act without being a terrorist organisation, as this new definition captures statements and conduct in support of previous terrorist acts as well as any prospective terrorist acts.

- 5.63 The Australian Press Council has argued that commentary on the activities concerning the liberation of peoples subject to foreign occupation or oppressive government could fall within the definition.⁷² The Law Institute of Victoria and Uniting Care also

69 AGD, *Submission 14*, p.6.

70 See Chapter 5, SLCLC, *Provisions of the Anti Terrorism Bill (No.2) 2005*, Commonwealth of Australia, November 2005.

71 AGD *Submission 290A, Attachment A*, p.7 as cited in SLCLC Report, *Provisions of the Anti-Terrorism Bill (No.2) 2005*, November 2005, p.118.

72 Australian Press Council, *Submission 1*, p.2.

support repeal of paragraph (c) on this basis.⁷³ The Sheller Committee said that:

In the context of paragraph (c), 'a risk' means no more than 'a chance' that such praise might have the effect of leading a person to engage in a terrorist act. It is hard to imagine that anything less than a 'substantial risk' was intended, or that a Court would construe 'risk' to mean anything other than a 'substantial risk'.⁷⁴

5.64 We note also the concerns of the Gilbert and Tobin Centre of Public Law, who argued that:

...it is well accepted that speech which directly incites a specific crime may be prosecuted as incitement...

...it is another matter to prosecute a third person for the statements of another, even more so when such statements need not be directly and specifically connected to any actual offence.⁷⁵

5.65 'Advocacy' is not a criminal offence *per se*, it provides a means of listing an organisation and thereby the ability to remove support for an organisation that advocates terrorism. Section 102.1 (1A) clearly raises substantive questions about limits of freedom of expression in a liberal democracy. However, it is not inherently objectionable for the law to prevent statements that incite the carrying out of a criminal offence.

5.66 The possibility of prosecution for a terrorist organisation offence would arise once the organisation is listed. All organisations listed so far are organisations based overseas; none of those organisations is listed on the basis of advocacy. Further, the Minister must have reasonable grounds for believing the direct praising of acts of terrorism creates a risk that other will engage in terrorist acts. That said, listing of an organisation enlivens criminal offences, which carry substantial penalties and, once an organisation is listed, there is no requirement for the Crown to prove that it is a terrorist organisation.

5.67 The Committee does not support repeal of (c) at this stage and will consider the question further in its consideration of the listing process in 2007. However, we agree with the observation of the Sheller

73 Law Institute of Victoria, *Submission 2*, p.9; Uniting Care, *Submission 11*, p. 4.

74 Sheller Report, p.71.

75 Sheller Report, p. 73.

Committee that risk should be substantial rather than a mere chance. A small and essentially technical amendment to clarify that 'substantial risk' is the intended threshold, would provide some improvement in certainty and proportionality.

Recommendation 14

The Committee does not recommend the repeal of 'advocacy' as a basis for listing an organisation as a terrorist organisation but recommends that this issue be subject to further review.

The Committee recommends that 'risk' be amended to 'substantial risk'.

Terrorist organisation offences

- 5.68 It is a criminal offence to intentionally do any of the following in connection with a 'terrorist organisation':
- direct activities (102.2);
 - be a member (102.3);
 - recruit a person to join or participate in activities (102.4);
 - receive or provide training (102.5);
 - receive funds from or make funds available (102.6);
 - provide support or resources that would help the organisation engage in preparation, planning, assisting or foster of the doing of a terrorist act (102.7);
 - on two or more occasions associate with a member or person who promotes or directs activities (102.8).

Membership of a terrorist organisation

- 5.69 A member of a terrorist organisation includes an 'informal member'.⁷⁶ The Sheller Committee rejected the proposition that 'informal' membership of a terrorist organisation is too vague on the basis that

76 Section 102.1 of the *Criminal Code*.

terrorist organisations are likely to be informal networks and the Committee was asked to give further consideration to this matter. In particular, the adverse impacts on the Muslim community, in which affiliations between faith based and social welfare organisations may not be clearly demarcated and community participation is high.

5.70 The Gilbert and Tobin Centre of Public Law were asked to provide further analysis to the Committee and subsequently advised that:

We have reviewed legislation from Canada, the United States, the United Kingdom and New Zealand and determined that none of these jurisdictions criminalises the status of informal membership without other culpable conduct, and that only the United Kingdom has a membership offence.⁷⁷

5.71 The UK has a membership offence that applies to a person who belongs or professes to belong to a proscribed terrorist organisation.⁷⁸ The United Kingdom Court of Appeal (Criminal Division) has stated that the purpose of the section is to criminalise membership of a proscribed organisation and that:

proof of membership may sometimes be difficult; hence profession of membership is itself a criminal offence.⁷⁹

5.72 The word 'profess' at least requires some self identification with, in the UK context, a listed organisation. Nevertheless, the word 'profess' has attracted judicial criticism:

The scope of 'profess' is in my view so uncertain that some of those liable to be convicted and punished for professing to belong to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions.⁸⁰

5.73 The Australian policy to date has also been to criminalise the status of membership *per se*. In New Zealand, 'informal membership' is caught by the offence of 'participating' in a terrorist group for the purpose of enhancing the ability of the entity to carry out or participate in the carrying out of a terrorist act.⁸¹

77 Gilbert and Tobin Centre of Public Law, Response to Questions on Notice, *Supplementary Submission 18*, p. 1-4.

78 The Australian offence applies to a terrorist organisation whether or not it is proscribed.

79 Latham CJ, *Re Attorney-General's Reference No.4 of 2002* [2003] 3 WLR 1153 at 1160.

80 Lord Bingham of Cornhill, *Attorney-General's Reference No.4 of 2002; Sheldrake v DPP* [2004] UKHL at 48.

81 Section 13 of the *Terrorism Suppression Act 2002*(NZ).

5.74 The Committee accepts the evidence of the AFP, who have said that proving a person is a member of a particular group is difficult:

It does appear that there is, however, an emerging difficulty in obtaining sufficient evidence to establish that an individual is a member of a proscribed entity. This is particularly so given that such organisations often do not have formal structures or membership lists.⁸²

5.75 The Sheller Committee also took the view, that, while informal membership itself creates some difficulties, the existence of a looser group, is the reality of the current security environment. However, there must still be sufficient cohesion among the people concerned that warrants the designation of the group as a terrorist organisation and attracts the terrorist organisation offences (as opposed to conspiracy etc). We note that in *R v Izhar Ul-Haque*, the Crown argued that the term organisation refers:

...to a standing body of people with a particular purpose: not a transient group of conspirators who may come together for a single discrete criminal purpose.⁸³

5.76 The underlying purpose of the membership offence is to stop people from participating in entities/organisations that engage in or promote terrorism. The New Zealand approach represents an alternative, which has the merit of capturing 'participation' and avoiding the technicalities and difficulties of formal and informal membership. The NZ participation offence also make clear that it is participation in the entity (whether listed or not) to further the terrorist aims of the group that is targeted.

82 AFP, *SLR Submission 8*, p. 5.

83 Crown submissions quoted in *R v Izhar Ul-Haque* (unreported, NSW Supreme Court, 8 February 2006) Bell J at 51.

Recommendation 15

The Committee recommends that the Government consider:

- replacing the membership offence with an offence of participation in a terrorist organisation; and
- whether 'participation' should be expressly linked to the purpose of furthering the terrorist aims of the organisation.

Training offences

5.77 Section 102.5 makes it an offence to intentionally or recklessly provide to or receive training from a terrorist organisation. The Sheller Committee concluded that the offence was broad enough to encompass

- innocent training; and
- the training offence does not require any connection to a terrorist act.⁸⁴

5.78 AGD submitted that, in its current form, the offence does not cover participation. The Sheller Committee did not agree entirely with this proposition, believing that the current offence probably covers participation. In any event, it was recommended that training offences should be:

- qualified so there is a link to a terrorist act or the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act;
- extended to cover 'participation' in training.

5.79 Much of the concern with section 102.5 relates to drafting. The excessive complexity of the provisions has contributed further to the uncertainty about the scope and application of the offence. The penalty of up to 25 years imprisonment reflects the seriousness of the offence and requires greater specificity.

5.80 It was suggested that, because training or receiving training is the conduct (*actus reus*) of the offence, it is appropriate that it be defined

⁸⁴ Section 101.2 requires a connection to a terrorist act or preparation for engagement in or assistance with a terrorist act. Section 102.5 contains no equivalent qualification.

with greater certainty.⁸⁵ The equivalent section in Title 18 of the US Code s. 2339D, defines military type training, as training in methods that can cause death or serious bodily harm, destroy or damage property, disrupt services to critical infrastructure or training in the use, storage, production or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction. The US approach is clearly focused on the type of training, which is commonly understood to be the type of training that may be received from a foreign terrorist organisation. This approach targets training which is inherently dangerous and provides more precision. It may not be the entire solution for the offence under Australian law, but it illustrates a valid point.

- 5.81 The purpose of the Sheller Committee recommendations is to draw the offence more carefully so that it cannot catch innocent training or the mere teaching of people who may be members of a terrorist organisation. Drawing the training offence more precisely would achieve greater certainty and a better proportionality between the conduct that is criminalised and the penalty. If the training offence is intended to cover other types of training, this could be identified in the training offence provisions or by separate offence with a penalty appropriate to the conduct.

Recommendation 16

The Committee recommends that the training offence be redrafted to define more carefully the type of training targeted by the offence. Alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act.

Getting funds to and from or for a terrorist organisation

- 5.82 Section 102.6 makes it an offence for a person to intentionally or recklessly receive funds from, make funds available, or collect for or on behalf of a terrorist organisation that they know to be a terrorist organisation.

85 Mr Lex Lasry QC, *Submission 12*, p.6.

5.83 It is a defence if the person receiving funds does so solely for the purpose of providing legal representation in proceedings relating to Division 102; or to assist the organisation to comply with Australian law. The defendant bears the legal burden, that is, on the balance of probability, that the funds were received for this purpose. This has the potential to create significant difficulties for the legal representative, who is bound by obligations of confidentiality and legal professional privilege. Mr Lex Lasry QC advised the Committee that:

The privilege is that of the client and may be waived by the client. Therefore, unless the client consents to the legal representative adducing evidence about the nature of the legal representation, the legal representative will be unable to discharge the legal burden.⁸⁶

5.84 The Sheller Committee recommended that the defence should be widened to apply to funds received for the purpose of providing legal representation in proceedings under Part 5.3 and that the defendant's legal representative should bear an evidentiary burden rather than a legal burden (see below). The Government has agreed to the first part of the recommendation but not the reduction from a legal to an evidential burden.⁸⁷

5.85 Uniting Care suggests that the Sheller Committee recommendation does not go far enough and suggests the funds transfer should be related to preparing for, assisting with or doing of a terrorist act.⁸⁸ The Committee does not agree. However, there is no clear rationale for limiting the scope of legal representation to criminal proceedings under Part 5.3 of the *Criminal Code* and a simpler and clearer approach would be to include legal representation in proceedings *per se*. This would also be more consistent with exceptions for legal counsel that exist in the association offence.⁸⁹ The exception for legal counsel in respect of the association offence also places an evidential burden on the defendant lawyer.⁹⁰

86 Mr Lex Lasry QC, *Submission 12*, p.10.

87 AGD, *Submission 14*, p.9.

88 Uniting Care, *Submission 11*, p 5.

89 Subparagraphs 102.8 (4) (i) to(vi) of the *Criminal Code*.

90 See note to subsection 102.8(4) of the *Criminal Code*.

Recommendation 17

The Committee recommends that:

- it be a defence to the offence of receiving funds from a terrorist organisation that those funds were received solely for the purpose of the provision of representation in legal proceedings; and
- that the legal burden be reduced to an evidential burden.

Providing support to a terrorist organisation

5.86 Section 102.7 criminalises ‘support’ for a terrorist organisation. There is no definition of ‘support’ in the *Criminal Code*. HREOC argued that ‘support’ could extend to publication of views that appear favourable to a listed organisation and therefore infringe freedom of expression.⁹¹

5.87 Mr Sheller AO QC, gave evidence that there was real concern about what ‘support’ is intended to cover and the possibility that it could be applied to verbal support.⁹² Although it may appear unlikely we acknowledge that there is sufficient concern about the ambiguity to warrant a recommendation that ‘support’ be qualified to avoid unnecessary intrusion in the freedom of expression.⁹³ The Australian Press Council supported the Sheller recommendation saying that:

An excessively broad interpretation of ‘support’ is a potential impediment to free speech... In order to ensure that media organisations are not placed under pressure to self-censor, it is important that the notion of providing support to terrorist organisations be defined narrowly. In the alternative, clear defences must be included in the legislation to exempt publication of news reports and commentary.⁹⁴

5.88 Both AGD and CDPP disagreed with HREOC’s interpretation. AGD submitted that the Government does not consider that the word ‘support’ can be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and

91 HREOC, *SLR Submission 11*, p.13.

92 Mr Sheller AO QC, *Transcript*, 31 July 2006, p.19.

93 For discussion, Sheller Report, p.122.

94 APC, *Submission 1*, p.1.

its stated objectives. To date, 14 charges have been laid under section 102.7 against 12 accused and 1 case, Thomas, has been dealt with. It was argued, that it is preferable to wait until the courts have interpreted section 102.7 and respond to any issues that may arise as a result.⁹⁵

5.89 Taken as a whole, section 102.7 requires the prosecution to establish to the requisite standard that:

a person provided support or resources to an organisation; the support or resources would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation (that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act); and the person knows or is reckless as to whether the organisation is a terrorist organisation.⁹⁶

5.90 We posed a hypothetical, where a person verbally claimed to support a terrorist organisation. In a follow up response to the question on notice, the CDPP advised the Committee that:

In my opinion the offence under section 102.7 of providing support to a terrorist organisation would not apply to those words alone...Even if the words 'I support Hezbollah' are taken to fall within the terms 'support', in the circumstances of the case posed, such words would not help that organisation (Hezbollah) engage directly or indirectly in preparing, planning, assisting in or fostering the doing of a terrorist act as required under that provision'.⁹⁷

5.91 The Committee understands that the underlying policy rationale is to target the provision of support and resources that help a terrorist organisation engage in a terrorist act or activities that are related to the doing of a terrorist act. This would indicate that the conduct must be some type of material support not mere words. However, it is conceivable that active engagement in propaganda activities could fall within the offence. An amendment, which clarifies 102.7 so that it applies to material support and resources and not to words is consistent with the policy and will provide certainty for the community.

95 AGD, *Submission 14*, p.9.

96 CDPP, Response to Question on Notice, *Supplementary Submission 23*, p.2.

97 CDPP, Response to Question on Notice, *Supplementary Submission 23*, p.2.

- 5.92 Given the seriousness of the offence and the penalties attached thereto, a technical refinement of this nature would be a reasonable modification. Further, we note that paragraph (a) of the definition of a terrorist organisation, includes ‘fostering’, which means to ‘promote’ or to ‘encourage’ the doing of a terrorist act. In these circumstances, clarification that mere words are insufficient to ground a conviction appears all the more important.

Recommendation 18

The Committee recommends that the offence of providing support to a terrorist organisation be amended to ‘material support’ to remove ambiguity.

Associating with a terrorist organisation

- 5.93 Under section 102.8 of the *Criminal Code*, it is an offence punishable by up to 3 years imprisonment to knowingly associate on two or more occasions with a member of a listed terrorist organisation or a person who directs/promotes activities of a listed terrorist organisation, with the intention of providing support and that assists the organisation to expand or continue to exist.⁹⁸
- 5.94 To address the concern that the offence disproportionately infringes freedom of association, the offence was qualified by a number of exceptions, which include,
- association with close family members in the context of family or domestic concerns;
 - association in the course of religious practice in a place of public religious worship;
 - association for the purpose of providing humanitarian aid;
 - association for the purpose of providing legal advice and representation for prescribed purposes.⁹⁹

⁹⁸ Subsection 102.8 (1) of the *Criminal Code*.

⁹⁹ Subsection 102.8(4) for exceptions to the offence of ‘association’; see subparagraphs 102.8(4)(d)(i) to (vi) for restrictions on legal advice and representation which is limited to criminal proceedings; proceedings relating to whether the organisation is a terrorist organisation; decisions and execution of ASIO questioning and detention warrants under

- 5.95 In addition, in recognition that aspects of the offence are constitutionally suspect, subsection 102.8 (6) was inserted to state that the offence only applies to the extent that it does not infringe the constitutional guarantee of freedom of political communication. The defendant bears an evidential burden to establish the exceptions or to establish that the application of the offence to the facts of their case infringes the constitutional limitation.
- 5.96 The association offence has provoked widespread anxiety and concern; it is highly contentious and arguably, has an impact beyond what was originally intended. It is complex, difficult to interpret and therefore difficult to advise people what they may or may not do.
- 5.97 The Sheller Committee took the view that the offence of association is almost impossible to define and too complex to prove. In particular, it criticised the framing of a criminal offence by an imprecise reference to a constitutional guarantee of freedom of association (s.102.8(5)). It was concluded that the actual offence can only be determined by constitutional interpretation or challenge. It is impossible therefore to know the scope of the offence. The Sheller Committee recommended that the association offence in its present form be repealed.
- 5.98 The Gilbert and Tobin Centre of Public Law gave its strong support for the repeal of the association offences. Among the reasons given is the primary aim of the association offence is to capture those who 'support' a terrorist organisation with the intention that the support assist the organisation to expand or to continue to exist:
- The core culpable conduct is not the person's association with a member of a terrorist organisation; rather it is the provision of support to the terrorist organisation. Section 102.8 does not properly target this culpable conduct.¹⁰⁰
- 5.99 Repealing section 102.8 and replacing it with a properly targeted offence that does not rely on association would address the constitutional and community concerns.¹⁰¹

the ASIO Act 1979; listing under section 15 Charter of United Nations Act 1945; US military commission proceedings established under Presidential Order; a review of a decision relating to passport or other travel document.

100 Gilbert and Tobin Centre of Public Law, *Submission No. 4*, p.3.

101 Gilbert and Tobin Centre of Public Law, *Submission No. 4*, p.3.

Recommendation 19

The Committee recommends that the offence of ‘associating with a terrorist organisation’ be re-examined taking into account the recommendations of the Sheller Committee.

Reverse onus provisions

5.100 In the context of the present review, the Sheller Committee and this Committee are asked to consider the appropriateness of the use of strict liability provision, applied to a number of the terrorist organisation offences. In summary, those offences are:

- membership of a terrorist organisation, which does not apply if the person can prove (on the balance of probabilities) that he took reasonable steps to cease to be a member when he knew the organisation was a terrorist organisation (s.102.3(2));
- training and association offences, in respect of the question of whether the organisation is a listed terrorist organisation (s.s. 102.5(3) and 102.8(3)).
- getting funds to, from or for a terrorist organisation imposes a legal burden on a legal representative to prove that monies received for the sole purpose of legal representation or assistance to comply with a Commonwealth, State or Territory law (ss. 102.6(3)).

Presumption of Innocence

5.101 The requirement that the prosecution in a criminal trial must prove all the elements of the offence with which the accused is charged, has been described as the governing principle of the criminal law and is integral to a fair trial.¹⁰² The underlying rationale is simply that:

...it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so.¹⁰³

102 *Attorney-General's Reference No.4 of 2002; Sheldrake v DPP* [2004] UKHL 43 Lord Bingham of Cornhill per 3; *Woolmington v DPP* [1935] AC 462, Viscount Sankey LC at 481; the presumption of innocence is one of the elements of the fair criminal trial repeated recognised by the European Court of Human Rights; see for example, *Bernard v France* (1998) 30 EHRR 808, paragraph 37.

103 *Attorney-General's Reference No.4 of 2002; Sheldrake v DPP* [2004] UKHL 43 Lord Bingham of Cornhill per 9.

- 5.102 Nevertheless, Parliament has at times decided that a reversal of the burden of proof may be permissible in certain limited and exceptional circumstances. The effect of the imposition of strict liability is to place a legal burden (sometimes referred to as the persuasive burden) on the defendant to prove on the balance of probabilities an element of the offence. In essence, where a defendant has to 'prove a fact on the balance of probability to avoid conviction this permits conviction in spite of the fact finding tribunal having a reasonable doubt as to the guilt of the accused'.¹⁰⁴ It is for this reason, that strict liability is generally not applied to an offence for which the penalty is a term of imprisonment.
- 5.103 By contrast, an evidential burden requires the defendant to adduce or point to evidence that suggests a reasonable possibility that the matter does or does not exist and the burden of proof reverts to the prosecution. Typically, where a defendant wishes to take advantage of an exception, exemption, proviso, excuse or qualification an evidential burden may fall upon the defendant. Provided the evidential burden is not applied to an element which is, in fact, a primary ingredient of the offence, the use of evidential burden may be considered a reasonable limitation.

Views of the Sheller Committee

- 5.104 The Sheller Committee regarded the use of strict liability as it applied to the terrorist organisation offences as unjust and disproportionate. They restated the principle that strict liability should not be used for any element where an offence carries a penalty of imprisonment. We have concluded that the view expressed by the Sheller Committee is consistent with the policy and practice of the Commonwealth executive and legislature over many years. The judicial trend is also to read down strict liability provisions to an evidential burden, and has been applied in numerous cases, including terrorism cases under similar statutes.¹⁰⁵
- 5.105 In 2002, the Senate Standing Committee for the Scrutiny of Bills examined the use of strict liability. It adopted a series of basic principles which state that:

104 *R v Whyte* (1988) 51 D.L.R. (4th) 481, 493.

105 *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326; *Attorney-General's Reference No.4 of 2002*; *Sheldrake v DPP* [2004] UKHL 43; *Salabiaku v France* (1988) 13 E.H.R.R. 379.

Fault liability is one of the most fundamental protections of the criminal law; to exclude this protection is a serious matter.

- 5.106 It recommended that strict liability never be applied to offences that carry a term of imprisonment. In formulating that recommendation, the parliamentary committee took account of the Commonwealth guidelines that strict liability may be appropriate for:
- regulatory offences; or
 - in relation to a matter that is peculiarly within the knowledge of the defendant;
 - to overcome a 'knowledge of law' problem, where an element of the offence expressly incorporates a reference to a legislative provision.
- 5.107 Based on Commonwealth Guidelines, the Senate Committee also stated that strict liability should be applied only where the penalty does not include imprisonment.¹⁰⁶
- 5.108 We agree with the Sheller Committee that there is no apparent need to require the defendant to bear the onus in relation to organisations that are listed by regulation. In a recent case on the same point, the House of Lords read down the legal burden to an evidential one after coming to the conclusion that there was a real risk that a person who was innocent of any criminal conduct may be unable to establish the defence (that the organisation was not proscribed etc).¹⁰⁷

Recommendation 20

The Committee recommends that strict liability provisions applied to serious criminal offences that attract the penalty of imprisonment be reduced to an evidential burden.

106 Attorney-General's Department Guidelines, as cited in Senate Standing Committee for the Scrutiny of Bills, Sixth Report, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002, p.259; see also NSW Legislation Review Committee, *Strict and Absolute Liability*, Discussion Paper No.2, Parliament of NSW, 8 June 2006.

107 *Sheldrake v DPP; Attorney-General's Reference (No.4 of 2002)* [2004] UKHL 43.

