

06/7338

The Hon David Jull MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Jull

Government comments on Recommendations of the Security Legislation Review Committee (the Sheller Review)

I am writing to provide you, on behalf of the Government, comments on the recommendations of the Security Legislation Review Committee (the Sheller Committee).

As you are aware, the Parliamentary Joint Committee on Intelligence and Security (the PJC) is required to review, as soon as possible after the third anniversary of the day on which the *Security Legislation Amendment (Terrorism) Act 2002* receives the Royal Assent, the operation, effectiveness and implications of amendments made by that Act and the *Border Security Legislation Amendment Act 2002*; the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and the *Suppression of the Financing of Terrorism Act 2002* (the 2002 legislation).

In the opening lines of the Executive Summary the Sheller Committee stated that it is “satisfied that, in addition to the general criminal law, separate security legislation is necessary”.

The Committee went on to note that on the material available to date there was no indication of excessive or improper use of the provisions that fall within the scope of the review. Indeed, there is limited practical experience with the legislation and consequently the Government notes that many of the recommendations are conceptual in nature. As the 2002 legislation has no sunset clause there is no imperative to enact any amending legislation within a certain time frame should the PJC conclude that there is insufficient experience with the legislation to justify changes at this time.

Bearing this in mind, the comments on the recommendations are provided in the attached document.

The action officer for this matter in my Department is Kirsten Kobus who can be contacted on 6250 5433.

Yours sincerely

Philip Ruddock

Comments on the Recommendations of the Security Legislation Review Committee

Recommendations	Comments
<p>1. Further Review</p> <p>The SLRC recommends that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years.</p> <p>If an independent reviewer, as discussed in this report, has been appointed, the review to be commissioned by the Council of Australian Governments (COAG) in late 2010, could be expanded in its scope to include all of Part 5.3 of the Criminal Code. The SLRC also draws attention to other models of review and urges the government to consider the models discussed in the report.</p>	<p>The Government does not support this recommendation.</p> <p>The Government is committed to ensuring that all security legislation remains necessary and effective against terrorism. Where the Government considers that legislation should be subject to review, due consideration is given to the various models of review available, such as those outlined in the report.</p> <p>The SLRC itself noted that the review had, to a certain extent, been a theoretical exercise because of the relatively short time in which the legislation, particularly in its latest amended form, has been operating. While the Government agrees with the SLRC that in the next few years more would be known about the operation of the legislation, we do not agree that another legislative-based review should be conducted in three years' time.</p> <p>Terrorism-related investigations, such as Operation Pendennis, and the numerous cases currently before the courts, demonstrate the long lead time involved where this legislation is concerned. The Government considers that it would be preferable to allow sufficient time for more operational and judicial experience with the legislation, and then respond to any issues that may arise as a result.</p>

2. Community education

The SLRC recommends that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim and Arab communities, and to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them.

Counter-terrorism legislation applies to all Australians, irrespective of their race or religion. The Government remains committed to engaging with the community on security issues and has taken a number of steps to address this recommendation. This includes convening a summit of Muslim leaders and publishing an explanation of the provisions of the recent terrorism legislation in a number of languages.

The Prime Minister's Summit with Muslim community leaders was held on 23 August 2005. The development of a National Action Plan to address intolerance and extremism by a Reference Group of Muslim leaders was endorsed by the Council of Australian Governments (COAG) in September 2005. Work on this is progressing.

Also in September 2005, COAG agreed to the development of a national strategy to promote public understanding of national counter-terrorism arrangements. Endorsement of the strategy, developed in consultation with jurisdictions, is being sought at the next meeting of COAG in July 2006. Following endorsement, the Commonwealth and jurisdictions will work on the detail of the implementation of that strategy.

In addition Commonwealth officers have appeared at a number of public forums around the country to discuss the laws and this process is ongoing.

Operational agencies at the Commonwealth and State/Territory level already engage the community on security and counter-terrorism issues. ASIO has long-standing liaison with the community as part of on-going business activities. In addition to formal engagement strategies in each jurisdiction, the AFP maintains relationships with community leaders to enhance community understanding of counter-terrorism issues. For example, after the arrest of 22 persons associated with Operation Pendennis, the AFP and New South Wales Police further engaged with affected communities to encourage community understanding of the facts of the case and to address specific concerns of the community.

The AFP is also conducting language training and education programmes to ensure that AFP officers have a greater level of understanding of Muslim and Arabic community beliefs, traditions and values.

3. Reform of the process of proscription

The SLRC recommends that the process of proscription be reformed to meet the requirements of administrative law.

The process should be made more transparent and should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

The Government does not support this recommendation. The Government considers that the current process of proscription conforms with administrative law and provides for sufficient accountability mechanisms.

The Government notes that a decision by the Attorney-General to proscribe an organisation is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act). Under the AD(JR) Act this is a review as to whether the decision to specify an organisation was made in accordance with the law. This enables a court, for example, to determine whether the decision that the Attorney-General is satisfied that an organisation is assisting in the doing of a terrorist act, was not made in bad faith or at the direction or behest of another person or is so unreasonable that no reasonable person could have so exercised the power.

The Government considers that the providing notice prior to listing could adversely impact operational effectiveness and prejudice national security. The Government is not persuaded that advance notification would provide any greater transparency to the existing process and considers that such notification could lead to confusion with the listing process.

Allowing for a right to be heard in opposition would necessarily involve advance notice as a pre-condition.

Once an organisation is listed, the legislation does allow for a case to be put to the Attorney-General outlining why the organisation should be de-listed.

4. Process of proscription

The SLRC recommends that either:

i. the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General.

In this case there should be built into that process a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. The committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice. The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public.

or

ii. the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected persons and a hearing in open court.

The Government does not support this recommendation.

The Government considers that the current listing process contains sufficient safeguards, including judicial review and parliamentary oversight (including a power to disallow a regulation proscribing a terrorist organisation), and that it is more appropriate for the proscription power to be vested with the Executive.

The Government considers that the process of proscription should continue as an Executive decision based on the advice of relevant Australian Government agencies (including ASIO, DFAT and AGD). The Government considers that opening up that advisory process to a public committee would be inappropriate given the sensitivity of the information. It would also unnecessarily complicate review processes.

See comments on recommendation 3 in relation to the provision of advance notification and right to be heard in opposition.

<p>5. Publicity of proscription of terrorist organisation</p> <p>The SLRC recommends that once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution.</p>	<p>Steps are already taken by the Government to publicise the proscription of a terrorist organisation. Once a Regulation has been made by the Federal Executive Council, the Attorney-General issues a press release announcing the proscription of the organisation, and providing reasons for proscription. While it is not possible to ensure that all persons connected with an organisation are notified of the proscription of that organisation, the Government is currently investigating ways in which the proscription of organisations can be even more widely publicised. The Government has also agreed that information regarding the proscription of an organisation be made publicly available in the top eight languages.</p>
<p>6. Definition of terrorist act – ‘harm that is physical’</p> <p>The SLRC recommends that the words ‘harm that is physical’ be deleted from paragraphs 2(a) and 3(b)(i) in the definition of ‘terrorist act’ 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.</p>	<p>The Government supports this recommendation and notes it is in accordance with the Attorney-General’s Department submission to the SLRC that serious psychological harm is just as damaging as physical harm.</p>
<p>7. Definition of a terrorist act – ‘threat of action’</p> <p>The SLRC recommends that the reference to ‘threat of action’ and other references to ‘threat’ be removed from the definition of ‘terrorist act’ in section 100.1(1).</p>	<p>The Government agrees that the way in which the threat of terrorist action is dealt with in the Criminal Code should be given further consideration. The Government notes that the definition of ‘terrorist act’ is a central concept to the terrorism offences in the Criminal Code, and the provisions relevant to the proscription of terrorist organisations. Any change to the definition of terrorist act will need to take into account the impact that change would have on those provisions and any relevant powers to inquire into terrorist activity.</p>

<p>8. Offence of ‘threat of action’ or ‘threat to commit a terrorist act’</p> <p>The SLRC recommends that an offence of ‘threat of action’ or ‘threat to commit a terrorist act’ be included in Division 101.</p> <p>The description should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur.</p>	<p>The Government agrees that the way in which the threat of terrorist action is dealt with in the Criminal Code should be given further consideration.</p> <p>The Government notes that there is operational experience to support the need for threat offences (either in their current or a modified form), particularly from the point of view of early intervention.</p> <p>The Government also notes that ‘threat’ and ‘hoax’ offences are separate concepts.</p>
<p>9. Definition of ‘advocates’</p> <p>The SLRC recommends that paragraph (c) of section 102.1(1A) be omitted from the definition of ‘advocates’.</p> <p>Section 102.1(1A) provides that an organisation advocates the doing of a terrorist act if ‘the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person ... to engage in a terrorist act’.</p> <p>If paragraph (c) is not omitted from the definition, the SLRC recommends that ‘risk’ should be amended to read ‘substantial risk’.</p>	<p>The Government does not support this recommendation and considers that amendments at this time would be premature as the legislation has only recently been enacted and has yet to be tested by the courts.</p> <p>In addition, the Government has some concerns that elevating the requirement in paragraph (c) to a <i>substantial</i> risk could undermine the operational effectiveness of the provision which is aimed at early intervention and prevention of terrorism.</p>

10. Definition of ‘terrorist organisation’

If the process of proscription is reformed as suggested in recommendation 3, the SLRC recommends that consideration be given to deleting paragraph (a) of the definition of ‘terrorist organisation’ so that the process of proscription would be the only method by which an organisation would become an unlawful terrorist organisation.

Paragraph (a) of the definition of ‘terrorist organisation’ provides that ‘an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act ...’ is a terrorist organisation.

The Government notes that the SLRC made this recommendation only in the context of the possible adoption of recommendation 3. As noted above, the Government does not support a reform of the proscription process as set out in recommendation 3.

The Government considers that the dual definition for a ‘terrorist organisation’ is necessary to capture the activities of persons associated with emerging terrorist organisations.

The definition of ‘terrorist organisation’ is central to a range of terrorism offences in the Criminal Code.

To date, all of the charges for offences related to terrorist organisations have, or will be, prosecuted on the basis that the organisation was a terrorist organisation within paragraph (a) of the definition. At the time the offences were committed none of the respective organisations were proscribed organisations.

If the definition was limited to proscribed terrorist organisations it would have prevented those charges being laid, and would prevent future prosecutions for offences associated with new or emerging terrorist organisations that had not yet been identified or proscribed.

Operational experience also supports the need for the dual definition, particularly as recent activities (such as Operation Pendennis), and current investigations, dealt or are dealing with terrorist organisations that would fall within paragraph (a) of the definition.

Overseas experience has also demonstrated the need to ensure that law enforcement has the capacity for early intervention and proactive disruption of previously unidentified or ‘home-grown’ terrorist groups.

<p>11. Section 102.3(2) – burden of proof</p> <p>The SLRC recommends that the burden of proof on the defendant under section 102.3(2) be reduced from a legal burden to an evidential burden.</p> <p>Section 102.3(2) requires the defendant to prove that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.</p>	<p>The Government does not support this recommendation and considers that the burden to prove on the balance of probabilities a person took all reasonable steps to cease being a member of a terrorist organisation is peculiarly within the knowledge of the defendant and not the prosecution.</p>
<p>12. Section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation</p> <p>The SLRC recommends that section 102.5 ‘Training a terrorist organisation or receiving training from a terrorist organisation’, be redrafted as a matter of urgency.</p> <p>The redraft should make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.</p> <p>The SLRC recommends that the scope of the offence should be extended to cover participation in training.</p> <p>That SLRC recommends that neither the offence nor any element of it be of strict liability.</p>	<p>The Government supports part of this recommendation and agrees that the scope of the offence should be extended to cover participation in training.</p> <p>The Government does not support the recommendation that the training be specifically connected with a terrorist act or preparing the organisation or individual to engage in, or assist with, a terrorist act. The offences in 102 relate to terrorist organisations. Those organisations by definition are engaged in terrorist acts. It is appropriate that providing training to, or receiving training from, such organisations is an offence without the training itself having to be connected to a terrorist act.</p> <p>Recent operational experience has highlighted the risk that training with terrorist organisations can equip persons with capabilities for use in Australia.</p> <p>The Government does not support the removal of the application of strict liability from paragraph (2)(b).</p> <p>The Government does, however, consider that the fault elements could be clarified, first by applying strict liability to the question of whether the organisation is a proscribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation.</p>

<p>13. Section 102.6 – getting funds to, from or for a terrorist organisation</p> <p>The SLRC recommends that, at most, a defendant legal representative should bear an evidentiary burden and that subsections (1) and (2) should not apply to the person’s receipt of funds from the organisation if the person received the funds solely for the purpose of the provision of:</p> <ul style="list-style-type: none"> (a) legal representation in proceedings under Part 5.3; or (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory. 	<p>The Government does not support reducing the burden of proof from a legal burden to an evidential burden. The Government believes that the burden of proof is appropriate and that the evidence concerned will be readily available to the defendant but not the prosecution.</p> <p>The Government does support expanding the exception in paragraph (a) to all proceedings under Part 5.3.</p>
<p>14. Section 102.7 – providing support to a terrorist organisation</p> <p>The SLRC recommends that section 102.7 ‘Providing support to a terrorist organisation’, be amended to ensure that the word ‘support’ cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective.</p> <p>One means of achieving this could be to insert defences of the type contained in section 80.3 of the Criminal Code in relation to treason and sedition.</p>	<p>The Government does not support this recommendation. The Government does not consider that the offence extends as far as the SLRC suggests.</p> <p>The Government considers that the way in which section 102.7 is currently drafted requires the prosecution to prove beyond reasonable doubt that the defendant provided ‘support’ and that the defendant intended that the support would help the organisation to engage in, prepare, plan, assist or foster in the doing of a terrorist act. 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 its stated objectives.</p> <p>The Government notes that to date, 14 charges have been laid under this provision against 12 accused. Only one case, <u>Thomas</u>, has been dealt with by the courts. The Government considers that it would be preferable to await the outcome of the remaining cases and respond to any issues that may arise as a result.</p>

<p>15. Section 102.8 – associating with terrorist organisations</p> <p>The SLRC recommends that in its present form section 102.8 of the Criminal Code ‘Associating with terrorist organisations’ be repealed.</p> <p>The SLRC recommends that, if section 102.8 is retained, section 102.8(5) be repealed.</p>	<p>The Government does not support this recommendation. The Government considers that there is no justification for removing the offence nor is there evidence that the offence is being misused to capture legitimate activities.</p> <p>The Government does, however, consider that the fault elements could be clarified, first by applying strict liability to the question of whether the organisation is a prescribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation.</p>
<p>16. Section 103.1 – financing terrorism</p> <p>The SLRC recommends that section 103.1 ‘Financing terrorism’ be amended by inserting ‘intentionally’ after ‘the person’ in paragraph (a) and removing the note.</p>	<p>The Government does not have any objection to this recommendation as it is one of form and not substance. The fault element of intention, already applies to paragraph (a) of the offence, as it is the default element under s5.6 of the Criminal Code.</p>
<p>17. Section 103.2 – financing a terrorist</p> <p>The SLRC recommends that consideration be given to re-drafting paragraph (b) of section 103.2(1) to make it clear that it is required that the intended recipient of the funds is a terrorist.</p>	<p>The Government does not support this recommendation, noting that the introduction of a new concept (‘terrorist’) could over-complicate the offence.</p> <p>The government considers that the way in which the offence is constructed does meet the objective of the FATF recommendation in that the offence only applies to a person (an ‘individual’) who will engage in terrorist acts (a ‘terrorist’) which would necessarily make that person an ‘individual terrorist’.</p>
<p>18. Section 80.1.(1)(f) – conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force</p> <p>The SLRC recommends that section 80.1(1)(f) ‘Conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force’ be amended to require, as an ingredient of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the ADF.</p>	<p>The Government does not support this recommendation and considers that the current fault element of recklessness is appropriate. Recklessness is the standard Criminal Code fault element for a ‘circumstance’ or ‘result’ and this offence is therefore consistent with the broader criminal law.</p>

<p>19. Customs' recommendations on border security</p> <p>The SLRC recommends that the government give consideration to implementation of Customs' eight recommendations on border security.</p>	<p>The Government agrees in principle to the recommendations made by Customs in oral and written submissions to the SLRC.</p> <p>In relation to Customs' recommendation 7, the Government notes that Australia's Passenger Name Records (PNR) system is currently undergoing assessment. Customs' current approach is not to retain passenger information. Section 64AF of the <i>Customs Act 1901</i> would only be amended to permit retention of passenger information if the Government decides that it is necessary to change the PNR system.</p> <p>In considering the most appropriate implementation of Customs' recommendations, the Government will take into consideration other relevant factors such as the impact on, or interaction with, other border and transport security legislation and operational requirements.</p>
<p>20. Hoax offence</p> <p>The SLRC recommends that a hoax offence be added to Part 5.3 in the terms of Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism to apply to a credible and serious threat to commit a terrorist act, where the evidence does not support a finding that there was such intention as described in the definition of 'terrorist act'.</p>	<p>While hoax offences are outside the Committee's terms of reference The Government supports this recommendation put forward by the Commonwealth Director of Public Prosecutions.</p> <p>Two recent incidents, involving the use of the postal service to carry a hoax explosive device, and the use of the internet to make a hoax threat to use chemical weapons on public utilities, have demonstrated that existing hoax offences that apply in other contexts may not be as effective for investigating and prosecuting elaborate terrorist hoax offences.</p> <p>The Governments considers that hoaxes relating to terrorist activity should be distinguished from other types of hoax incidents because of the potential to cause significant alarm and disruption in the community, and to divert valuable law enforcement, emergency services and related resources in responding to those hoaxes.</p>

Key Findings	Comments
<p>The SLRC considers that amendments such as either the provision of a judicial process for proscription or greater safeguards for the existing process, and the repeal of section 102.8, would play an important role in reducing the concern and fear felt by the Muslim and Arab communities and members of other communities about the security legislation.</p>	<p>The Government believes that the entire Australian community, including Muslim and Arab people, are beneficiaries of these laws, which are concerned with the identification and elimination of terrorist organisations. The proscription regime and the association offences (s102.8) are designed to make operating and growing such organisations difficult.</p>
<p>The SLRC concluded that on balance, the Passenger Analysis Unit (PAU) appeared to be operating effectively and protecting the personal information it collects appropriately. The system also appears to ensure the smooth transition of passengers through Customs. The SLRC concluded that the audits of the PAU are a valuable monitoring mechanism. The SLRC considers that the government should fund the undertaking of audits on a regular basis, and at least every two year.</p> <p>The SLRC concluded that efforts should be made to obtain an ‘adequacy’ finding from the European Commission (EC) for the Australian Passenger Name Records (PNR) system. The SLRC recommends that consideration be given by government as to how best to achieve such an ‘adequacy’ finding.</p> <p>The SLRC concluded that the powers of Customs officers are appropriate and that appropriate safeguards and guidelines are in place.</p>	<p>Australia's PNR system is currently undergoing assessment. The Government notes that Customs current approach is not to retain passenger information. Amendment to section 64AF of the Customs Act to permit retention of passenger information will only be considered if it becomes necessary to change Australia's current system.</p>

Key Findings	Comments
That the definition of member of an organisation to include an informal member should remain.	The Government agrees.
The SLRC does not recommend that paragraph (b) of the definition of ‘terrorist act’, which provides that ‘the action is done or the threat is made with the intention of advancing a political, religious or ideological cause’, be deleted from the definition.	While the Government notes the views of the Committee, it will give the proposal further consideration.
The SLRC does not recommend amendment of paragraph (a) of the definition of ‘terrorist organisation’ in section 102.1(1) and in particular does not recommend the omission of the word ‘fostering’ from paragraph (a).	The Government agrees.
SLRC does not recommend any change from ‘the’ to ‘a’ amendments made to sections 101.2(3), 101.4(3), 101.5(3), 101.6(2) and 101.3(2) of the Anti-Terrorism Act (No 1) 2005 and to subsections 102.1(1) (paragraph (a) of the definition of a <i>terrorist organisation</i>) and (2) by Anti-Terrorism Act (No. 2) 2005, which were apparently driven by concern that preparatory acts could only be prosecuted under the offences as originally drafted if they pointed to some specific planned terrorist act.	The Government agrees.

Key Findings	Comments
<p>The SLRC does not recommend the application of any less extended geographical jurisdiction than that described in section 15.4 (category D). Under s 15.4, an offence applies whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not the result of the conduct constituting the alleged offence occurs in Australia.</p>	<p>The Government agrees.</p>
<p>The SLRC does not recommend abolition of the law of treason in section 80.1 as a whole, or of paragraph (f) of section 80.1(1).</p>	<p>The Government agrees and notes the Australian Law Reform Commission issued a discussion paper on 29 May 2006, as part of its review of sedition laws, which includes proposals for amendments to the treason offences.</p>
<p>The SLRC does not recommend amendment to Part 1C of the <i>Crimes Act 1914</i> to allow the admissibility of evidence obtained overseas in circumstances where AFP officers had done ‘all that they could reasonably be expected to do to comply’ with that Part.</p>	<p>The Government notes that this issue was outside the Committee’s terms of reference. Any issues associated with the application of Part 1C will be considered separate to this review process.</p>
<p>The SLRC does not recommend that there be legislative provisions providing for a statutory right protecting anonymity of ASIO officers in counter-terrorist prosecutions.</p>	<p>The Government believes that the protection of the identity of ASIO officers and employees is paramount, and has long been established in legislation (s92 <i>Australian Security Intelligence Organisation Act 1979</i>). Protecting the identity of former and serving ASIO officers and employees is essential to ensure the safety of ASIO personnel and their families. It is also critical to ASIO’s ability to effectively perform its functions. The disclosure of identity of present or former ASIO personnel may, among other things, (i) seriously compromise ongoing activities with which they are or were involved, (ii) identify past operational activities, (iii) warn targets that they were, or are, of security interest and (iv) reveal ASIO modus operandi.</p>