**SUBMISSION TO THE REVIEW OF SECURITY AND COUNTER TERRORISM LEGISLATION BY THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

## 1. Grounds for objection to Part 5.3 of the *Criminal Code*

In my submission to the Security Legislation Review Committee, I argued for the repeal of Part 5.3 of the *Criminal Code*. My argument was one which will be familiar to the Committee, as it is similar to the concerns about the breadth of the definition of 'terrorist offence' expressed in my submission to this Committee's predecessor's inquiry into Division 3 Part III of the *ASIO Act 1979*.

I have attached a copy of my submission to the Security Legislation Review Committee to this submission, and also of the transcript of my testimony to that Committee. My principal objections can be summarised as follows, however:

- The definition of 'terrorist act' in section 100.1 of the *Criminal Code* is overly broad, including as it does all acts or threats of politically-motivated violence which are intended to intimidate any government or public wheresoever in the world;

- Paragraph (a) of the definition of 'terrorist organisation' in sub-section 102.1(1) of the *Criminal Code* is overly broad, including as it does all organisations throughout the world which *indirectly foster or assist* acts of politically-motivated violence which are intended to intimidate any government or public wheresoever in the world;

- The grounds for the listing of organisations pursuant to paragraph (b) of the definition of 'terrorist organisation' in sub-section 102.1(1) of the *Criminal Code*, which grounds are set out in sub-section 102.1(2), are overly broad – both because of the use of the

concept of 'indirectly fostering or assisting' and also because of the definition of 'advocacy in sub-section 102.1(1A);[1]

- The excessive breadth identified above in turn infects the various offences established under Part 5.3, many of which are already extremely (perhaps overly) broad in their formulation;

- This excessive breadth of the offence, in turn, leads to a discriminatory approach to investigation and prosecution.

The rest of this first part of the submission will elaborate the above points. The second part of the submission will respond to the particular recommendations made by the Security Legislation Review Committee.

*1.1 Excessive breadth of the definition of 'terrorist act'*

This issue is discussed at some length in my submission to the Security Legislation and Review Committee. I have also raised the issue in a number of submissions to this Committee and its predecessor relating to the listing of organisations under section 102.1 of the *Criminal Code*.

The point can most easily put by reference to an assertion made by this Committee's predecessor in its *Review of the listing of the Palestinian Islamic Jihad*, that 'political violence is not an acceptable means of achieving a political end in a democracy'.[2] Whether or not one agrees with this assertion, it immediately draws attention to a number of objectionable features of the definition of 'terrorist act' in the *Criminal Code*:

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[1] The proscription power in its current form was conferred by the *Criminal Code Amendment (Terrorist Organisations) Act 2004*, which repealed the earlier requirement that an organisation, to be proscribed, must have been listed by the United Nations Security Council, and item 10 of Schedule 1 of the *Anti-Terrorism Act (No 2) 2005*, which introduced 'advocacy' of a terrorist act as an additional ground of proscription.

[2] *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) at 3.20.

- No distinction is drawn between threats and acts intended to intimidate a democratic government, and threats and acts intended to intimidate an authoritarian or tyrannical government.

Thus, under the *Criminal Code* it is as criminal to engage in acts of political violence with the intention of overthrowing the government of North Korea, as it is to engage in acts of political violence with the intention of overthrowing the government of Australia. In days gone by, this would have made a criminal of Nelson Mandela, or of Xanana Gusmao – both threatened the use of violence in order to intimidate dictatorial governments into establishing democracies.

- No distinction is drawn between violence against civilians and violence against soldiers, police and other non-civilian targets.

Thus, under the *Criminal Code* it is as criminal to threaten violence against the soldiers of a tyrannical state, with the intention of forcing a change of policy on the part of that state, as is it to plant bombs against civilian targets. As a result, under Australian law the invasion of Iraq by the United States, the United Kingdom and Australia constituted a 'terrorist act', although the intended targets of violence were soldiers and not civilians. Whether or not one thinks that invasion was defensible, it was not an act of terrorism. If it was a crime, the relevant crime was the international crime of aggression, which it is intended in due course will be defined pursuant to the statute of the International Criminal Court.[3]

- No distinction is drawn between violence perpetrated by soldiers or other agents of government, and violence perpetrated by civilians and non-state actors.

As a result, there is an unhappy overlap between the operation of Part 5.3 of the *Criminal Code*, and the international law of armed conflict. Unlawful violence by soldiers should be prosecuted under the latter body of law (which is incorporated into Australian law by Division 268 of the *Criminal Code*, among other provisions).

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[3] See the discussion on the website of the International Criminal Court, at <http://www.icc-cpi.int/about/ataglance/faq.html#faq7>.

A further adverse consequence of the failure of the *Criminal Code* to distinguish between different classes of perpetrators of violence and of targets of violence is that it makes criminals of all soldiers throughout the world who are engaged in military conflicts, given that all such soldiers are using or threatening politically-motivated violence with intimidatory intent. This puts Australian criminal law at odds with the basic principles of the international law of armed conflict, which protect soldiers from prosecution merely for fighting, so long as they do not commit war crimes. The criminalisation of ordinary acts of warfare threatens the international comity and forbearance on which Australian service personnel rely in order to be treated by foreign powers in accordance with the international law of armed conflict.

It should be noted that other areas of Australian criminal law *are* sensitive to the distinction between soldiers and others. For example, the *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence for Australians to become involved in armed hostilities overseas, but exempts those who are serving with the armed forces of another country.[4]

At a minimum, therefore, the definition of 'terrorist act' in Division 100.1 ought to be confined in order to allow adequate room for the relevant principles of the law of armed conflict, by limiting its application to the use or threat of violence against civilians outside circumstances of armed conflict.

The definition should be further narrowed by, at least, repealing paragraphs (b) and (f) of sub-section 100.1(2), which extend the concept of terrorist violence beyond harm to persons to include damage to property and systems. If damage to property, or harm to a system, is not such as to endanger the life of one or more persons, then it is not sufficiently significant to constitute terrorist violence, according to the ordinary understanding of that phrase.

The definition should also be narrowed by amending paragraph (c) of sub-section 100.1(2), to exclude from the definition of 'terrorist act' those acts which only cause the death of the one who performs them. Such a provision is not required to capture suicide bombings, as these are acts which are also intended to harm others; and it risks

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[4] *Crimes (Foreign Incursions and Recruitment) Act 1978* s 6, especially s 6(4).

criminalising certain sorts of acts of dissent, such as self-immolation, which (whatever their merits as acts of political expression) ought not to be criminal.

Finally, the definition should also be narrowed by amending paragraph (e) of sub-section 100.1(2) (which would also entail amendment of sub-paragraph (iv) of paragraph (b) of sub-section 100.1(3) ). Whereas paragraphs (a) and (c) focus on acts that cause harm, and paragraph (d) focuses on the narrower concept of 'endangering life', paragraph (e) uses the very expansive concept of 'creating a serious risk to the health or safety of the public or a section of the public.' Presumably this is intended to cover such conduct as the distribution of anthrax powder through the post, or the dispersion of non-toxic chemical agents through an underground station, and so on. As it stands, however, it may also pick up other sorts of dissenting conduct which is not terrorist, and not even violence in any obvious sense, such as threatening to disrupt public access to hospitals (perhaps by way of a blockade or a picket – while the definition of a 'terrorist act' excludes 'industrial action',[5] this does not extend to industrial action intended to create a serious risk to the health and safety of a section of the public.[6]).

I do not have a suggested form of words for the suggested amendment. I think a preferable approach is to replace the attempt at a catch-all definition of 'terrorist act' with a series of more precisely defined offences (which might include an offence of disseminating toxins through the mail, or of releasing chemical agents in public places with the intention of causing harm). A good example of this is provided by the *Crimes (Aviation) Act 1991*, which makes it an offence punishable by up to life imprisonment to hijack an aircraft,[7] or by Division 72 of the *Criminal Code*, which makes it an offence, punishable by up to life imprisonment, to place explosives with the intention

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[5] *Criminal Code Act* s 100.1.

[6] In any event, it is unlikely to afford any protection to picketing which has been found not to be 'industrial action' under the *Workplace Relations Act 1996*: *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR, 550, 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at 586) ('*Davids'*). For commentary on this case, see John Howe, 'Picketing and the Statutory Definition of 'Industrial Action'' (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in *Davids* has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR [4-282] and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR [4-382]. I owe this point to Joo-Cheong Tham.

[7] *Crimes (Aviation) Act 1991* s 13.

of causing death, destruction or serious harm.[8] As it is currently drafted, the Division 72 offences do not apply if the bombing involves no international element.[9] This limitation (and such potential limitations on other attempts to create precise Commonwealth terrorist offences) could be overcome, however, by seeking a referral of powers from the States analogous to that which currently supports the overly-broad offences in Part 5.3.

*1.2 Excessive breadth of the definition of 'terrorist organisation'*

This issue is discussed at some length in my submission to the Security Legislation and Review Committee. I have also raised the issue in a number of submissions to this Committee and its predecessor relating to the listing of organisations under section 102.1 of the *Criminal Code*.

The objection can be summarised in this way: An organisation can 'indirectly foster' or 'indirectly assist' the doing of a 'terrorist act' without itself having any terroristic or other criminal purpose. An example would be a charity which provides relief to Palestinian families whose houses have been demolished by the Israeli government because of the participation of family members in suicide bombings. Such demolition is clearly intended as way of punishing and/or deterring terrorist bombings. By providing relief which mitigates the effect of such punishment/deterrence, an organisation could well be said to be fostering, at least indirectly, terrorist bombings.

The fact that the definition of 'terrorist act' extends to acts or threats against foreign governments[10] also means that for the purposes of Australian law an organisation is considered a 'terrorist organisations' regardless of the nature of the government whose intimidation it assists or fosters, regardless of its political motivation and purposes, and regardless of the circumstances of its operation. No distinction is drawn in the legislation between criminal organisations and various sorts of revolutionary and national liberation movements, many of which may well have a

[8] The above is a summary characterisation of the offences created under the *Criminal Code* s 72.3.

[9] See the jurisdictional requirements set forth under the *Criminal Code* s 72.4.

legitimate cause. Nor does the legislation differentiate between the fostering of attacks against civilians, and the fostering of revolutionary or national liberation struggles. Division 102 of the *Criminal Code* is therefore apt to make criminals of the members of many quite ordinary and fundamentally innocent organisations, such as the members of organisations offering support to such foreign political organisations (and thereby directly or indirectly fostering 'terrorist acts').

Even if the definition of 'terrorist act' were amended as suggested above, the definition of 'terrorist organisation' would still be overly broad. The fact that a legitimate organisation has engaged in, or perhaps indirectly fostered, a single criminal attack against civilians does not necessarily deprive the organisation as such of legitimacy (just as the fact that the Allied forces engaged in deliberate bombings of German and Japanese civilian targets during the Second World War does not undermine the overall legitimacy of those forces, or of their operations against Germany and Japan).

*1.3 Excessively broad grounds for the listing of organisations*

The grounds for the listing of organisations in paragraph (a) of sub-section 102.1(2) are identical to paragraph (a) of the definition of 'terrorist organisation' in sub-section 102.1(1). The same objection therefore applies to them.

The grounds for the listing of organisations in paragraph (b) of sub-section 102.1(2) are that the organisation:

- directly or indirectly counsels or urges the doing of a 'terrorist act' (whether or not a terrorist act has occurred or will occur); or,
- directly or indirectly provides instruction on the doing of a 'terrorist act' (whether or not a terrorist act has occurred or will occur); or,
- 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

[10] *Criminal Code* s 100.1(1), sub-paragraph (c)(i) of the definition of 'terrorist act'; see also s 100.1(4).

> person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a 'terrorist act' (whether or not a terrorist act has occurred or will occur).[11]

(The last three of these grounds are, somewhat misleadingly, characterised as the 'advocacy' of terrorism.[12])

The breadth of such concepts as 'directly or indirectly counselling' or 'directly praising' means that an extremely wide range of groups is liable to be listed under this limb of the power. For example, Marx's *Communist Manifesto* famously concludes with the following words:

> The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. WORKINGMEN OF ALL COUNTRIES, UNITE![13]

These words counsel terrorism within the meaning of section 100.1 of the *Criminal Code*. Thus, any organisation that disseminates them (a publisher, a political party) is apparently liable to proscription, for such dissemination at least indirectly counsels terrorism. As an academic, I refer to the *Communist Manifesto* in the course of my teaching. Does this make Monash University liable to proscription, on the grounds that it is an organisation indirectly counselling terrorist acts?

The absurdity of this breadth of criminality that the *Criminal Code* purports to establish shows that it has not been clearly thought through. *Counselling*, *providing instruction*, *praising* – these are merely the production of words. In a democratic society, the utterance and dissemination of such political speech ought not to be criminal, and ought not to make an organisation liable to proscription. It may be a different matter if the one who disseminates the words intends that they be acted upon, or is motivated by racial or religious hatred. (The issue of hate speech, and the

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[11] *Criminal Code* s 102.1.

[12] *Criminal Code* s 102.1(1A).

[13] Lewis S Feuer (ed), *Marx & Engels: Basic writings on politics and philosophy*, Fontana/Collins, 1984, p 82.

proper response to it, is one element of the Australian Law Reform Commission's current inquiry into Australia's sedition laws.) But no such nexus is required by the definition of 'advocacy' – the closest it gets is in relation to praise, where there is a requirement that praise *might* lead someone to engage in a terrorist act.

The absurdity of this breadth of criminality also raises doubts about its constitutionality. Can the Attorney-General, by way of regulation, really achieve what the Parliament, by way of legislation, could not, namely, the criminalisation of political organisations on the basis of a threat they are deemed, but have never been proven, to pose?[14] This submission will not canvass the constitutionality of this aspect of the *Criminal Code*, but refers the Committee to the work of Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations'.[15]

### *1.4 Excessive breadth of offences under Divisions 101, 102 and 103 of the* Criminal Code

The excessive breadth of the key definitions in Part 5.3 of the *Criminal Code* infects the offences created under Divisions 101, 102 and 103. These offences, established on the basis of the definitions of 'terrorist act' and 'terrorist organisation', impose criminal liability in circumstances that go far beyond participation in acts of catastrophic violence such as bombings and hijackings.

Division 101 of the *Criminal Code* makes it an offence to engage in a 'terrorist act'.[16] Division 101 also criminalises a range of conduct *ancillary to* 'terrorist acts'. Thus, it is an offence to prepare for or plan a 'terrorist act', with a maximum penalty of up to life imprisonment.[17] An offence is committed by providing training,

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[14] In the well known *Communist Party Case*, the High Court of Australia struck down as unconstitutional the *Communist Party Dissolution Act 1950*: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[15] (2004) 27 *UNSW Law Journal* 482-523. See also the remark of George Williams, quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 47, that the proscription regime under the *Criminal Code* bears 'disturbing similarity' to the *Communist Party Dissolution Act 1950*.

[16] *Criminal Code* s 101.1.

[17] *Criminal Code* s 101.6.

possessing a thing, or collecting or making a document, that is connected with the preparation for, engagement in or assistance in a 'terrorist act'.[18] The maximum penalty for the training offence is 25 years imprisonment if the connection is known to the accused, or 15 years imprisonment if the accused is reckless; for the other offences it is 15 or 10 years imprisonment. Division 103 creates financing offences, imposing a maximum penalty of life imprisonment for providing or collecting funds while being reckless as to their use to facilitate or engage in a terrorist act,[19] or for making funds available to or collecting funds for another, while being reckless as to their use by the other person to facilitate or engage in a terrorist act.[20] These are all extremely severe penalties, comparable (for example) to those for crimes against humanity.[21]

These offences are objectionable on a number of counts. First, they inherit the excessive breadth of the definition of 'terrorist act'. Thus, section 101.2 makes it an offence to train revolutionaries in techniques of evacuation of the wounded from a battlefield, because such training is connected with the engagement of those revolutionaries in a terrorist act (namely, fighting battles). But this does not seem a very serious criminal matter at all.

Second, it is possible to commit these offences, which attract the severe penalties noted above, without being guilty of any violent act. In the case of the offences relating to documents and things, it is possible to commit the offences without even having any violent intention. (It is a defence, for someone accused of such an offence, that possession of the document or thing was not intended to facilitate preparation for, engagement in or assistance of a terrorist act; but the accused bears an evidential burden of adducing evidence that raises this defence.[22] One undesirable feature of offences structured in this way is that often the only way of discharging the evidential burden will be for the accused to testify, thus waiving his or her right of silence.)

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[18] *Criminal Code* ss 101.2, 101.4, 101.5.

[19] *Criminal Code* s 103.1.

[20] *Criminal Code* s 103.2.

[21] *Criminal Code* Division 268.

[22] *Criminal Code* ss 13.3, 101.4(5), 101.5(5).

Third, the interaction of these offences with the general ancillary offence provisions in Part 2.4 of the *Criminal Code* means that criminal liability, with extremely serious penalties attached, can be incurred at a point in time when the conduct is quite remote from the actuality of violence. Thus, for example: The concept of a 'terrorist act' includes, within itself, the threat of violent action.[23] The offence of engaging in conduct preparatory to a terrorist act[24] is therefore committed by preparing for or planning the threat of a 'terrorist act'. It is also an offence, likewise punishable by life imprisonment, to attempt to prepare or plan such a threat,[25] or to conspire to prepare or plan such a threat.[26]

The Security Legislation Review Committee concluded that these ancillary offences are not 'broad or uncertain,' although it gave no reason for that conclusion.[27] My objections do not turn on any assertion of uncertainty. The breadth of these offences, however, particularly in light of the extremely serious penalties attached to them, seems to me to be beyond dispute.

The Security Legislation Review Committee also seems to agree with the opinion expressed by the Commonwealth DPP, that these ancillary offences are required in order to arrest and prosecute terrorists prior to the commission of a terrorist act.[28] To some extent this argument ignores the fact that any serious planning for a terrorist bombing (to pick one example) is likely to involve violation of a host of other offences, such as those relating to the unlawful possession and manufacture of various chemicals, explosives and so on. But in any event, it is not an argument for eliminating the need, in these offences, to prove a terroristic intention on the part of the accused.

Under Division 102, if an organisation satisfies the statutory definition of a 'terrorist organisation' – and the breadth of that concept must be kept in mind – then it

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[23] *Criminal Code* s 100.1(1), definition of 'terrorist act'.

[24] *Criminal Code* s 101.6.

[25] *Criminal Code* s 11.1.

[26] *Criminal Code* s 11.5.

[27] *Report of the Security Legislation Review Committee*, 2006, para 6.28.

[28] *Report of the Security Legislation Review Committee*, 2006, para 5.12.

is an offence for anyone, anywhere in the world, to be a member of that organisation, to direct it, to train with it, to recruit for it, to supply it with funds, other resources or support, or to receive funds from it.[29] Again, the penalties for these offences are extremely severe: up to 25 years imprisonment for knowingly directing, recruiting for, getting funds to or from or providing support to an organisation; up to 25 years imprisonment for knowingly or recklessly training with an organisation;[30] up to 15 years for recklessly directing, recruiting for, getting funds to or from or providing support to an organisation; and up to 10 years for knowingly being a member of an organisation. Even 'informal membership' or the taking of steps to become a member of a 'terrorist organisation' is punishable by up to ten years in prison.[31]

These penalties are quite excessive, given that these offences can be committed whether or not the offender had any violent intention, and with the exception of the offence of providing support to an organisation,[32] offences can be committed even if the offender's involvement with the organisation was in no way itself connected, even indirectly, to 'terrorist acts'. Criminalising such conduct as training member of Hamas to drive a jeep has nothing to do with protecting communities from politically-motivated violence.

In relation to both Division 101 and Division 102, the breadth of the offences is compounded by the application to them of extended geographical jurisdiction category D.[33] This means that a wide range of conduct committed entirely overseas, with no implications for the wellbeing or security of Australia or Australians, is made criminal by Australian law. The Security Legislation Review Committee discussed this issue, and concluded that

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[29] *Criminal Code* s 102.2-102.7, together with paragraph (a) of the definition of 'terrorist organisation' in s 102.1. The extension of criminal liability for membership to include membership of organisations which have not been proscribed was brought about by item 19 of Schedule 1 of the *Anti-Terrorism Act 2004*.

[30] The increase in the penalty for recklessly training with a 'terrorist organisation' was increased from 15 to 25 years by item 20 of Schedule 1 of the *Anti-Terrorism Act 2004*.

[31] *Criminal Code* s 102.3, together with paragraphs (a) and (b) of the definition of 'member' in s 102.1.

[32] *Criminal Code* s 102.7(1)(a).

[33] *Criminal Code* ss 101.1(2), 101.2(4), 101.4(4), 101.5(4), 101.6(3), 102.9.

> Terrorism in its current forms is known to operate without regard to borders or jurisdictional limits. Practical considerations of an evidential nature will bear upon the decision to prosecute within Australia. Bearing in mind that knowledge or recklessness is an essential feature of each of the offences, the SLRC would not recommend the application of any less extended geographical jurisdiction.[34]

This conclusion fails to take account of a number of relevant considerations. First, it is true that terrorism may occur in any jurisdiction. So may murder. But it does not therefore follow that murder, wherever in the world it takes place, should be a criminal offence under Australian law. The assertion of universal jurisdiction is typically confined to certain extremely grave crimes such as war crimes or crimes against humanity. As has been argued above, the offences established under Divisions 101 and 102 do not all satisfy this criterion.

Second, while it is true that practical constraints apply to prosecution in Australia of offences committed abroad, there are a number of complicating factors that need to be borne in mind. For example, these offences may mean that foreigners who come to Australia find themselves subject to prosecution under Australian law for conduct that they could not plausibly have known to be criminal in Australia at the time they undertook it – such as fighting in a revolution, or being a member of an organisation that advocated armed resistance to tyranny. That knowledge or recklessness is an essential feature of each of the offences is irrelevant to this example – the point is that criminality is being imposed on foreigners who could not be expect to know that their conduct is criminal in Australia (this contrasts with the well-known universal jurisdiction in relation to war crimes or piracy, for example).

Furthermore, prosecution does not exhaust the practical implication of these offences. As noted in my submission to the Security Legislation Review Committee, the offences defined in Divisions 101 and 102 trigger a special regime of investigation under the *ASIO Act 1979*. A person who has knowledge of entirely foreign political activity, with no implications for Australian security, may nevertheless be subject to questioning and even detention by ASIO, as such a person would have knowledge of a 'terrorist offence', even though it is not an offence that would be likely to be prosecuted in Australia. As the Committee is aware, a nexus to Australia is not a requirement for the triggering of ASIO's investigatory powers.

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[34] *Report of the Security Legislation Review Committee*, 2006, para 11.6.

This last point is an instance of a more general one, that the excessive breadth of the offences defined in Divisions 101 and 102 has broader implications, because it feeds into the special regimes for investigation, arrest, detention and sentencing in relation to 'terrorist offences' established under the *ASIO Act 1979* and the *Crimes Act 1914*. These regimes suspend, to a lesser or greater degree, the normal operation of the rule of law in Australia. Under the *Crimes Act 1914*, a person arrested on suspicion of committing a 'terrorism offence' – including all the offences under the *Criminal Code* under Divisions 101 and 102 – may be held without charge for up to 24 hours, compared to the normal period under the *Crimes Act 1914* of 12 hours.[35] In addition, certain periods of time which would normally count against this period of pre-charge detention may be excluded in the case of someone arrested on suspicion of having committed a 'terrorism offence'.[36] Furthermore, a person charged with a 'terrorism offence' has an extremely restricted right to be remanded on bail,[37] while those convicted of such offences are subject to minimum non-parole periods.[38] The breadth of the offences which trigger such exceptional departures from the ordinary rule of law is a further reason to narrow or repeal those offences.

Departures from the ordinary rule of law, as it applies to criminal law and criminal prosecution, also flow from the exercise of the power to list organisations as 'terrorist organisations.' The listing of an organisation under the *Criminal Code* means that the offences established under Division 102 are committed by those who are involved with the organisation, with no need for the prosecution to prove the 'terrorist' character of the organisation beyond reasonable doubt – as the Security Legislation Review Committee puts it, the listing regulation 'proves itself'.[39] Listing has additional consequences to this relaxation of the ordinary rule of law as it relates to criminal prosecution. If an organisation has been listed under the *Criminal Code*, it also becomes an offence to meet or communicate with a member, director or promoter

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[35] Compare ss 23CA and 23DA(7) of the *Crimes Act 1914* applying to terrorism offences, to ss 23C and 23D(5) which apply to all other Commonwealth offences. 'Terrorism offence' is defined in s 3(1) to include any offence against Part 5.3 of the *Criminal Code.*

[36] *Crimes Act 1914* s 23CB.

[37] *Crimes Act 1914* s 15AA.

[38] *Crimes Act 1914* s 19AG.

[39] *Report of the Security Legislation Review Committee*, 2006, paras 7.9, 10.32.

of that organisation, in circumstances where such meeting or communication is intended to support the organisation's existence or assist its expansion.[40]

Listing also changes the burden of proof under section 102.5 (the offence of training with a terrorist organisation): instead of the prosecution having to prove recklessness, an evidential burden is placed on the accused to adduce evidence as to his or her innocent state of mind, if he or she is to escape conviction.[41] Listing also removes one defence to a charge of incursion under the *Crimes (Foreign Incursions and Recruitment) Act 1978*. Normally, under that act it is a defence to a charge of engaging in hostilities in a foreign country that the hostile acts took place while serving with a country's armed forces.[42] This defence does not apply, however, if an organisation with which the accused was serving, or with which the accused intended to serve, was proscribed under the *Criminal Code*.[43]

The breadth of the power to list organisations therefore confers on the executive a wide-ranging discretion to change the incidence of criminality in relation to a number of extremely serious criminal offences. The evident conflict between this executive discretion, and the rule of law as it is ordinarily understood, takes us to the most fundamental of this submission's objections to Divisions 101 and 102 as they currently stand.

### *1.5 Discriminatory application of Division 101 and 102 offences*

As I argued in my submission to the Security Legislation Review Committee, and as I have argued in submissions to listings inquiries undertaken by this Committee and its predecessor Committee, the breadth of the offences under Divisions 101 and 102 means that the investigation and prosecution of them, and the exercise of the power to list organisations, will inevitably be highly discretionary.

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[40] *Criminal Code* s 102.8, together with the definition of 'associate' in s 102.1. This offence was introduced into the *Criminal Code* by item 3 of Schedule 3 of the *Anti-Terrorism Act (No 2) 2004*

[41] *Criminal Code* s 102.5(2),(3),(4). This aspect of the offence was introduced by item 20 of Schedule 1 of the *Anti-Terrorism Act 2004*, and is discussed below in relation to Recommendation 12 of the Security Legislation Review Committee.

[42] *Crimes (Foreign Incursions and Recruitment) Act 1978* s 6(4)(a).

[43] *Crimes (Foreign Incursions and Recruitment) Act 1978* s 6(5),(6),(7)(b).

Excessive discretion in policing and prosecution is always undesirable, opening the door as it does to discriminatory application of the law, and to the potential for undermining the independence of the police and prosecuting authorities. When the key concept at the heart of the discretion – 'terrorist act' – is defined by reference to political, religious or ideological motivation, added to the potential for discriminatory application is the potential for that discrimination to be politically or ideologically motivated.

The connections between terrorism, as statutorily defined, and political and ideological motivation, make the investigation of such offences a particular challenge for a democracy. A democracy, while it must protect the lives and well-being of its people, is also committed to political openness and political pluralism. Indeed, if sufficiently many members of a democracy come to hold a particular political view, a democracy must be open to the possibility that that view will become part of its mainstream, even if that view has at one time been associated with political violence (in this regard one can think of the African National Congress in South Africa, for instance, or of the leaders of the American Revolution, or even of the more extreme abolitionists prior to the American Civil War). On the other hand, if a small group in a democracy poses a threat of violence to the rest, the policing of this threat must be undertaken in a way that is not seen simply to be an attack upon the dissent and diversity that is always a legitimate part of a democracy.

The breadth of the grounds for the listing of organisations as 'terrorist organisations' establishes even further opportunities for the exercise of discretion. The Attorney-General's Department has stated that

> It is in Australia's national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act.[44]

However, a moment's though will indicate that only the tiniest fraction of organisations satisfying this description have been listed under the *Criminal Code*. Without undertaking a detailed investigation of all the organisations in the world

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[44] Attorney-General's Department, *Submission No 7 to the Parliamentary Joint Committee on ASIO, ASIS and DSD's Inquiry into the listing of six terrorist organisations*, p 1, available at <http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsa/subs/sub7.pdf>.

linked more or less directly to political violence, the disparity between the listings under the *Criminal Code* and those under the *Charter of the United Nations Act 1945* is sufficient to indicate that some narrower criteria for proscription is being applied.[45]

The former Director-General of ASIO, in a hearing before this Committee's predecessor held on February 1, 2005, stated that in selecting organisations for proscription ASIO takes account of the following factors:

- the organisation's engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation's links to Australia;
- the threat posed by the organisation to Australian interests;
- the proscription of the organisation by the United Nations or by like-minded countries;
- whether or not the organisation is engaged in a peace or mediation process.[46]

As part of a subsequent inquiry, on May 2, 2005 ASIO informed the Committee that these factors

> are taken as a whole; it is not a sort of mechanical weighting, that something is worth two points and something is worth three points. It is a judgement across those factors, and some factors are more relevant to groups than others.[47]

When one considers this remark, and then attends to the organisations which have been listed, it is difficult to see that these factors are being applied in any systematic

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[45] The tensions between the quotation in the text, and other remarks of the Attorney-General's Department, and also remarks made by the Australian Security Intelligence Organisation ('ASIO') were noted in this Committee's predecessor's *Review of the listing of six terrorist organisations* (2005), para 2.23.

[46] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations* (2005) at 2.3.

[47] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.4.

fashion at all. In particular, the questions of a link to Australia, or a threat to Australian interests, seems to be given rather little consideration in most cases.[48]

Part of the difficulty in the application of the factors identified by ASIO may result from the fact that the meaning of some of them is not entirely clear. For example, what is meant by 'engagement in terrorism'? If 'terrorism' in this factor has the meaning of 'terrorist act' as that phrase is defined by the *Criminal Code*, then the factor gives very little guidance beyond simply restating the statutory requirement for proscription. But if ASIO understands 'terrorism' in this context to have some more narrow meaning – for example, engaging in illegitimate attacks upon civilians – then it is incumbent upon ASIO to make this meaning clear, and to explain how it is being applied. This narrower meaning could then be incorporated into the statutory grounds for the listing of organisations.

Again, what is meant by the 'ideology' of an organisation. Does this refer to the political or religious outlook of its members? Or, given the coupling of ideology with links to other groups, does 'ideology' mean the organisation's conception of itself as a player in the geo-political arena? Until the meaning of this factor is made clear, it is impossible to analyse the way in which it is being applied. If 'ideology' refers to political outlook, then a further question is raised: what sorts of ideology does ASIO regard as illegitimate? Presumably, given that the threat posed by the organisation to Australia is listed by ASIO as a separate factor, ASIO does not limit its consideration of ideology to the question of opposition to the Australian state or the Australian people. Some other standard is being applied. In a democracy, it must always be a matter of concern when a necessarily clandestine security agency is given a significant degree of power in determining which political outlooks are legitimate, and which are not, and are liable to lead to criminal prosecution. A democratic culture cannot thrive under such conditions. If only certain ideologies are regarded as

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[48] See, for example, the remarks of this Committee's predecessor in its *Review of the listing of six terrorist organisations* (2005) at 3.22, 3.26, 3.35, 3.45, 3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.24, 2.28; *Review of the listing of seven terrorist organisations* (2005) at 3.12, 3.17, 3.38, 3.41, 3.50, 3.52, 3.61, 3.73, 3.74, 3.82, 3.83; *Review of the listing of four terrorist organisations* (2005) at 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89.

criminal by those authorities who actually apply the *Criminal Code*, this should be made explicit, and incorporated into the statutory grounds for listing.

Furthermore, to the extent that the factors used by ASIO are clear, they seem to emphasise foreign policy rather than domestic considerations. For example, the concept of 'posing a threat to Australian interests' is most naturally interpreted in as a foreign-policy concept.[49] Likewise, the proscription of an organisation by the United Nations, the proscription of an organisation by like-minded countries (which is itself a concept belonging to foreign policy), and the engagement of the organisation in a peace process, are all primarily foreign policy matters.

A government in a democracy of course has the right to pursue its foreign policy goals in accordance with its conception of the country's national interest. But in a democracy the criminal law should not be used as a tool to enforce these foreign policy preferences, nor political preferences more generally. It is not the proper function of Australian law to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day. Yet it is precisely this possibility that is enlivened by the definitions of 'terrorist act' and 'terrorist organisation', and the grounds for the listing of organisations, in the *Criminal Code*. The definitions are so broad, the inevitable discretion therefore so great, that there is a real threat that political activity deemed undesirable by the government and the authorities will be made subject to investigation and prosecution, while other political activity, which satisfies the statutory definitions but is deemed acceptable, will go uninvestigated and unpunished.

Such extreme discretion in deciding who will be policed and who not, and in deciding the limits of legitimate political activity, is utterly contrary to the rule of law, particularly as so many of the decisions are made in secret by ASIO, a covert security agency. And it threatens the freedom of political speech and political organisation, which are the cornerstones of any democracy. In a democracy, political controversies are to be resolved through political activity, not through the application of the criminal law by way of executive fiat. This must be particularly true where the

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[49] This Committee's predecessor noted the vagueness of this factor in its *Review of the listing of six terrorist organisations* (2005), para 2.29.

political preferences are foreign policy ones, and where the democracy in question is Australia, a multi-cultural community whose citizens have the most tremendous and diverse sorts of relationship with, and interests in, the people, places and politics of other countries.

Of the many hundreds or thousands of organisations throughout the world which are liable to be listed under the *Criminal Code*, only 19 have been so far.[50] In all but one case, all these groups are self-identified Islamic groups. This consistent targeting of Islamic groups can easily create a perception of discriminatory application of the power to list organisations. In the absence of more detailed information being provided about why these particular groups have been listed, and how their listing relates to the needs, rights and interests of Australians, an impression is created that the purpose of these listings is primarily a political one, of supporting the foreign policy goal of targeting militant Islamic organisations as part of the so-called 'war on terrorism'. The merits of such a foreign policy goal obviously fall outside the purview of the Committee's inquiry, and therefore of this submission. But it is within the Committee's purview to insist, for the reasons given above, that such foreign policy goals do not provide an adequate basis for the banning of organisations.

The perception of discriminatory application is in fact apt to be compounded by the fact that the Security Legislation Review Committee, under the heading 'The nature of terrorism', cites in evident agreement certain remarks by the former Australian Human Rights Commissioner, Dr Sev Ozdowski, that

> contemporary acts of terrorism [are] premised on an entirely unsustainable concept: namely the total subjugation of non-believers to a specific 'religio-political' ideology.[51]

This (mis-)description, this casual association of terrorism with a certain type of Islam, completely ignores 'terrorist acts' undertaken by such nationalist organisations as the Tamil Tigers or the PLO, or such secular insurrectionary groups as the Shining Path (an organisation listed under the *Charter of the United Nations Act 1945*). It is far from obviously true even as a description of the motivation of such listed Islamic organisations as PIJ or Hamas, whose rhetoric and apparent goals seem to be far more

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[50] *Criminal Code Regulations 2002*, Part 2.

[51] *Report of the Security Legislation Review Committee*, 2006, para 5.8.

tightly focused on conflict with Israel. And it is in fact belied by the listing of the PKK as a terrorist organisation pursuant to the *Criminal Code*.

Similar discriminatory characterisations of the nature of terrorism occur in the Security Legislation Review Committee's apparent reference to the threat posed by 'Islamist extremists' as a principal justification for anti-terrorism legislation,[52] and in their argument that one reason to fund an education campaign for Muslim and Arab Australians is to help prevent so-called 'homegrown terrorism'.[53]

This impression of discriminatory application is further compounded by the fact that if one wishes to find violent activity which has actually taken place in Australia, and which satisfies the *Criminal Code* definition of terrorism, there is no Islamist violence to be found. The most obvious example of such violence that has actually taken place is that of the fire bombings by white supremacists of Chinese restaurants in Perth.[54] But this activity – this 'homegrown terrorism', this politically-motivated violence that was actually undertaken (as opposed to merely anticipated) in Australia with the intention of intimidating a section of the public – is typically not described using the language of terrorism either by the media or by the authorities. (As an example, given his characterisation of terrorism in Australia as cited by the Security Legislation Review Committee, it is apparently not regarded as terrorism by the Director-General of ASIO.[55]) It is this selective use of the language of terrorism, this selective use of the power to list organisations, and the possibility (even, given the current political climate, the likelihood) of the selective investigation and prosecution of 'terrorist offences' that is the greatest objection to the retention of Divisions 101 and 102 in their current form.

I note that the Security Legislation Review Committee accepted that the breadth of paragraph (a) of the definition of 'terrorist organisation' may be a matter in need of

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[52] *Report of the Security Legislation Review Committee*, 2006, para 10.81.

[53] *Report of the Security Legislation Review Committee*, 2006, para 10.97, and see also the Executive Summary.

[54] As per the definition in section 100.1 of the *Criminal Code*, these are ideologically-motivated acts of violence that threaten the safety of the public and are intended to intimidate a section of the public. For information on these acts, see <http://www.abc.net.au/wa/news/200402/s1035658.htm>, <http://www.abc.net.au/pm/content/2004/s1157360.htm>, both available on 7 July 2006.

consideration.[56] The Committee suggested that this could wait until court proceedings to consider the matter. Given the fundamental issues of political liberty and the rule of law that are involved, however, it is important that these issues of breadth, and the ensuing discretions and potential for discriminatory application, be addressed immediately.

If the power to list organisations is to be retained, it is essential that sound criteria for proscription be spelled out clearly in the legislation. On this point I draw the Committee's attention to the remarks on this subject made in section 2.3 of my submission to the Security Legislation Review Committee (some of those remarks go not the grounds for listing, but the process, which I understand is to be the subject of a future inquiry by this Committee). But for the reasons given above – namely, its breadth, the resulting necessity for the exercise of discretion in both proscription and criminal enforcement, and the consequent discriminatory and politicised application – this submission opposes the proscription power established by the *Criminal Code*. It should be repealed with the rest of Division 102.

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[55] *Report of the Security Legislation Review Committee*, 2006, para 10.87.

[56] *Report of the Security Legislation Review Committee*, 2006, para 7.7. See also para 7.16.

## 2. Response to recommendations of the Security Legislation Review Committee

*Recommendation 1*

I support this recommendation. Consistently with the view I expressed in regard to Division 3 Part III of the *ASIO Act* 1979, if the argument for repeal is rejected, the next best outcome is for a strong regime of review of the operation of these extraordinary laws.[57]

*Recommendation 2*

I support this recommendation, but with certain reservations. First, the social and political circumstances surrounding the passage of the legislation under review, as well as the various amendments to it, have had an impact on Muslim and Arab Australians which it will is likely to be difficult to undo with an education campaign. This impact is compounded by the discriminatory application of the legislation, and the discriminatory rhetoric that has come to dominate the discussion of terrorism – including by the Security Legislation Review Committee – that I have discussed above.

Furthermore, the need for education is at least as great, if not great, in respect of the broader community. That is, the best way to allay the concerns of Muslim and Arab Australians that they are subject to discrimination would be to educate other Australians, in order to break down the discriminatory assumptions that have become commonplace in Australian public political discourse relating to terrorism.

*Recommendation 3*

On the assumption that the listing regime is to continue, I support this recommendation. I have argued in my submission to the Security Legislation Review

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[57] Evidence to Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, Melbourne, 7 June 2005, pp 29–30 (Patrick Emerton).

Committee that community consultation prior to a listing is essential if listings are to be perceived as legitimate by those that they effect.

*Recommendation 4*

I have no view on this recommendation. It is no part of my objection to the listing regime that the Attorney-General has listed organisations in an unlawful fashion. Indeed, my point is that the grounds for listing are so broad that any number of organisations can be said to satisfy them. My objection to the listing regime is to its discretionary character, and that character would remain under either of the alternatives given here.

If the criteria for proscription were to be changed in order to require some sort of nexus with Australia, or the need to prove the inadequacy of ordinary criminal law for dealing with the threat posed to Australia by an organisation, then I would support a judicial process for the testing of these claims. Unlike the current grounds, these would be far more difficult to satisfy, and it would be appropriate to require that they be proved to a court.

*Recommendation 5*

On the assumption that the listing regime is to continue, I support this recommendation. It is consistent with my own arguments about community consultation and community confidence in the listing of organisations.

*Recommendation 6*

I do not support this recommendation. Given the use to which the definition of ‘terrorist act’ is put – forming an element in the definition of a number of offences, of the grounds for listing organisations, and so on – it ought not to be made broader, by bringing into play the difficult concept of ‘harm to a person’s mental health’.

*Recommendation 7*

I support this recommendation, which is consistent with my argument that the definition of ‘terrorist act’ be narrowed in a number of respects.

*Recommendation 8*

I do not support this recommendation. If by ‘threat’ is meant mere speech, then there is no need to criminalise it. If, on the other hand, by ‘threat’ is meant some sort of conduct, then existing offences, such as preparation or planning, or ancillary offences such as attempt, are sufficient to criminalise such conduct.

*Recommendation 9*

I support this recommendation, as it is consistent with my argument that ‘advocacy’ as a ground for the listing of organisations be repealed.

*Recommendation 10*

I support this recommendation. It is consistent with my argument that the existing ‘terrorist organisation’ offences under Division 102 are excessively broad.

*Recommendation 11*

I support this recommendation. It is consistent with my argument that the offences under Division 102 establish an excessive burden of criminal liability.

*Recommendation 12*

I agree with parts of this recommendation, namely, that there should be no offence of strict liability in relation to training with ‘terrorist organisations’, and that if training with a ‘terrorist organisation’ is to remain a criminal offence, then such training ought to be connected in some fashion to engagement in a terrorist act.

I do not agree with the recommendation that the grounds of liability under section 102.5 be potentially widened by a reference to 'participation in training'– as I have argued, they are already too wide.

I do not agree with the Security Legislation Review Committee that the operation of section 102.5, as it currently stands, is hopelessly confused.[58] The Committee correctly notes that, under the *Criminal Code*, the fault element in relation to a circumstance, if not otherwise specified, is recklessness.[59] Sub-section 102.5(3) does specify otherwise, however, in respect of the offence created by sub-section 102.5(2): namely, it specifies that the circumstance specified in paragraph 102.5(2)(b) is one to which strict liability applies. That is, as per sub-section 6.1(2) of the *Criminal Code*, no fault element applies to that physical element. Sub-section 102.5(3) also allows for the operation of sub-section 102.5(4), which allows a defence of absence of recklessness on the part of the accused as to the terrorist character of the organisation in question.[60]

The Security Legislation Review Committee's discussion of strict liability[61] seems to focus only on the definition of offences of strict liability in sub-section 6.1(1) of the *Criminal Code*, and then rightly points out that the regulation listing an organisation 'proves itself' with no need to invoke the concept of strict liability. This discussion fails to note the relevance of sub-section 6.1(2), however, which establishes the applicable concept of an offence being one in respect of which one or more physical elements carry no fault element.

Although the operation of section 102.5 is explicable, it does not follow that it is defensible. The Security Legislation Review Committee correctly notes the inconsistency with normal standards of criminal liability to have strict liability apply to any element of an offence for which the maximum penalty is 25 years

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[58] See the discussion in the *Report of the Security Legislation Review Committee*, 2006, paras 10.25-10.38.

[59] *Criminal Code* s 5.6(2). See the *Report of the Security Legislation Review Committee*, 2006, para 10.26.

[60] This operation is correctly characterised in the *Report of the Security Legislation Review Committee*, 2006, para 10.34.

[61] *Report of the Security Legislation Review Committee*, 2006, paras 10.28, 10.29, 10.32.

imprisonment.[62] The Committee also queries why the offence is not cast in the same fashion as the bulk of the other offences in Division 102, with a knowledge variant, and a less-serious recklessness variant.[63] It does not note that the offence did have just this form, until it was amended by the *Anti-Terrorism Act 2004*. At the time, no satisfactory explanation was given for this amendment.[64] If the offence is not to be repealed, then it ought at least the 2004 amendment ought to be repealed.

*Recommendation 13*

Under the assumption that the offence under section 102.6 is to remain, I support this recommendation. It is consistent with my view that the scope of these offences be narrowed. It is also tends towards an upholding of the rule of law, by allowing payment to be made to obtain legal representation. This recommendation ought in fact to be expanded, to encompass in addition the range of legal actions contemplated by paragraph 102.8(4)(d). Likewise, that paragraph ought to be expanded to cover all legal action under Part 5.3, or to comply with the laws of the Commonwealth or of a State or Territory.

*Recommendation 14*

Under the assumption that the offence under section 102.7 is to remain, I support this recommendation.

*Recommendation 15*

I support the recommendation of repeal of section 102.8. I also agree that the strict liability element of this offence be repealed.

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[62] *Report of the Security Legislation Review Committee*, 2006, para 10.36.

[63] *Report of the Security Legislation Review Committee*, 2006, para 10.27.

[64] I discuss this amendment in more detail in 'Paving the Way for Conviction Without Evidence – A Disturbing Trend in Australia's 'Anti-Terrorism' Laws' (2004) 4 *QUT Law and Justice Journal*.

I disagree with the Security Legislation Review Committee that the drafting of this offence is confused.[65] On my analysis, the offence has the following elements:

1 intentional association with a person (call him or her *X*);

F2 knowledge that *X* is a member, promoter or director of an organisation *O*;

P2 that *X* actually be a member, promoter or director of an organisation *O*;

F3 intention that association with *X* support *O* to exist or to expand;

P3 that the association with *X* actually supports *O*;

F4 knowledge that *O* is a 'terrorist organisation' (ie is either listed, or else is directly or indirectly fostering, assisting etc), with a defence of absence of recklessness as to the fact that *O* is a listed organisation;

P4 that *O* actually be a listed organisation.

The first element combines both fault and physical elements. There are then three further sets of fault and physical elements. It is in respect of the last set that the alleged confusion arises. As I read the offence, however, it requires that the accused know that the organisation is a terrorist one, but establishes strict liability – with a defence of absence of recklessness, similar to that in section 102.5 – as to the identity of the organisation as a listed organisation. Thus, for example, a person could commit the offence if she associated with a member of the PKK (which is a listed organisation) believing that person to be a member of the Tamil Tigers, because although she did not know that the person was a member of a listed organisation, because she was not aware that the person was a member of any of the organisations named in the regulations, she would know that person to be a member of a terrorist organisation (ie one directly or indirectly fostering or assisting etc). She would have a

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[65] *Report of the Security Legislation Review Committee*, 2006, paras 10.35, 10.58, 10.64, 10.65.

defence, however, that she was not reckless as to the possibility that the person was a member of the listed organisation.

That the operation of the offence is explicable does not make it defensible. It is both complex and oppressive, and ought to be repealed.

*Recommendation 16*

On the assumption that the offence is to remain, I support the recommendation.

*Recommendation 17*

I do not understand the purpose of the recommendation. If it is to further narrow the operation of section 103.2, by eliminating the possibility of innocent agency and focussing on individual terrorists,[66] then it seems otiose given that section 103.1 already swamps the operation of section 103.2.[67]

*Recommendation 18*

I support this recommendation. I also support the suggestions of the Australian Law Reform Commission, in its Discussion Paper 71 on Sedition (2006), that treason be redefined to be an offence that can be committed only by an Australian citizen or resident (in this case, in addition, the extended geographical jurisdiction could be reduced from category D to category B). This would overcome the current absurdity, that foreign soldiers at war with Australia become criminals under Australian law, for committing the offence of treason.

The Australian Law Reform Commission has also suggested in its Discussion Paper that the phrase 'engages in conduct that assists by any means whatever, with intent to assist', which appears in both paragraph 80.1(1)(e) and 80.1(1)(f) be amended to require that the assistance be material, and that the intention be to assist the enemy, country or organisation in question to wage war or engage in hostilities.

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[66] *Report of the Security Legislation Review Committee*, 2006, para 12.15.

[67] *Report of the Security Legislation Review Committee*, 2006, paras 12.8, 12.9.

This would exclude from liability the provision of assistance which was irrelevant to the conflict in question. The concept of 'material assistance' should be defined to include only direct assistance, such as the provision of troops, funds, arms or other materiel, or intelligence, but to exclude indirect assistance such as the refusal to fight, the provision of humanitarian supplies, etc. (The current defence at sub-section 80.1(1A) could be incorporated into such a definition.) This would make it clear that conscientious objectors and pacifists, who argue against enlistment and call upon soldiers to lay down their arms, are not guilty of treason. At present, such conduct could be construed as treasonous, as it would arguably be intended to assist the enemy (because, as per Division 5 of the *Criminal Code*, the pacifist might be aware that the urged result would occur in the ordinary course of events[68]), and might (at least indirectly) provide such assistance.

*Recommendation 19*

I have no opinion on this recommendation.

*Recommendation 20*

I do not support this recommendation. Given the excessive breadth of the definition of 'terrorist act', further offences which depend upon it ought not to be established.

*Other key findings*

I have made my view on these findings clear in the first part of this submission. In particular, unlike the Security Legislation Review Committee, I have argued that Division 101 is in need of substantial amendment if not repeal, and that Division 102 should be repealed. I have also argued for the narrowing of extended geographical jurisdiction, to require some sort of nexus or threat to Australia. I agree with the Committee, however, that the definition of 'terrorist act' should not be widened.

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[68] *Criminal Code* s 5.2(3), defining 'intention' in respect of physical elements that are results of conduct.

# SUBMISSION TO THE SECURITY LEGISLATION REVIEW COMMITTEE

This submission argues that, in its present form, Part 5.3 of the *Criminal Code* establishes a regime of offences that is overly broad, and therefore inevitably discretionary in its application. Furthermore, given the connection between terrorism offences, as they are defined by Part 5.3, and political motivation, this discretionary application is prone to politicisation. The same is true of the power to proscribe organisations under Division 102. The submission therefore argues that Part 5.3, in its present form, should be repealed.

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## 1. THE TERRORISM OFFENCES IN PART 5.3 OF THE *CRIMINAL CODE*

This submission is opposed to Part 5.3 as it was introduced into the Commonwealth *Criminal Code* by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and *Criminal Code Amendment (Terrorism) Act 2003*, and as it has subsequently been amended by the *Anti-Terrorism Act 2004* (Cth), the *Anti-Terrorism Act (No 2) 2004* (Cth), the *Anti-Terrorism Act 2005* (Cth) and the *Anti-Terrorism Act (No 2) 2005* (Cth).

Part 5.3 of the *Criminal Code* creates a large number of offences, all of which (except for the offence of association under section 102.8) are punishable by lengthy terms of imprisonment. These offences are also themselves triggers for other extraordinary powers and processes under the *Crimes Act 1914* (Cth) ('*Crimes Act*') and the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). An assessment of Part 5.3 must take into account this larger statutory framework within which it operates.

It is the contention that when breadth of these offences, coupled with this wider statutory framework, is taken into account, Part 5.3 of the *Criminal Code* can be seen to be an excessively broad regime, which extends beyond the appropriate criminalisation of political violence, to threaten the legitimate political activities of people both in Australia and overseas. It is riddled with executive discretions that make it inimicable to Australia's liberal political traditions.

### 1.1 Breadth of the definition of 'terrorist organisation' under the *Criminal Code*

At the centre of the regime established by Part 5.3 of the *Criminal Code* is the concept of a 'terrorist act'.[1] 'Terrorist act' is a term whose meaning is defined extremely broadly, to extend far beyond acts like bombing and hijackings. It is defined to include any action or threat of action where the following four criteria are met:

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[1] *Criminal Code* s 100.1.

- the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
- the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
- the action does, or the threatened action would:
  - cause serious physical harm, or death, to a person; or,
  - endanger the life of a person other then the one taking the action; or,
  - create a serious risk to the health and safety of the public, or of a section of the public; or,
  - cause serious damage to property; or,
  - destroy, or seriously interfere with or disrupt, an electronic system;
- the action is, or the threatened action would be:
  - action that is not advocacy, protest, dissent or industrial action; or,
  - intended to cause either serious physical harm, or death, to a person; or,
  - intended to endanger the life of a person other then the one taking the action; or,
  - intended to create a serious risk to the health and safety of the public, or of a section of the public.

This definition includes virtually all actual, attempted or threatened politically or religiously motivated violence, in Australia or overseas, whether undertaken by a

government or by private individuals, whether undertaken in support of or in opposition to democracy, whether undertaken aggressively or defensively, and whether undertaken with or without justification. Thus, it undoubtedly includes within its scope such conduct as the attacks upon New York and the Pentagon of September 11, 2001. However, it also includes within its scope much action that many do not wish to condemn, including the following:

- The invasion of Iraq by Australia, the United States and the United Kingdom (which was politically motivated intimidation of the former Iraqi government causing, and intended to cause, the deaths of many persons);

- The American Revolution (which was the politically motivated coercion of the government of Great Britain causing, and intended to cause, the deaths of many persons);

- The activities of the African National Congress (which was the politically motivated intimidation of the government of apartheid South Africa causing, and intended to cause, serious physical harm and death).

These examples also show that it may not always be correct to say, as the Parliamentary Joint Committee on ASIO, ASIS and DSD said in its *Review of the listing of the Palestinian Islamic Jihad*, that 'political violence is not an acceptable means of achieving a political end in a democracy'.[2] Taken literally, such a statement would preclude the use of force by Australia to defend itself from an invading power; it would likewise preclude the use of force by the police to restrain violent protestors, or by citizens to prevent an attempt at a coup or other sort of anti-democratic revolution. It is worth remembering that some of the world's great democracies, such as France and the United States, were founded by political violence; that in the case of the United States, the extension of democracy into those states which had hitherto enslaved around a third of their inhabitants was achieved by political violence; and

[2] *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) at 3.20. Hereafter, this submission will refer to this Committee, and its successor Parliamentary Joint Committee on Intelligence and Security, as the PJC.

that the ongoing invasion of Iraq is said to be justified, in part, by the necessity of such violence for the introduction of democracy into Iraq.

As well as these events which are fundamental to the political ideals of many of us today, a host of other activity is apt to be caught up in the definition of 'terrorist act', although it does not necessarily seem criminal or worthy of condemnation. Some examples are the following:

- The holding of a student or union demonstration deliberately causing damage to property, and thereby intended to provoke the authorities to retaliate, thus showing their true political colours – a common tactic in trying to bring about political change in authoritarian states (which would be politically motivated intimidation or coercion of the government in question, causing serious property damage and intended to cause a serious risk to the health and safety of the public);

- The exercise, by the citizens of the Federal Republic of Germany, of their constitutional right to resist an attack on the constitutional order of that country[3] (which could quite possibly involve politically motivated intimidation of the unlawful government, causing harm and intended to cause harm to the agents of that government).

At its margins, the definition even embraces certain acts of industrial action, like the picketing of a public hospital by nurses.[4]

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[3] *Basic Law of the Federal Republic of Germany*, article 20(4).

[4] While the definition of a 'terrorist act' excludes 'industrial action' (*Criminal Code Act* s 100.1), this does not extend to industrial action intended to create a serious risk to the health and safety of a section of the public. In any event, it is unlikely to afford any protection to picketing which has been found not to be 'industrial action' under the *Workplace Relations Act 1996* (Cth): *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR, 550, 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at 586) ('*Davids'*). For commentary on this case, see John Howe, 'Picketing and the Statutory Definition of 'Industrial Action'' (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in *Davids* has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR [4-282] and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR [4-382].

The point of these examples is to show that, from the mere fact that certain conduct satisfies the definition of 'terrorist act' under the *Criminal Code*, nothing can be confidently inferred about its moral character: the students in the example above might be Iranian students, and their opponents Iranian police attempting to enforce the repressive laws of that country.

### 1.2 The danger of excessive discretion

This breadth in the definition of 'terrorist act', and the fact that it covers a range of activity which is not deserving of condemnation, makes it inevitable that the policing and prosecution of offences and the exercise of statutory powers based upon this definition of terrorism will be highly discretionary.

Excessive discretion in policing and prosecution is always undesirable, opening the door as it does to discriminatory application of the law, and to the potential for undermining the independence of the police and prosecuting authorities. When the key concept at the heart of the discretion – 'terrorist act' – is defined by reference to political, religious or ideological motivation, added to the potential for discriminatory application is the potential for that discrimination to be politically or ideologically motivated.

The connections between terrorism, as statutorily defined, and political and ideological motivation, make the investigation of such offences a particular challenge for a democracy. A democracy, while it must protect the lives and well-being of its people, is also committed to political openness and political pluralism. Indeed, if sufficiently many members of a democracy come to hold a particular political view, a democracy must be open to the possibility that that view will become part of its mainstream, even if that view has at one time been associated with political violence (in this regard one can think of the African National Congress in South Africa, for instance, or of the leaders of the American Revolution, or even of the more extreme abolitionists prior to the American Civil War). On the other hand, if a small group in a democracy poses a threat of violence to the rest, the policing of this threat must be undertaken in a way that is not seen simply to be an attack upon the dissent and diversity that is always a legitimate part of a democracy.

In a democracy the criminal law ought not to be used simply as a tool for enforcing political preferences. Yet it is precisely this possibility that is enlivened by the definition of 'terrorist act' in the *Criminal Code*. The definition is so broad, the inevitable discretion therefore so great, that there is a real threat that political activity deemed undesirable by the government and authorities will be made subject to investigation and prosecution, while other political activity, which satisfies the statutory definitions but is deemed acceptable, will go uninvestigated and unpunished.

As this submission will go on to argue, this danger is increased by the fact that the regime established by the *Criminal Code* establishes even further opportunities for the exercise of discretion, and also by the fact that the offences that are established on the basis of this definition of 'terrorist act' impose criminal liability in circumstances that go far beyond participation in acts of catastrophic violence such as bombings and hijackings.

### 1.3 Offences under Division 101 of the *Criminal Code*

Division 101 of the *Criminal Code* makes it an offence to engage in, prepare for or plan a 'terrorist act'.[5] The penalty for any of these offences is up to life imprisonment.

Division 101 also criminalises a range of conduct *ancillary to* 'terrorist acts'. Thus, an offence is committed by providing training, possessing a thing, or collecting or making a document, that is connected with the preparation for, engagement in or assistance in a 'terrorist act'.[6] The maximum penalty for the training offence is 25 years imprisonment if the connection is known to the accused, or 15 years imprisonment if the accused is reckless; for the other offences it is 15 or 10 years imprisonment. These are extremely severe penalties, comparable (for example) to those for crimes against humanity.[7]

These offences are objectionable on a number of counts. First, as was demonstrated by the examples considered above (in 1.1), there is no necessary

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[5] *Criminal Code* ss 101.1, 101.6

[6] *Criminal Code* ss 101.2, 101.4, 101.5.

[7] *Criminal Code* Division 268.

connection between the commission of these offences and immoral conduct. For example, section 101.2 would make it an offence to train the students, imagined in the example above, about the best way to respond to the use of tear gas by the authorities in a demonstration. This does not seem immoral, and does not seem to be a very serious criminal matter.

Second, it is possible to commit these offences, which attract the severe penalties noted above, without being guilty of any violent act. In the case of the offences relating to documents and things, it is possible to commit the offences without even having any violent intention. (It is a defence, for someone accused of such an offence, that possession of the document or thing was not intended to facilitate preparation for, engagement in or assistance of a terrorist act; but the accused bears an evidential burden of adducing evidence that raises this defence.[8] One undesirable feature of offences structured in this way is that often the only way of discharging the evidential burden will be for the accused to testify, thus waiving his or her right of silence.)

Third, the interaction of these offences with the general ancillary offence provisions in Part 2.4 of the *Criminal Code* means that criminal liability, with extremely serious penalties attached, can be incurred at a point in time when the conduct is quite remote from the actuality of violence. Thus, for example: The concept of a 'terrorist act' includes, within itself, the threat of violent action.[9] The offence of engaging in conduct preparatory to a terrorist act[10] is therefore committed by preparing for or planning the threat of a 'terrorist act'. It is also an offence, likewise punishable by life imprisonment, to attempt to prepare or plan such a threat,[11] or to conspire to prepare or plan such a threat.[12]

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[8] *Criminal Code* ss 13.3, 101.4(5), 101.5(5).

[9] *Criminal Code* s 100.1(1), definition of 'terrorist act'.

[10] *Criminal Code* s 101.6.

[11] *Criminal Code* s11.1.

[12] *Criminal Code* ss 11.5.

### 1.4 Offences under Division 102 of the *Criminal Code*

Division 102 creates a number of offences which criminalise virtually any sort of involvement with 'terrorist organisations'.

If an organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)',[13] then it is an offence for anyone, anywhere in the world, to be a member of the organisation, to direct it, to train with it, to recruit for it, to supply it with funds, other resources or support, or to receive funds from it.[14] Again, the penalties for these offences are extremely severe: up to 25 years imprisonment for knowingly directing, recruiting for, getting funds to or from or providing support to an organisation; up to 25 years imprisonment for knowingly or recklessly training with an organisation;[15] up to 15 years for recklessly directing, recruiting for, getting funds to or from or providing support to an organisation; and up to 10 years for knowingly being a member of an organisation. Even 'informal membership' or the taking of steps to become a member of a 'terrorist organisation' is punishable by up to ten years in prison.[16]

These penalties are quite excessive, given that these offences can be committed whether or not the offender had any violent intention, and with the exception of the offence of providing support to an organisation,[17] offences can be committed even if the offender's involvement with the organisation was in no way itself connected, even indirectly, to 'terrorist acts'. One example that illustrates this point is the following. The Indonesian island of Aceh was one of the regions most devastated by last year's Boxing Day tsunami. At that time, parts of Aceh were under the control of the rebel

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[13] The change of wording from 'the terrorist act' to 'a terrorist act' is brought about by item 6 of Schedule 1 of the *Anti-Terrorism Act (No 2) 2005* (Cth).

[14] *Criminal Code* s 102.2-102.7, together with paragraph (a) of the definition of 'terrorist organisation' in s 102.1. The extension of criminal liability for membership to include membership of organisations which have not been proscribed was brought about by item 19 of Schedule 1 of the *Anti-Terrorism Act 2004* (Cth).

[15] The increase in the penalty for recklessly training with a 'terrorist organisation' was increased from 15 to 25 years by item 20 of Schedule 1 of the *Anti-Terrorism Act 2004* (Cth).

[16] *Criminal Code* s 102.3, together with paragraphs (a) and (b) of the definition of 'member' in s 102.1.

[17] See *Criminal Code* ss 102.7(1)(a).

Free Aceh Movement, clearly a terrorist organisation under the act. Thus, anyone sending money to the rebels to help them with tsunami relief, or anyone teaching them health or construction techniques to cope with the aftermath of the tsunami, would have been committing crimes under Australian law punishable by very lengthy terms of imprisonment. Criminalising this sort of behaviour has nothing to do with protecting communities from politically-motivated violence.

Indeed, if we combine the breadth of the concept of ‘ terrorist act’ with the breadth of the concept ‘indirectly fostering’, we can see that a very large number of organisations satisfy the definition of ‘terrorist act’: not only organisations such as Al-Qa’ida or Hamas, but also the armed forces of most nations, which (by training for, and adopting a posture of readiness for, military activity) are indirectly fostering the commission of ‘terrorist acts’. Likewise, any organisation that offers support to political protestors who clash with police is likely to constitute a ‘terrorist organisation’, on the grounds that it is indirectly fostering politically motivated activity which is intended to intimidate a government, and which both is intended to, and does, create a serious risk to the health and safety of a section of the public (by provoking the police to attack them). Similarly, a charitable organisation, which among its various activities offers succour to the families of those who have been arrested or killed for undertaking acts of political violence, is also a candidate ‘terrorist organisation’, on the grounds that it is indirectly fostering such violence, which in turn constitutes a terrorist act under the legislation. extends far beyond criminal gangs plotting bombings or hijackings. And, as was indicated above (at 1.1), a picket by nurses could potentially amount to a terrorist act. From this possibility, it follows that a trade union offering advice to nurses as to how they might go about establishing a picket might well be a terrorist organisation, as it might well be at least indirectly assisting the doing of a terrorist act.

A final set of examples, which might be considered by some as absurd, in fact demonstrates the absurd breadth of this statutory definition of a terrorist organisation. The governments of the United States, the United Kingdom and Australia are directly engaged in the planning of politically motivated military activity in Iraq. This action is being undertaken with the intention of coercing a government (namely, the former government of Iraq) and of a section of the public (namely, those Iraqis who continue

to oppose the invasion of that country). Furthermore, that action was intended to cause, and indeed has caused, a great deal of danger to health and safety, as well as many deaths. Thus, each of these governments (together with many other governments around the world) is a terrorist organisation. Indeed, even such an organisation as the Liberal Party of Australia (which at least indirectly fostered the use of political violence in Iraq) satisfies the statutory definition.

What these examples show is that, merely from the fact that an organisation satisfies the statutory definition of a terrorist organisation, next to nothing can be known about its moral character, or the criminality of its conduct. Some governments are perhaps criminal – the invasion of Iraq has indeed been predicated upon the claim that the former government of that country was criminal – but very few people would regard the governments of Australia, the United Kingdom or the United States as criminal organisations. Likewise, some charities may be criminal, but few people would have regarded charities offering succour to the families of resistance fighters in East Timor as criminal organisations deserving to be banned – despite the fact that, as was pointed out above, if they were in operation now they would probably count as terrorist organisations under the *Criminal Code*. And to return to another example given above, the mere fact that a group supports those who clash with police does not show it to be a criminal group that ought to be banned – what if the group is a group of Iranian students, and the police are Iranian police attempting to enforce the repressive laws of that country? Division 102 of the *Criminal Code* makes criminals of the members of many quite ordinary and fundamentally innocent organisations, such as the ordinary members of trade unions, or the members of organisations offering support to foreign political organisations.

Once again, this excessive breadth means that prosecution for these offences will inevitably be highly discretionary. Organisations deemed legitimate will not be prosecuted, despite the fact that those involved with them will be guilty of criminal offences under the *Criminal Code*. As was explained above (at 1.2), this sort of discretionary approach to the policing of political activity is inimical to democracy.

In the context of these ‘terrorist organisation’ offences, the threat of politically discriminatory policing is particularly great, because those involved with organisations operating in Australia can become liable to prosecution on the basis of

those organisations' connections to political activity overseas. For example, there is no doubt that any organisation providing succour to an overseas resistance movement would constitute a 'terrorist organisation', as any resistance movement is necessarily engaged in politically motivated violence intended to intimidate a government. In the past, for example, the Australian Anti-Apartheid Movement would have constituted a terrorist organisation, on account of its open support for the African National Congress, which was waging an armed struggle against the apartheid government of South Africa. The existence of broad 'terrorist organisation' offences therefore opens the door to the prosecution of the members of these groups, although they pose no threat to the wellbeing of Australia or Australians.

### 1.5 The wider statutory framework

Not only does Part 5.3 of the *Criminal Code* establish a suite of offences that are unjustifiably broad in the conduct that they criminalise, and the discretions they therefore give rise to. It also interacts with a number of other statutory regimes, triggering departures from the normal rule of law in Australia. These additional elements of the operation of Part 5.3 are essential to any adequate evaluation of the legislation.

Individuals arrested on suspicion of committing 'terrorism offences' – including all the offences under the *Criminal Code* relating to 'terrorist acts' or 'terrorist organisations' discussed in the preceding section – may be held without charge for up to 24 hours, compared to the normal period under the *Crimes Act 1914* (Cth) ('*Crimes Act*') of 12 hours.[18] In addition, certain periods of time which would normally count against this period of pre-charge detention may be excluded in the case of someone arrested on suspicion of having committed a 'terrorism offence'.[19] Furthermore, a person charged with a 'terrorism offence' has an extremely restricted right to be

[18] Compare ss 23CA and 23DA(7) of the *Crimes Act* applying to terrorism offences, to ss 23C and 23D(5) of *Crimes Act* applying to all other Commonwealth offences. 'Terrorism offence' is defined in s 3(1) to include any offence against Part 5.3 of the *Criminal Code*.

[19] *Crimes Act* s 23CB.

remanded on bail,[20] while those convicted of such offences are subject to minimum non-parole periods.[21]

Given the breadth of activity criminalised by Part 5.3, including a wide range of non-violent activity, no adequate justification has been given for these departures from the normal processes of the criminal law. If they are to remain, the offences in Part 5.3 must be redefined in order to bring about a sensible correlation between the seriousness the *Crimes Act* assumes these offences to involve, and the actual seriousness of the conduct that they criminalise.

In addition to these departures from the usual criminal law that apply in the case of Part 5.3 of the *Criminal Code*, this legislation also acts as a trigger for unprecedented intelligence-gathering powers. Where there are reasonable grounds for believing that detaining and/or questioning someone will substantially assist the collection of intelligence that is important in relation to an offence against Part 5.3, and that other methods of collecting that intelligence would be ineffective, then that person is liable to be detained and/or questioned by ASIO – whether or not they are themselves suspected of engaging in any violation of Australian or other law.[22] Detention under the *ASIO Act* may last for up to 7 days.[23] Furthermore, the exercise of such powers by ASIO is cloaked with secrecy. It is illegal to disclose information relating to most of ASIO's activities relating to the exercise of these special powers.[24]

This investigative power – itself highly discretionary in its operation – simply adds to the concern that the offences in Part 5.3 are prone to discriminatory and politicised application. Imagine, for example, a person who threatens that her organisation will use violence against the police in a political demonstration in Iran. She is probably committing a terrorist act. If an organisation in Australia provides support to, or even expresses solidarity with, the organisation to which she belongs, then that Australian

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[20] *Crimes Act* s 15AA.

[21] *Crimes Act 1914* s 19AG.

[22] *ASIO Act* ss 34C, 34D. 'Terrorism offence', as it appears in those sections, is defined in s 4 to include any offence against Part 5.3 of the *Criminal Code*.

[23] *ASIO Act* ss 34D(3), 34HC.

[24] *ASIO Act* s 34VAA.

organisation is quite possibly a terrorist organisation (as it is indirectly fostering the threat against the Iranian police). If I were to teach someone in that Australian organisation to use a photocopier, then I would arguably be training with a terrorist organisation. So if you know that I am thinking of providing such training, then you may well have information that is important in relation to a terrorism offence. Let's hope that ASIO don't come knocking on your door! If they do, and they believe that you might let me know about it, then they can have you secretly detained for up to a week to face interrogation.

This example illustrates two points. First, the interaction between the offences created by Part 5.3, and ASIO's power to issue secret warrants for compulsory questioning and detention, has transformed ASIO from being merely a gatherer of information, into something closer to a secret police. Second, these criminal offences, and ASIO's powers which are defined in relation to them, can apply to activity which has only the most tenuous of connections, if any at all, to such catastrophic violence as bombings and hijackings.

Of course, we are not living in a police state. And we know that ASIO is not going to compulsorily question (as it might) people who have information important in relation to the offence that thousands of Australians are committing by being members of the Liberal Party. But this simply illustrates the danger posed by these laws. With the legislation so broad in its application, the government and ASIO have been given an extraordinary discretion to determine whose political activity and political organisation will be classed as legitimate – and therefore immune from investigation and prosecution – and who will suffer the crack down. This extreme discretion in deciding who will be policed and who not, and in deciding the limits of legitimate political activity, is utterly contrary to the rule of law, particularly as so many of the decisions are made in secret by ASIO, a covert security agency. It also threatens free political speech, which is the cornerstone of any democracy.

These threats are simply compounded by the proscription regime established under the *Criminal Code*.

## 2. PROSCRIPTION UNDER DIVISION 102 OF THE *CRIMINAL CODE*

Division 102 of the *Criminal Code* also confers power on the Commonwealth Attorney-General to proscribe 'terrorist organisations'. Regulation may be made specifying an organisation as a 'terrorist organisation' if the Attorney-General is satisfied, on reasonable grounds, that the organisation:

- is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,
- directly or indirectly counsels or urges the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,
- directly or indirectly provides instruction on the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,
- directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act (whether or not a terrorist act has occurred or will occur).[25]

(The last three of these grounds are, somewhat misleadingly, characterised as the 'advocacy' of terrorism.[26])

The breadth of the statutory definition of 'terrorist act', together with the breadth of such concepts as 'directly or indirectly assisting in', 'directly and indirectly fostering', 'directly or indirectly counselling' or 'directly praising' such acts, means

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[25] *Criminal Code* s 102.1. The power in its current form was conferred by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth), which repealed the earlier requirement that an organisation, to be proscribed, must have been listed by the United Nations Security Council, and item 10 of Schedule 1 of the *Anti-Terrorism Act (No 2) 2005* (Cth), which introduced 'advocacy' of a terrorist act as an additional ground of proscription.

[26] *Criminal Code* s 102.1(1A).

that an extremely wide range of groups is liable to be proscribed under Australian law. This must be kept in mind in assessing the merits of the offences established by Division 102. To given one example additional to those already given above: Marx's *Communist Manifesto* famously concludes with the following words:

> The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. WORKINGMEN OF ALL COUNTRIES, UNITE![27]

These words counsel terrorist acts. Thus, any organisation that disseminates them (a publisher, a political party) is liable to being proscribed (if the Attorney-General's Department is interested, the publisher of my copy, which I used as an undergraduate and now use for undergraduate teaching, is indicated in the footnote).

The absurdity of this breadth of criminality that the *Criminal Code* purports to establish also raises doubts about its constitutionality. Can the Attorney-General, by way of regulation, really achieve what the Parliament, by way of legislation, could not, namely, the criminalisation of political parties on the basis of a threat they are deemed, but have never been proven, to pose?[28] This submission will not canvass the constitutionality of this aspect of the *Criminal Code*, but refers the Committee to the work of Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations'.[29]

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[27] Lewis S Feuer (ed), *Marx & Engels: Basic writings on politics and philosophy*, Fontana/Collins, 1984, p 82.

[28] In the well known *Communist Party Case*, the High Court of Australia struck down as unconstitutional the *Communist Party Dissolution Act 1950* (Cth): *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[29] (2004) 27 *UNSW Law Journal* 482-523. See also the remark of George Williams, quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 47, that the proscription regime under the *Criminal Code* bears 'disturbing similarity' to the *Communist Party Dissolution Act 1950* (Cth).

## 2.1 Consequences of proscription under the *Criminal Code*

The proscription of an organisation under the *Criminal Code* means that the offences discussed in the previous section (1.4) are committed by those who are involved with the organisation, with no need for the prosecution to prove the 'terrorist' character of the organisation beyond reasonable doubt. Proscription has additional consequences also.

If an organisation has been proscribed under the *Criminal Code*, it also becomes an offence to meet or communicate with a member, director or promoter of that organisation, in circumstances where such meeting or communication is intended to support the organisation's existence or assist its expansion.[30]

Proscription also changes the burden of proof under section 102.5 (the offence of training with a terrorist organisation): instead of the prosecution having to prove recklessness, an evidential burden is placed on the accused to adduce evidence as to his or her innocent state of mind, if he or she is to escape conviction.[31]

Proscription also removes one defence to a charge of incursion under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). Normally, under that act it is a defence to a charge of engaging in hostilities in a foreign country that the hostile acts took place while serving with a country's armed forces.[32] This defence does not apply, however, if an organisation with which the accused was serving, or with which the accused intended to serve, was proscribed under the *Criminal Code*.[33]

To proscribe an organisation under the *Criminal Code* is therefore not merely symbolic. It is a serious step, with serious consequences for the application of Australian criminal law. It trigger a number of departures from the ordinary rule of law in Australia: offences are enlivened of involvement with an organisation, which

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[30] *Criminal Code* s 102.8, together with the definition of 'associate' in s 102.1. This offence was introduced into the *Criminal Code* by item 3 of Schedule 3 of the *Anti-Terrorism Act (No 2) 2004* (Cth).

[31] *Criminal Code* s 102.5(2),(3),(4). This aspect of the offence was introduced by item 20 of Schedule 1 of the *Anti-Terrorism Act 2004* (Cth).

[32] *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 6(4)(a).

[33] *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 6(5),(6),(7)(b).

do not require the proof of any terrorist intent or conduct on the part of an accused, and which have maximum sentences comparable to those for manslaughter, rape and serious war crimes; one of these offences – that of training with a banned organisation – places an evidential burden on the accused to lead evidence of his or her innocent state of mind; all of these offences are subject to departures from the ordinary rules relating to pre-trial, remand and post-conviction detention; and all act as triggers for an extra-judicial process of interrogation and detention by ASIO.

### 2.2 Objections to the grounds on which the Attorney-General currently exercises the power of proscription under Division 102 of the *Criminal Code*

The Attorney-General's Department has stated that

> It is in Australia's national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act.[34]

However, a moment's though will indicate that only the tiniest fraction of organisations satisfying this description have been listed under the *Criminal Code*. The most obvious exceptions are all the governments of the world who, through their military expenditure, preparation and activity are indirectly preparing for the commission of acts of political violence, and all those arms and explosives manufacturers who are likewise directly and indirectly assisting such acts. But even if some would consider as absurd the proscription of such organisations – and it again it must be emphasised that such a judgement of absurdity would have no basis in the legislation, which encompasses all such activity and all such organisations – the disparity between the listings under the *Criminal Code* and those under the *Charter of the United Nations Act 1945* (Cth) indicates that some narrower criteria for proscription is being applied.[35]

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[34] Attorney-General's Department, *Submission No 7 to the Parliamentary Joint Committee on ASIO, ASIS and DSD's Inquiry into the listing of six terrorist organisations*, p 1, available at <http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsa/subs/sub7.pdf>.

[35] The tensions between the quotation in the text, and other remarks of the Attorney-General's Department, and also remarks made by the Australian Security Intelligence Organisation ('ASIO') were noted in the PJC's *Review of the listing of six terrorist organisations* (2005) at 2.23.

The former Director-General of ASIO, in a hearing before the PJC held on February 1, 2005, stated that in selecting organisations for proscription ASIO takes account of the following factors:

- the organisation's engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation's links to Australia;
- the threat posed by the organisation to Australian interests;
- the proscription of the organisation by the United Nations or by like-minded countries;
- whether or not the organisation is engaged in a peace or mediation process.[36]

As part of a subsequent inquiry, on May 2, 2005 ASIO informed the Committee that these factors

> are taken as a whole; it is not a sort of mechanical weighting, that something is worth two points and something is worth three points. It is a judgement across those factors, and some factors are more relevant to groups than others.[37]

When one considers this remark, and then attends to the organisations which have been listed, it is difficult to see that these factors are being applied in any systematic fashion at all. In particular, the questions of a link to Australia, or a threat to Australian interests, seems to be given rather little consideration in most cases.[38]

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[36] PJC, *Review of the listing of six terrorist organisations* (2005) at 2.3.

[37] PJC, *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.4.

[38] See, for example, the remarks of the PJC in its *Review of the listing of six terrorist organisations* (2005) at 3.22, 3.26, 3.35, 3.45, 3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.24, 2.28; *Review of the listing of seven terrorist organisations* (2005) at 3.12, 3.17, 3.38, 3.41, 3.50, 3.52, 3.61, 3.73, 3.74, 3.82, 3.83; *Review of the listing of four terrorist organisations* (2005) at 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89.

Part of the difficulty in the application of the factors identified by ASIO may result from the fact that the meaning of some of them is not entirely clear. For example, what is meant by 'engagement in terrorism'? If 'terrorism' in this factor has the meaning of 'terrorist act' as that phrase is defined by the *Criminal Code*, then the factor gives very little guidance beyond simply restating the statutory requirement for proscription. But if ASIO understands 'terrorism' in this context to have some more narrow meaning – for example, engaging in illegitimate attacks upon civilians – then it is incumbent upon ASIO to make this meaning clear, and to explain how it is being applied. This narrower meaning could then be incorporated into the statutory definition.

Again, what is meant by the 'ideology' of an organisation. Does this refer to the political or religious outlook of its members? Or, given the coupling of ideology with links to other groups, does 'ideology' mean the organisation's conception of itself as a player in the geo-political arena? Until the meaning of this factor is made clear, it is impossible to analyse the way in which it is being applied. If 'ideology' refers to political outlook, then a further question is raised: what sorts of ideology does ASIO regard as illegitimate? Presumably, given that the threat posed by the organisation to Australia is listed by ASIO as a separate factor, ASIO does not limit its consideration of ideology to the question of opposition to the Australian state or the Australian people. Some other standard is being applied. In a democracy, it must always be a matter of concern when a necessarily clandestine security agency is given a significant degree of power in determining which political outlooks are legitimate, and which are not, and are liable to lead to criminal prosecution. A democratic culture cannot thrive under such conditions. If only certain ideologies are regarded as criminal by those authorities who actually apply the *Criminal Code*, this should be made explicit, and incorporated into the statutory definition.

Furthermore, to the extent that the factors used by ASIO are clear, they seem to emphasise foreign policy rather than domestic considerations. For example, the concept of 'posing a threat to Australian interests' is most naturally interpreted in as a

foreign-policy concept.[39] Likewise, the proscription of an organisation by the United Nations, the proscription of an organisation by like-minded countries (which is itself a concept belonging to foreign policy), and the engagement of the organisation in a peace process, are all primarily foreign policy matters.

A government in a democracy of course has the right to pursue its foreign policy goals in accordance with its conception of the country's national interest. But the criminal law should not be used as a tool to enforce these foreign policy preferences. It is not the proper function of Australian law to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day. In a democracy, political controversies are to be resolved through political activity, not through the application of the criminal law by way of executive fiat. This must be particularly true where the political preferences are foreign policy ones, and where the democracy in question is Australia, a multi-cultural community whose citizens have the most tremendous and diverse sorts of relationship with, and interests in, the people, places and politics of other countries.

For the reasons given above (at 2.1), an organisation ought not to be proscribed simply to make a political point. However, of the many hundreds or thousands of organisations throughout the world which are liable to be proscribed, only 19 have been so far.[40] In all but one case, all these groups are self-identified Islamic groups. This consistent targeting of Islamic groups can easily create a perception of discriminatory application of the power to list organisations. This is particularly so when one notes that activity undertaken in Australia by non-Muslims, which satisfies the *Criminal Code* definition of terrorism, is typically not described in that fashion either by the media or the authorities (for example, hate crimes undertaken by white supremacist groups).

In the absence of more detailed information being provided about why these particular groups have been listed, and how their listing relates to the needs, rights and interests of Australians, an impression is created that the purpose of these listings is

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[39] The PJC noted the vagueness of this factor in its *Review of the listing of six terrorist organisations* (2005) at 2.29.

[40] *Criminal Code Regulations 2002* (Cth), Part 2.

primarily a political one, of supporting the foreign policy goal of targeting militant Islamic organisations as part of the so-called 'war on terrorism'. The merits of such a foreign policy goal obviously fall outside the purview of the Committee's inquiry, and therefore of this submission. But it is within the Committee's purview to insist, for the reasons given above, that such foreign policy goals do not provide an adequate basis for the banning of organisations.

### 2.3 Sound criteria for proscription under the *Criminal Code*

For the reasons given above – namely, its breadth, the resulting necessity for the exercise of discretion in both proscription and criminal enforcement, and the consequent discriminatory and politicised application – this submission opposes the executive proscription power established by the *Criminal Code*. If the power is to be maintained, however, it is essential that sound criteria for proscription be spelled out clearly in the legislation.

In general, it is not a criminal act to be a member of an organisation. Nor is it a criminal act to direct, or provide support to, or train with, or recruit for, an organisation. To list an organisation under the *Criminal Code* is first and foremost, therefore, to criminalise conduct that otherwise would be lawful. It is this impact of proscription that therefore must be given the foremost consideration. Furthermore, as the PJC has noted, it is inevitable that the operation of Australian criminal law will be primarily confined to Australia.[41] Therefore, to give foremost attention to the criminal law aspects of proscription, is to give foremost attention to its domestic impact.

It is obvious that, the greater the number of Australians who are involved with an organisation, or whose friends, associates or family are involved, the greater will be the impact – the real legal impact, of the sort identified above (at 2.1) – upon Australian citizens, and Australian families, and Australian communities, of any decision to proscribe the organisation. This is therefore a significant factor to be taken into account. By banning the organisation, who is being made a criminal? How will

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[41] *Review of the listing of six terrorist organisations* (2005) at 2.28; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.27.

this affect Australians? These are questions to which ASIO and the Attorney-General's Department should be able to provide answers. Judging from the reports into listings undertaken by the PJC, to date they have not done so.

Furthermore, the greater the number of Australians who are involved with, or who support, an organisation, the more politically controversial becomes the judgement that the organisation poses a threat to Australia. It has become almost trite in the context of discussions of terrorism to cite the examples of the African National Congress or of Fretilin. Nevertheless, these example are powerful reminders that political realities can change: what was condemned as terrorist violence by one government may come to be lauded as liberation by a successor government. If a large number of Australians change their minds about the merit of a foreign organisation's cause, it becomes very difficult to sustain a judgement that it is nevertheless in Australia's interests to proscribe that organisation.

In the context of the proscription of an organisation, then, it becomes relevant to ask such questions as how many Australian's support the organisation? How many are opposed to it? Is banning the organisation likely to lead to political or communal tension within Australia? Will some Australian's experience it as an affront to their civic and political liberties? Again, there is no evidence that these questions are being considered in a serious way by the government.

It is with these sorts of questions in mind that I suggest the following criteria which, at a minimum, ought to play a role in any decision taken by the Australian government to ban an organisation under section 102.1 of the *Criminal Code*, and against which the merits of any such proscription could thereby be tested.[42]

- the serious nature and extent of the political violence engaged in, planned by, assisted or fostered by the organisation;

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[42] These criteria are based on those that I have suggested in a number of submissions to the PJC, and which have been noted by that Committee in its reports: *Review of the listing of six terrorist organisations* (2005) at 2.32-2.35; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.7; *Review of the listing of seven terrorist organisations* (2005) at 2.25.

- the serious nature and extent of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;

- the existence of reasons for believing that an effective response to such political violence, and those who are connected to it via the organisation, requires singling out for criminalisation by Australian law in ways that go beyond the ordinary criminal law.

These points are intended to ensure that the proscription of an organisation is warranted on the basis of a genuine need to prevent criminal conduct, and is not merely an exercise in political or foreign policy symbolism, and that better grounds are given for criminalising what would otherwise be lawful conduct, than simply its inconsistency with the government's own foreign policy goals. It is only if this is made clear in a public fashion that confidence can be maintained across the Australian community that the power of proscription is being exercised in a non-discriminatory manner, and is not being used simply to target political ideas to which the government of the day, or ASIO itself, is opposed. The third point in particular draws attention to the fact that political violence, and acts preparatory to such violence, are already criminal offences in Australia, and in most legal systems world-wide; there is therefore a significant onus of justification on the government to explain why these existing laws are inadequate and why the extraordinary step of proscription is therefore required.

In addition to holding proscription to tighter criteria, of the sort canvassed above, the Attorney-General should be obliged to provide information to Australians when an organisation is proscribed, indicating what the government believes the to be the likely impact of the proscription on Australia and Australians. Relevant information in such a statement would include, but need not be limited to:

- an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;

- an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;

- the way in which the concept of 'membership', and particularly 'informal membership', will be applied in the context of the organisation.

These points are intended to enable the community to be satisfied that the consequences of proscription have been thought through by the government. It is also important that Australians be able to understand clearly what the government understands the consequences of proscription to be, so that they can assess these consequences against their civil and political rights, including their rights to the security of themselves and their families, and so that, where necessary, they can change their behaviour to bring it into compliance with the law. (It is a basic requirement of the rule of law that the law be able to be known by those to whom it applies.) The point about the meaning of 'membership' and 'informal membership' in the context of a given organisation is particularly important, as the concept of membership is crucial not only for the membership offence[43] but also the association offence[44] – the two offences that seem most likely to have the widest application once an organisation has been listed.

Furthermore, ASIO should be obliged to provide a statement indicate the extent to which it intends to take advantage of the proscription of an organisation to use its detention and questioning power (under Division 3 of Part 3 the *ASIO Act*) to gather intelligence. There are three important reasons for seeking this information from ASIO. First, it is important these extraordinary powers not be allowed to corrupt the culture of ASIO as an organisation which is sympathetic to, and not hostile to, the values of democracy, nor to lead it into the mentality of being a secret police. Second, it is important that the Australian community be able to retain confidence in ASIO. This requires that ASIO be open about the general nature of its intentions with respect to the exercise of such powers, so that they are not experienced by Australians an attack upon their civil and political liberties. Third, ASIO plays a significant role in any decision to ban an organisation.[45] ASIO is also an organisation whose scope of

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[43] *Criminal Code* s 102.3.

[44] *Criminal Code* s 102.8.

[45] See, for example, the PJC's *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) at 2.1, 2.2, 2.9, 3.11, 3.13-3.16; *Review of the listing of six terrorist organisations* (2005) at 1.11-1.12, 2.4-2.5,

operation is increased by any decision to proscribe (in virtue of the enlivenment of its questioning and detention powers by the suspicion of the commission of an offence under Division 102 of the *Criminal Code*). As a result, there is inevitably the possibility of it appearing to be the case that ASIO supports the banning of an organisation not because it believes that involvement with that organisation ought genuinely to be criminalised, but because it believes that it can further its own operations by increasing the scope of its power to gather intelligence through compulsory questioning and/or detention. One way of dispelling this possible adverse perception of ASIO's motives is for it to be clear from the beginning as to the extent to which it intends to take advantage of the banning of an organisation.

The call for such openness on ASIO's part need not be inconsistent with the an acknowledgement that, to some extent, the success of ASIO operations is dependent upon their secrecy. In a democracy, this need for secrecy cannot always be given the highest priority; in a democracy, other values, including those of open political debate, must come first. Alternatively, provision could be made for this statement to be made to the PJC, which is quite accustomed to the taking of confidential evidence from ASIO, as part of its role in reviewing any decision to proscribe an organisation.

Finally, any decision to proscribe an organisation under the *Criminal Code* ought to be proceeded by, and followed by, community consultation. Although the PJC, as a result of its review work, has a degree of success in encouraging the Attorney-General's Department to take more seriously its obligations of consulting with other branches of the Commonwealth Government, and with State Governments, in relation to the proscription of organisations under the *Criminal Code*,[46] its recommendation that community consultation take place[47] does not seem to have been taken up.[48]

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2.23-2.25, 3.8-3.9, 3.15, 3.20, 3.26, 3.31, 3.35, 3.40, 3.48-3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.9, 2.3, 2.19, 2.33.

[46] *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.10-1.18.

[47] *Review of the listing of six terrorist organisations* (2005) at 2.38 to 2.40 and Recommendation 1.

[48] *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.19-1.21; *Review of the listing of seven terrorist organisations* (2005) at 2.16; *Review of the listing of four terrorist organisations* (2005) at 2.18, 2,21.

Community consultation in relation to proscriptions is crucial if these are to be seen by those they affect as the legitimate exercise of power within the framework of Australia's democracy, and not simply as anti-democratic interferences with civic and political freedom. To relate this point back to the grounds for proscription that were argued for above: it is not sufficient that the Attorney-General or ASIO be satisfied that an organisation is connected to political violence, and that the ordinary criminal law of this or some other country is inadequate to respond to that violence. Steps must be taken to ensure that those who will be directly affected by a listing are likewise satisfied of this. Of course, this sort of consultation with the community would be a natural consequence of requiring a statement of the likely impact of proscription: the most natural way for the government to develop an understanding of the impact upon Australians of the listing of an organisation, is to talk to them about it.

It is unhelpful to assume that it is obvious to all Australians that the activities of a proscribed organisation are beyond the pale, such that involvement with such an organisation is obviously wrong and deserving of criminalisation. Unfortunately, something like this attitude can be detected in the Attorney-General's press release accompanying a recent set of proscriptions:

> The re-listing [of these four organisations] confirms the Government's commitment to ensuring that involvement in these organisations will not be tolerated.[49]

Whatever its own political convictions, a government in a liberal democracy like Australia has a special duty to preserve the integrity of that liberal democracy, including the freedom of political outlook and political dissent that characterises democratic life. The proscription of an organisation makes criminal the political activities of some, and impacts more diffusely on the political life of many more. If no serious attempt is made to justify to those people the singling out of their political commitments for targeting by the criminal law, they are likely to experience a proscription as nothing more than an anti-democratic attempt to stifle their political freedom. This is not good for the health of Australian democracy.

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[49] Attorney-General The Hon Philip Ruddock MP, *Government Re-Lists Four Terrorist Organisations*, News Release, May 25, 2005.

A further remark by the Attorney-General is also unhelpful. In the same press release, he states that

> Australia's law enforcement agencies will continue to pursue those who commit terrorist offences to the letter of the law.[50]

On its face, this remark is simply untrue. Given the breadth of the concept of 'terrorist act' in Australian law, and the even greater range of conduct that constitutes 'terrorist offences' under the *Criminal Code*, it is obvious to anyone who reflects on it that not all these offences are being pursued. For example, as mentioned earlier, all foreign soldiers seem to be training with organisations that are indirectly fostering political violence (that is, they belong to armies), and therefore are committing terrorist offences.[51] But it is obvious that in most cases they will neither be arrested, nor charged, nor prosecuted by Australian authorities even if the opportunity arises.

It would be more productive, and more consistent with democratic imperatives and the rule of law, for both the government and the legislation to acknowledge that only a small group of organisations is being singled out for listing and for investigation, and to set about explaining and justifying that selection to those affected. One purpose of a process of community consultation would be to explain (on the assumption that an explanation is available) why the targeting of particular groups is not in fact discriminatory, and is consistent with the imperatives of criminal law enforcement in Australia.

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[50] Attorney-General The Hon Philip Ruddock MP, *Government Re-Lists Four Terrorist Organisations*, News Release, May 25, 2005.

[51] Australian soldiers are protected by the defence of authority under Commonwealth law: *Criminal Code* s 10.5.

## 3. LISTING UNDER THE *CHARTER OF THE UNITED NATIONS ACT 1945*

Part 4 of the *Charter of the United Nations Act 1945* (Cth) ('*Charter of the UN Act*') obliges the Foreign Minister to list a person or entity if satisfied, among other things, that such a person or entity is involved in a 'terrorist act'.[52] If an entity or person is listed, it is illegal to use or deal with the assets of the listed person or entity. It is also be an offence to directly or indirectly provide assets to a listed person or entity.[53]

The term 'terrorism' is not defined by the Act, and this therefore creates a highly discretionary power to freeze assets. It is also interesting to not that, while all the groups that are proscribed under the *Criminal Code* have also been listed under the *Charter of the UN Act*, the converse is not true. This suggests that the Australian government is using multiple conceptions of what constitutes 'terrorism', which are not clearly established by law, and which result in a highly discretionary exercise of executive fiat.

This reinforces the central contention of this submission, that Part 5.3 of the *Criminal Code* is objectionable, and should be repealed.

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[52] *Charter of the UN Act* (Cth) s 15 and *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1).

[53] *Charter of the UN Act* (Cth) ss 20, 21. Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20(1)(d), 21(1)(c), 22.

TRANSCRIPT OF PROCEEDINGS

SECURITY LEGISLATION REVIEW COMMITTEE

Independent Review of the operation
of the Security Acts relating to terrorism

At the County Court of Victoria, Melbourne
On Wednesday, 8 February 2006, at 9.45 am

The Hon Simon Sheller AO QC, Chair
Mr John McMillan, Commonwealth Ombudsman
Mr Ian Carnell, Inspector-General of Intelligence and Security
Ms Karen Curtis, Privacy Commissioner
Mr John Davies APM, OAM, Former ACT Chief of Police and
Attorney-General's nominee
Mr Dan O'Gorman, Law Council of Australia
Mr Graeme Innes AM, Human Rights Commissioner

SPARK AND CANNON 9670-6989
Level 9, 620 Bourke Street, Melbourne

THE CHAIRMAN: The public hearing will now resume and this morning we have the benefit of the presence of Mr Patrick Emerton, a lecturer from Monash University, who has come to speak to the very careful and much researched paper that he has furnished to the committee. Mr Emerton, this is of course an informal occasion in the sense that it's not a court, even though we're sitting up here in this way, and it's intended that you should be able to say what you want to say in a relaxed atmosphere. If you're happy sitting down like that, that's fine. If you want to stand at a rostrum, if you prefer doing that, it's present; whichever way you want to do it.

MR EMERTON: I'm quite happy to sit, if that's okay.

THE CHAIRMAN: The practice we've adopted, we've all of course read your paper, is to suggest you have some time, however long, five minutes or 10 minutes, just to speak to it generally, to emphasise any matters you would like to and so on, and then we proceed by a questioning process of asking you about various matters that we're interested or particularly interested in. Is that suitable to you?

MR EMERTON: Yes.

THE CHAIRMAN: So if you're ready to go, if you'd like to start, please.

MR EMERTON: Thank you, and thank you for the opportunity to appear.

THE CHAIRMAN: You could speak up and perhaps get as close to a microphone as you can.

MR EMERTON: Yes. Thank you for the opportunity to appear, as I said, and I'll speak only briefly to my paper. I hope that its core theme is reasonably clear and that core

theme is that particularly I'm focusing on Part 5.3 of the Criminal Code but also the fact that it acts as a trigger for other pieces of legislation - but first and foremost on 5.3 itself because part of the Criminal Code is built on a foundation of a statutory definition of "terrorist act" and my contention is that that definition is broad and in fact that it's overly broad, that it certainly picks up a wide range of sort of wicked or inimical conduct but it also picks up conduct which is not obviously wicked, and then I've sort of tried to both pick up some uncontroversial examples of non-wicked conduct that gets picked up.

For example, I think I mentioned the American Revolutionary War and the American Civil War, and I also tried to pick up perhaps controversial bits of conduct which clearly get picked up but their moral status is certainly in doubt. I mention there, for example, the invasion of Iraq. Clearly there is wicked conduct that it picks up such as the attacks on New York and the Pentagon in 2001.

So we have a definition which picks up wicked continue but also a wide range of other types of conduct, and therefore my contention is that that conception of a terrorist act is overly broad. On that statutory foundation is then erected a superstructure of offences which inherit that breadth and therefore are themselves overly broad, but furthermore in certain respects introduce additional breadth and therefore, as it were, sort of pile excessive breadth on top of what is already an overly broad foundation.

When I'm talking about offences sort of creating

additional breadth, I have in mind in particular the organisational offences in Division 102 of the Criminal Code because not only do they, in a sense, inherit the extreme breadth of the concept of "terrorist act", but they pile onto that the idea of directly or indirectly fostering or engaging and so on. But I think fostering is the broadest concept in that definition and in paragraph (a) of section 102.1 in that division dealing with terrorist organisation offences.

So on top of this overly broad concept of a terrorist act, we then have more breadth in the concept of a terrorist organisation and we therefore have offences, which again certainly make criminals of some people who probably deserved to be made criminals of, perhaps of members of various organisations conspiring to fly planes into buildings, but also make criminals probably of people who almost certainly do not intend to be made criminals of.

An example which was actually advanced by a colleague of mine at Melbourne University, Joo-Cheong Tham - and it appeared in a column in The Age that appeared on the same day that we both appeared before the Parliamentary Joint Committee, now on intelligence and security, as it then was on ASIO, ASIS and DSD, and he gave his example in evidence to that committee, "It seems reasonably clear that the Liberal Party of Australia is a terrorist organisation under Part 5.3 of the Criminal Code because it fostered indirectly a terrorist act, namely the military invasion of Iraq."

So it seems that that organisation is criminalised under Australian law and yet it's utterly absurd that

that organisation, which is one of the sort of backbones of political life in Australia, should be made criminal by Australian law. So I mean, again just because I think the example actually comes across as controversial, just to sort of reiterate the argument that Mr Tham puts, that the Liberal Party was one of those groups which was advocating the invasion of Iraq when that was under debate towards the end of 2002 and early 2003, the invasion of Iraq itself is clearly a terrorist act in the sense that it was a politically motivated act intended to intimidate a government or a section of the public, namely the government of Iraq and a section of the public of Iraq. Clearly it was both intended to, and did, cause a significant amount of serious harm and death and damage to property.

So under paragraph (a) of section 102.1 it seems that the Liberal Party of Australia is an organisation indirectly fostering at least one terrorist act and therefore is a criminal organisation, and that's just absurd. So that's kind of the reductio ad absurdum on the breadth of the definition of terrorist organisations within Division 102 of the Criminal Code.

So we've got the initial breadth of the concept of a terrorist act. Particularly when we get to 102 we have this extra breadth of the concept of a terrorist organisation which means that the reach of those criminal offences does become absurdly broad and I guess the final part of this submission about the extreme breadth is that the offences in Part 5.3 act as triggers for other areas of the law and other types of power, and in particular triggers for investigation under special questioning and

detention warrants that can be issued under Division 3 of Part III of the ASIO Act and although I appreciate that legislation is not under review, I think it is difficult to review Part 5.3 of the Criminal Code effectively without keeping in mind that it is not standing in isolation but is part of the framework. So I think that feeds into these other powers, such as the ASIO powers.

I guess the concluding thing I want to say in my statement is that this extreme breadth, as I'm arguing this absurd breadth of offence as created in 5.3, means that they will never all be prosecuted. They will never all be investigated. The application of the law under Part 5.3 is inevitably going to be highly discretionary because the concept of political motivation, ideological motivation, plays an important role in the concept of a terrorist act. It seems to be almost inevitable that that discretion will impart the politically guided or the politically motivated discretion.

It's not necessarily in an inimical way, but when one is thinking about which terrorist offences to prosecute and which ones to ignore, it seems that the nature of the political outlook of the organisation to the individuals in question will be part of what governs the discretion, even though that's not part of the statutory definition of the crimes.

That's already had a certain sinister dimension that there should be politically motivated policing in Australian law in when that feeds through into the secret and covert regime of ASIO questioning and detention warrants in the sense that it's an offence to discuss really very much at all of what goes on there for at

least two years after it happens. That's under s.34VAA of the ASIO Act.

We therefore have excessively broad offences, discretionary application. That discretion is likely to be politicised discretion. That then feeds through into other regimes, be it the secret ASIO questioning or be it the preventative detention regime which has recently been introduced which of themselves are highly discretionary and have additional aspects to do with near incommunicado documentation, secret questioning and so on.

Therefore the upshot of Part 5.3 is that we get a trend in Australian law which in my contention is undesirable, which is a trend towards something like a secret policing of certain aspects of the political lives of Australians. I'm not saying we have a secret police, I'm saying we have a trend towards, in virtue of the breadth and therefore the discretions, the politicised character of the discretions and the character of certain of the other statutory powers that are triggered by Part 5.3. We have a trend towards something like a secret or semi-secret policing of certain aspects of Australian political life.

It's the contention of my paper that that's undesirable and is contrary to the more mainstream liberal, democratic trend of Australian political life. That's my opening submission, summarising my paper. Thank you.

THE CHAIRMAN: Thank you, Mr Emerton. I suppose the context of the legislation that we are considering, or anti-terrorism legislation generally, is an anticipation and fear that in Australia there may be a terrorist

attack and the desire at government level to try and prevent that happening rather than letting it happen and then seeking to impose penalties on perpetrators if they survive. Does that seem to you to be a reasonable approach taken by government in the climate to try and do what it can to prevent this happening; in other words to either deter people or learn about what people are doing and stop them.

MR EMERTON: Yes, but "stop" can have different meanings. From time to time one hears that the authorities in Indonesia have cracked down on Jemaah Islamiyah and one wonders if that means that they have arrested them for various offences which are well established under the Indonesian Criminal Code and charged them, or one wonders if that means sort of men in balaclavas and jackboots have stormed into certain buildings and carried people off to secret dungeons. The phrase "cracked down" could have both sorts of meanings. I mean, secret dungeons and men in balaclavas have existed and operated in various countries around the world.

If we then think in the Australian context, the concept of stopping a criminal act can be carried out in various different ways.

THE CHAIRMAN: Of course.

MR EMERTON: So we can create sort of well defined defences, such as unlawfully procuring materials preparatory to building an explosive device, for example, or conspiring to do so, and we can have the standard criminal apparatus or we can create a framework which criminalises a vast range of very broadly defined political activity and political connections and we think can then give to the

policing and intelligence authorities a very wide range of discretions as to how they will prosecute and operate under these powers and in a sense leave it to their best judgment as to who are the dangerous political activists and who are not.

I guess I've got no objection to the first sort of approach but have concerns about the second sort of approach. My concern is that the government in pursuing its aim of criminalising certain sorts of conduct has perhaps erred more towards the second than the first of the two approaches I've described.

THE CHAIRMAN: Well, the definition of "terrorist act" includes threat of action.

MR EMERTON: Yes.

THE CHAIRMAN: That would seem to be directed towards trying to deal with a situation where there is a threat but no action. Is there anything that you perceive wrong in that approach?

MR EMERTON: It partially depends, I guess, on how one concedes a threat in that context. Does it mean a communication sort of saying, "Unless certain demands are met we shall do this thing," or something of that nature, or does it mean something closer to what we'd normally think of as an attempt. I mean, a threat can be - - -

THE CHAIRMAN: It needn't be an attempt, it's a threat. So if you do have somebody who is in Australia and threatens to - whatever example you like - blow up a building, or blow up a bridge, that would be something that I think government inevitably would have to be taking steps to try and stop in advance and that wouldn't be an attempt and it wouldn't necessarily be a conspiracy.

MR EMERTON: I would sort of want to know - I mean, in that case one would start to wonder what's the nature of the threat and, for example, is it a single person sitting in his or her house sort of ranting and posting absurd rants to an Internet site?

THE CHAIRMAN: Well, just take it that somebody turns up in Australia and says in some way or communicates that they propose to blow up a building - he or she proposes to blow up a building. I understand - and it's helpful to be looking at ways, as you say, about some of the illustrations you give which are helpful illustrations but they produce a sort of absurd conclusion if one says that's a terrorist act. But what government is really concerned with, one would suppose - and perhaps I'm wrong - is dealing with a threat, somebody who is quite determined and threatens to do something which will kill many people, perhaps conceivably bring the social system - do it great harm.

Now, once one - and I'm not meaning to be doctrinaire about this - accepts that something may happen here or may happen tomorrow or may not happen for three years - who knows - then the very fact that threat is brought into this definition suggests that that is something that the government is trying to prevent happening. It's in that sort of field that I think one gets down perhaps a little closer to the reality of what this legislation is about.

MR EMERTON: May I say something?

THE CHAIRMAN: Yes, please. I'm talking too much. You go ahead.

MR EMERTON: The case of threatening to blow up a bridge, for

example, I don't know Division 72 as well as I know the Part 5.3 divisions, but I think blowing up a bridge is captured by Division 72 which implements the international convention, I think, prevention of terrorist bombing. So if we ever wished to criminalise threats to engage in conduct which, if it were carried out, would be an offence against Division 72, that would already be a much more narrow scope for criminal liability than what presently exists, but would at least seem apt to catch the particular example that you gave and would catch I think a number of the more standard kind of commonsense examples of the sort of terrorism we want to stop, where one does have in mind sort of catastrophic acts of violence against the public or pieces of sort of essential infrastructure, as opposed to the definition in Division 100, which captures those activities but also goes far more broadly.

So that would be one remark in response. If one wanted to catch those sorts of threats there are other ways to do it - other international instruments to build on and other parts of the Criminal Code which could be explored and developed in certain ways.

THE CHAIRMAN: I'm not confining this to a bridge, obviously. What I am merely directing it at is a threat to do something, as you have said, of catastrophic consequence to people and to institutions and so on.

MR EMERTON: Because then I start to think for example - I then think, suppose the threat is not to attack a bridge in Australia, but for example, the threat is to blow up a barracks in West Papua.

THE CHAIRMAN: How does that help the argument that we look at

that rather than looking to a threat in Australia?

MR EMERTON: Because currently that's also a criminal act to do that in Australia and it can be punished by life imprisonment. So for example, I don't know the stories of all those people who sailed across the Torres Strait a couple of weeks ago, but if some of their claims about persecution are true and also if some of the stories as to the sort of activities they're engaged in or are connected with are true, from time to time some of them may have been making threats to do various things to the Indonesian military which would constitute offences under section 101.1, which may have happened in the time this legislation has been in force and which are therefore offences under Australian law; that if at least one looks at the punishment, are equal to murder - a punishment of life imprisonment.

I guess I think we could look for a statutory definition that tries to capture the example of the threat of catastrophic violence to civilians and civilian infrastructure in Australia, that doesn't also capture other sorts of conduct which - there are things to be said either way about the West Papuan resistance fighting. The soldiers in Indonesia - I don't dispute that. But it strikes me we have a clear intuition that there is something greatly wicked about attacking civilians and civilian infrastructure in Australia.

THE CHAIRMAN: Why civilian?

MR EMERTON: Well, attacks upon the military, depending the way in which it's carried out - - -

THE CHAIRMAN: Well, a barracks building in, say, Sydney or Melbourne, which has got civilians in it as well as

military personnel and buildings and all the rest.

MR EMERTON: It would be a criminal offence for an Australian to do that. For example, typically - traditionally it's not a criminal offence for a foreign soldier to do that if their country has declared war on Australia first.

THE CHAIRMAN: But we're not dealing with a situation of declared war at the moment, are we.

MR EMERTON: We're not, but again, all foreign soldiers who go to war with Australia become criminals under Australian law, punishable by life imprisonment. So, again, I'm concerned that the definition - - -

THE CHAIRMAN: How do you then - if we go back to the definition - and I'm looking still at the definition of "terrorist act" - how do you say it should be changed or modified?

MR EMERTON: I think we could - for example, we could bring in the concept of attacks on civilians, for example. That could be one way to - - -

THE CHAIRMAN: I don't understand that. I don't understand why, if somebody intends to commit a terrorist accountant in Australia, the fact that there are some military people involved, changes if you like the enormity of the crime.

MR EMERTON: I guess, conversely then, we could try to limit it to acts carried out in Australia. But I guess my concern is currently Australia has universal jurisdiction to criminalise all attacks on all soldiers anywhere in the world. So if we, for example, reduced the universal jurisdiction - because I've got no strong objection to Australia enacting domestic law to criminalise non-military action against Australian soldiers.

I have concerns about making criminals of foreign soldiers at war with Australia because that then interferes with Australia's obligations and rights; for example, under international humanitarian law where, sort of, prisoners of war can be held but they typically can't be charged. So I sort of worry that overly broad legislation could in fact interact with other parts of our regime which kind of guarantee our soldiers' rights as well as conferring rights on foreign soldiers with whom we might be at war.

But if we looked at, as I say, focusing on acts in Australia which might include then non-military attacks on Australian personnel, that could be one way to narrow it. If we introduced concepts which figure, for example, in Division 72 as it currently stands - so concepts which - as opposed to merely serious harm to one person which is currently - if the other mental elements are there, they can be sufficient under the current definition.

If a way was found to introduce concepts closer to concepts of catastrophic violence - again, the sorts of descriptions that figure in things like the Convention on the Suppression of Terrorist Bombing and various other international instruments, and some of which an attempt has been made to capture them in Division 72 of the Criminal Code. I mean, it would have to be remembered that then - I'm not arguing that offences against an individual person shouldn't be criminal. It's just that - I mean, there are sort of other regimes that can deal with them. I mean, there's ordinary criminal law.

THE CHAIRMAN: What about threats? Is there other criminal law in relation to threats? Quite a lot of people have told

us that they would prefer that this legislation be repealed because it is said that there are sufficient criminal sanctions elsewhere in the law. We have asked them to, in due course, with time to do it, to actually point those out to us by reference to particular sections of the code. But let's take "threat".

MR EMERTON: Then if I can come to threats. I hope not overly cheekily, but I was writing my submission and I had the thought, and I found it an odd thought - one of the subjects that I teach at Monash University is law and social theory and if one is teaching social theory, one can't ignore Marx - I mean, the greatest of all 19th Century social theorists, so obviously an intellectual thinker, whether one believes that is for good or for ill or for some of both. And then the Communist Manifesto obviously contains, as it were - the mere publication of that is not to issue a threat, although as I argue, I still believe that under the recent amendments to Division 102, publication of that document probably is indirectly urging or counselling terrorist acts and probably therefore the publisher - and I think I drew attention to the publisher of my edition - I think those publishers can be proscribed if the Attorney-General wishes to.

But the communists are now all gone, but in the 1940s and 50s they did use to make threats; meaning from time to time they were threatening that they were going to bring the economy to a standstill and that a revolution was going to take place and so on. But in fact at that time, they weren't. I mean, there was no offence of threatening. The polity survived.

THE CHAIRMAN: Can I ask you, does this mean that you say in this definition the word "threat" should be removed?

MR EMERTON: As I say, I think the concept of "threat" has different meanings and it's not entirely clear to me what the statutory intention is. For example, I mean, A threatened B with a gun. That doesn't mean that A said the words, "I'll shoot you." Typically that means A drew a gun and waved it around in B's general direction. So the concept of threat can describe both the communicative performances, the mere production of words. It can also cover the waving around of guns or steps to build bombs or whatever.

As I say, the statutory intention strikes me as not entirely clear as to whether it's intending to criminalise the mere utterance of words, or if it's meaning to criminalise conduct which is not itself conduct that fits paragraphs 2 as it is included by paragraph 3 - the conduct which is itself actions that threaten in that direction.

So when it talks about a threat which it carried out would sort of cause serious harm, it's not clear to me whether it means saying, "I'm going to blow up this bridge," or doing things like carrying explosives in the general direction of the bridge; or putting explosives in a pile in a warehouse with sort of sign saying under them, "These are the ones we're going to use to blow up the bridge next week."

I mean, as I say, threats can have different meanings. If it's merely trying to criminalise the speech or the expression, then I guess I have to lay my civil libertarian cards on the table and say I'm far from

persuaded that the mere act of speech in fact should be criminal offences per se. There may be issues of incitement and so on and I'm not here to take on the law of incitement. But leaving to one side, as it were, more conventional ways of criminalising speech the mere remark, "It's my desire or perhaps even my intention, when I have the capacities, to blow up a bridge in order to show a lesson to the Australian people," I'm not persuaded that mere utterance should be a criminal offence, certainly not one punishable by a maximum of life imprisonment. But as I say, I'm not persuaded it should be a criminal offence at all.

On the other hand, once we get to actions that count as threats, of which in the two-person case the paradigm is waving a gun in someone's direction. Of course, I mean, waving a gun in someone's direction probably is already an offence because it's probably sort of conduct endangering life and it may be that again we can find more particular ways of criminalising threatening conduct, such as acquiring materials which are conducive to building explosives or acquiring materials with the intention of building an explosive device, or even attempting to acquire materials or perhaps conspiring, although if there's only one person there will be no conspiracy.

So I'm not here giving you a draft code off the top of my head but I'm just trying to say that concept of threat can have different meanings and depending what sort of threats we do or don't want to capture, there may be other ways which, I guess, focus less on sort of the utterance and the intention, and focus more on, in a

sense, slightly more banal and commonplace features of conduct, which our conventional criminal law is already used to dealing with, in the same way that it's an offence various sorts of chemicals with the intention of turning them into speed or ecstasy or whatever.

So it can be an offence to collect various sorts of chemicals with an intention to turning them into an explosive and in fact I suspect already is.

MR McMILLAN: Mr Emerton, can I just tease out your thoughts on that issue of criminalising speech. There's actually probably a good case study we can use from recent experience and it's where people are about to board an aircraft and they make some remark - and all the examples seem to indicate that it has been made as a jocular remark that - "Oh, there's a gun in my bag," or, "I hope you don't find the explosives."

Now, the airport and prosecution authorities have come down very hard on that and people have been prosecuted; they've been put in gaol. There's one school of thought, and I must say I had a lot of sympathy for it, that it's been an overreaction to what was an off-colour, jocular remark and it is, after all, just criminalising sort of ill-advised speech.

The counter view has been that, "Well, we just have to take an absolutely firm line on this," and with the positive result that everybody behaves themselves when they now check in at the airline counter and nobody dares make silly, off-colour remarks that lead to planes, you know, taking off late. Now, what's your view on that, because it's a straightforward example of speech being criminalised?

MR EMERTON: It is, and it's an interesting example and it illustrates a number of the features of a situation that starts to become relevant when we think about criminalising various sorts of speech because, I mean, my immediate thought is, those people are being threatened with life imprisonment. Okay, so that's in a sense tangential to the real issue of your question.

But my second thought is, it's in a certain context and it's analogous to the classic example - the classic counter example to sort of radical free speech people is, "Well, why should there be free speech to sort of shout 'fire' in a crowded theatre?", and these examples have some analogy to that, in that there's a sort of a protest going on and sort of trying to get people on board planes, trying to have everyone be confident the plane is safe.

In that context we criminalise certain sorts of remarks, and again I have to confess I don't know what the penalties are for those offences. My feeling will be those penalties are up to 10 years. That strikes me as really quite severe. If they're treated as sort of summary offences it's maximum penalties of sort of two or three years. They start to perhaps look more sensible and they will be part of a range of summary offences that govern all sorts of conduct where coordination of large-scale activity under real time pressure with real resource constraints is an important thing.

I mean, the road traffic law obviously is the paradigm example and there's sort of constraints on speech there. There are constraints on the sorts of messages you can send with your indicators, with your car

horn or whatever. But the context where, for example, someone says, "I'm a dedicated revolutionary and I think that Australia's constitutional regime is wicked for various reasons, and it would be better if it were otherwise and perhaps the best way we can make a message will be to set a bomb under Parliament House, a bit like Guy Fawkes tried to do," is that speech - I mean, firstly its content is in a sense more significant in a democracy than the content of the joke about the gun in the bag.

MR McMILLAN: I suppose one could say though that years ago it was common practice for people to make silly off-colour remarks about, you know, guns in their pocket and bombs in the bag, and people took no notice of it. But the situation has changed and so it's felt that there is a need to alter people's behaviour and the same argument would apply here, that for decades people have made comments about, you know, "The only person who walked into parliament with an honest intention was Guy Fawkes."

Yet the argument is, "Well, we now live in a different climate and so we've just got to stop remarks that border upon, or remarks that speculate upon, using violence," and even though it's punishing words and threats that's sort of the climate now. We've just got to educate the public that you just don't talk and carry on public discourse in that fashion any more. You can still carry on public discourse but you've just got to censor your own comments.

MR EMERTON: A number of responses to that: Mr Rumsfeld recently reiterated that America doesn't withdraw the intention of using force against Iran if it deems it necessary. That's probably not a threat under the act,

depending how wide "threat" is. Mr Rumsfeld wouldn't have to change the syntax of his remark very much for it to be a threat under the act.

Now, I guess when Mr Rumsfeld comes to trial he's a protected person under the diplomatic legislation, so he couldn't be prosecuted. But he may have aides and assistants who have made similar remarks, who don't enjoy diplomatic protection. I take it, it's not our intention to prosecute them. Why do we make criminals of them? Because again that's the point about universal jurisdiction. I mean, they don't have to make the remarks in Australia of course for the Criminal Code universal jurisdiction to pick up its category D. Wherever they make their remarks, once they come to Australia we are asserting the universal jurisdiction over them.

So there are all sorts of remarks about the use of violence which, whatever one thinks of the merits or demerits of Mr Rumsfeld's policy, it would be absurd for him to be prosecuted in Australia and I think the absurdity shows not that we need clever discretion; there are so many cases analogous to Mr Rumsfeld. I think the absurdity shows we need to do something about a universal jurisdiction or something else.

But even in the Australian context, I mean, is it - there's one thought which says however justified some revolutions may be, no legal system can ever contemplate a revolution against itself. So they sort of take the Lockean view that revolution always has to, as it were, be extra-constitutional.

Of course, the German Constitution doesn't take that

view. The German Constitution, having been drafted with certain incidents in mind, expressly reserves the right to the citizenry to use force to prevent the overthrow of certain crucial parts of the constitution including their crucial human rights provisions.

MR McMILLAN: And explained by history in their constitution.

MR EMERTON: It is explained by history. But now it's not obvious to me, (a) that we do have to crack down on, even in Australia, all mere suggestions that violence may be permissible as opposed to, for example, dealing with actual attempts at violence or concocting of plans to implement violence.

MR McMILLAN: Yes.

MR EMERTON: I mean, I don't see the great harm that is done by various sorts of remarks and I guess I may be closer to this than perhaps a large number of other Australians because, for example, it may not surprise you to know that I, from time to time, go to Trades Hall down on Lygon Street to go to meetings of various sorts of organisations. There's an organisation, for example, called the Civil Rights Network of which I'm a member.

At Trades Hall one sees signs up for all sorts of organisations for meetings, such as West Papua sympathisers and East Timor sympathisers - although they won, the East Timor sympathisers, in the end. They won, and in the course of winning they were advocating the use of violence.

Here in Australia they were defending, for example, the right of Fretilin to use violence against Indonesian authorities. As it turns out we now all agree that they're right, it seems to me. There's no-one in the

mainstream who says that we made a mistake in sending soldiers to East Timor to help that liberation and the foreign policy of 20 years ended up being to a significant extent discredited. These are the examples I'm worried about.

MR McMILLAN: Thanks for that response. In fact I was going to ask you separately about some of the examples that are given in your paper, and that others, I might say, in their submissions have relied upon as well, to illustrate that while provisions of this kind catch the September 11 activities as they should, they also have unintended consequences, for example, the African National Congress and the Liberal Party are given. It's useful in analysing statutory provisions to think of whether there are unintended consequences.

But I was going to question whether those examples really stand up. While they may come literally within the words of some of the provisions, seriously would a court ever convict for this reason that those provisions as we know are read against a whole background of statutory presumptions and so on. Without trying an extended legal analysis here, I can well imagine a court saying that these provisions are read against a background of a democratic system that functions by the election of political parties and that when you're reading the literal terms of this legislation that it can never extend to the implementation of a policy by the elected government of a day.

On orthodox legal analysis those examples realistically aren't caught. The Rumsfeld example, the Liberal Party example, realistically they're not caught

by these statutory provisions properly construed.

MR EMERTON: There's certainly an argument for that. In fact the Liberal Party example may even be protected by the protection of political communication and association. I mean, if ever there will be an example right to properly interpret, somewhat obiter, on the extent of that protection, that will be an ample opportunity to do it. On the other hand, there are groups on the fringe who - I've got two lines I want to take in response to your remark and this is the first. There are organisations on the fringe who historically haven't had as good relationships with the police and with the Australian Security Intelligence Organisation as the Liberal Party.

I think Hope J on his report on ASIO talked about ASIO having tended to regard any leftist organisation as therefore subversive. There are groups on the fringe who perhaps don't have quite the same confidence in the commonsense of the courts. They may have less confidence in the commonsense of certain elements, at least of the police and security agencies.

On the other hand there was - and I guess I'm under review here but nevertheless one can't but keep in mind ASIO, for example, in the 60s and 70s had quite a different relationship with groups on the left and certain Croatian groups on the right and so on. That led to various historical things taking place. But once we get to the fringe it can be a little bit different.

That leads into the second part of my response which these provisions are not merely triggers for prosecution, they're also triggers for certain special powers under the Crimes Act under ss.23C, CA, D, DA, I think it is.

If you were arrested under one of these your rights are lessened. I mean, still there are bail hearings and certain extensions in questioning time to be approved by a magistrate and so on.

That's not quite the same as getting to argue legal commonsense in front of a court, those sorts of hearings. Once, of course, there's ASIO questioning or ASIO detention or preventative detention under Commonwealth laws, then no court is involved at all.

MR McMILLAN: I think that's a good point. The provisions, though they would never stand up in court, can be used for sort of strong-arm muscling by authorities that are misusing their powers.

MR EMERTON: Yes.

MR CARNELL: I feel I really must comment that of course one of the actions that flowed from Hope J's reports, which are of course at least a quarter of a century old, was indeed the creation of my position.

MR EMERTON: Yes, and one accepts that there are watchdogs and scrutinies but still I guess there are those who feel exposed. I don't want it to turn into my sort of diary either but I can't help but notice that the most recent groups to be proscribed - I think 18 December - is the PKK. Now, as it happens I've spoken at a public meeting, from memory, the second half of 2004, at the cultural centre in Sydney Road, Brunswick, and I have good reason to believe some of the people with whom I communicated on two occasions were in fact, if not members of the PKK, probably knew some members of the PKK.

Some of them had had dealings with ASIO and the purpose of their public meeting is they wanted to have

various speakers to talk about what it meant for their sort of cultural and political life, what knew laws meant and so on. So I sort of spoke and gave a presentation on the structure of the act and so on and I noted at that time that the PKK was banned under the charter of the United Nations Act, so they would be committing an offence if they sent money to the PKK.

But mere membership at that stage wasn't an offence and now it is. In fact if I was to go to those meetings now I'm probably committing an offence and could go to prison for three years because I did communicate on two occasions with members of these groups. As I say, I'm not sure if they themselves would constitute members but the concept of membership under division 102 includes informal membership for those who have taken steps to become members and have not adequately renounced the membership. Some of these people have migrated from Turkey and I don't really know what they were doing in Turkey back before they came to Australia.

In hindsight we look at the ANC, for example, and again very few people now are prepared to criticise Nelson Mandela and in fact even a myth goes around - I hear it, for example, from some broadcasters in Melbourne - that Nelson Mandela never advocated violence. Given the speeches where he talks up between - - -

MR McMILLAN: I think the ANC example is a good one. My question is how relevant it is in our context because you're dealing with a different situation in which you've got a minority government now that even at the time was regarded by others as being improperly constituted, and you've got an alternative body which is recognised then

and now as representing a majority of people trying to overthrow - and that's not the situation we've got in Australia. It's just not a comparable political and social situation.

MR EMERTON: What about Fretilin or the PKK. I mean, Fretilin didn't represent a majority in Indonesia, it represents an extremely tiny minority who felt oppressed, as it were, in their zone. The PKK has connections to a minority which feels to some extent oppressed in its little zone of Turkey, and other - of course, Syria, Iraq and Iran as well.

Is it an act of deployment (?) of Australian criminal law to try and pick up the activities of those people in that cultural centre on Sydney Road who have connections to a civil struggle with Turkey which has many complicated dimensions and I know currently there's an inquiry into that listing under way by a Parliamentary Joint Committee on intelligence and security which has received a number of submissions, and I'll be interested to see what they say, or again to take an even more controversial example, Hamas. What if anyone in Australia wants to have dealings with the Palestinian authorities? They can't now; it's a criminal offence to have communications on two occasions and then - - -

THE CHAIRMAN: There seem to be parts of Hamas, aren't there? There's the military and whatever the other - - -

MR EMERTON: There is, and again those distinctions are subtle and I suspect on the ground sometimes hard to draw.

THE CHAIRMAN: You come into the area of organisations and there's been quite a lot of material presented to us about the method by which organisations are proscribed,

or whatever the appropriate word is, and we have been considering the suggestions that there ought to be some judicial process take place before an organisation can be proscribed or, if that's not appropriate, there ought to be some ability to have a merits review before a judge following upon proscription.

Now, I think that it would be thought by many that either of those would be some improvement upon an executive proscription. Do you have anything you'd want to say about that?

MR EMERTON: I think though that sort of process would be an improvement because, for example, in relation to the PKK listing, my understanding is that some of the attributions of bombings to the PKK are disputed. I gather representatives of the PKK maintain that at least some of that activity was in fact carried out by elements, be they rogue elements or sanctioned elements, of the Turkish military and security forces and are being attributed to the PKK.

A judicial process or a process of merits review which allowed submissions to be made and so on could actually try and more firmly establish some of the factual bases for listing, although I have to say so much of that - at least under a sort of traditional process. So much of that material will fall under the government foreign relations prerogatives that it might be a difficult sort of hearing to hold or to head into uncharted territory.

But in my submission I don't believe I canvassed judicial review, because my real concern was the breadth, the criteria, and there's a certain sense in which, if

the criteria are very broad and the use is very narrow and therefore again highly discretionary and discretionary in a politicised way, a judicial process can't really respond to that, because if the criteria are very broad, then an honest judge is going to have to say, "These broad criteria have been satisfied," and it's not up to the judge to vet which candidates get put up for listing by the government and which do not.

So judicial review I think could help, particularly where there are contested factual matters. But, for example, I don't contend that any of the current listings are unlawful. I mean, given the breadth of the grounds for listing, as far as I can see and from what I know about the organisations, they seem to me to be lawful listings. My objection is that the law permits more than it ought and a judicial process can't help with that.

THE CHAIRMAN: What do you mean it permits more than it ought?

MR EMERTON: In the sense that the law permits the listing of organisations which a good law would not permit to be listed and so the law is too broad in terms of the discretion.

THE CHAIRMAN: Is that a question of setting appropriate criteria?

MR EMERTON: I believe that is a question of setting criteria and I suggest some criteria in my submission.

THE CHAIRMAN: Yes, I know, and some others have taken up the ones you've suggested.

MR EMERTON: So I suggest, for example, some connection to Australia is the starting point for thinking about criteria and then, once we look at connection for Australia we start to think connection both in terms of

the activities of the organisation in Australia and the threat posed to Australians by those activities. Then one starts to think about the number of Australians who are participants.

So one starts to think about sort of trying to work out again criteria where it's required to be explained why the ordinary criminal law aren't adequate. I mean, for example - and again I don't want to be seen to be muddying the waters by bringing in various examples, but to me they just sort of seem illustrative of some of the issues at hand.

If I think about at least alleged organisations which cause a loss of life in Melbourne I think about various alleged criminal organisations, of which a number of murders, some of which happened only very recently, are taking place, they are actually causing a loss of life and a threat to life. But we don't have vast drafts of legislation to tackle those criminal organisations as we do here, because in fact it's already an offence to carry firearms and make amphetamines and that sort of thing, and that law enables us to seek to investigate and prosecute those members of those organisations without needing sort of organisation offences.

I think if we're going to have - in the regime of political violence if we're going to have not just prosecuting violent acts or activities which are connected in various preparatory or so on ways to violence, if we're going to focus on organisations as such, I think the listing process needs to, at some stage, require an explanation as to why the ordinary means of investigating the ordinary criminal conduct of

the alleged members of the organisation is not sufficient.

Particularly if we were to keep Division 101 in something like its current form, suppose that is to remain, including its range of - given that sort of attempting to engage in preparatory acts is an offence under section 11 plus Division 101, then why do we also need this extra raft of organisation offences? What's the criminal conduct that needs to be caught there, that can't be caught under other parts of the law?

MR O'GORMAN: Mr Emerton, have you ever done an analysis of whether offences that could conceivably be caught under the legislation we're dealing with here, could be caught under pre-2002 criminal law?

MR EMERTON: Not in a sort of systematic or publishable form. I mean, they're kind of - I've thought about it and sort of looked through and have some familiarity. I should also say I think Division 72 is post-2002, from memory, and I think there's no objection to Division 72 in my paper. I've got no - I mean, if in the new age we're going to have criminal offences, the sort of thing we have in division 72 strikes me as the sort of thing we would like kind of focused and targeted on, the perceived genuine threat.

MR O'GORMAN: Would you be prepared to embark upon such an exercise to assist the commission?

MR EMERTON: I would, but may I make this caveat: I have a doctoral thesis due for submission in about the next three weeks and I'm working very hard on that.

MR O'GORMAN: We have asked a couple of other organisations to do that. I just thought perhaps you might.

MR EMERTON: May I ask, is one of those organisations the Federation of Community Legal Centres of Victoria?

MR O'GORMAN: Yes.

MR EMERTON: In which case that's an organisation - Ms Marika Dias appeared before you yesterday?

MR O'GORMAN: Yes.

MR EMERTON: We are friends and colleagues on some of these issues and so, to the extent that they are doing that, I'm sort of - yes, almost certainly we'll be talking to Marika. If she's doing that task I'll be talking to her in any event.

MR O'GORMAN: Good.

MR EMERTON: So I'm quite happy to take part in - - -

MR O'GORMAN: Sure.

MR EMERTON: But if the committee were to have some sort of joint project in mind, without everyone trying to invent the wheel on their own - - -

MR O'GORMAN: Sure.

MR McMILLAN: More important you finish your doctoral thesis.

THE CHAIRMAN: When you talk about criminal organisations in Melbourne the theme that stands out in some of the material is that here we're really dealing with a crime that has far greater possible implications than whether somebody has cornered the drug scene in some part of Melbourne, and because we are beginning to talk about nuclear and these sorts of things coming into this, it's not - but we are talking of really very serious potential threats to Australian society and I just wonder whether, when one says, "Oh, well, we've got some laws in place that would deal with criminal organisations in Melbourne," whether that helps very much.

MR EMERTON: On the one hand I take your point, but I also think - I mean, I'm not sure whatever weight you think the nuclear case should take, but I start to think an organisation which is trafficking in nuclear materials would be committing so many offences against - I mean, if you think of any area of industrial life which is more heavily regulated than the nuclear industry; I'm not sure that I could think of one. The armaments industry as a whole is not as heavily regulated, I don't think, as the civilian nuclear industry.

So that would be a case where the investigative powers triggered by existing regulatory and serious criminal offence would strike me as already very, very wide.

THE CHAIRMAN: Somebody, as I come back to my threat, simply comes here and says, "I have available to me some sort of nuclear device and I'm going to blow you up" - whatever. It is in the interest of Australia to do everything it possibly can to prevent that happening.

MR EMERTON: I think - I mean, I hope this doesn't discredit the rest of my testimony - but I think at this point I'm going to bite the bullet on that one. If all that person does it make that utterance - if that's all they do, I am not persuaded that there's a criminal offence. I mean, I'm not persuaded that there is, as it were, a genuine - I mean, what ought to be a criminal offence there. There is nothing but the utterance. If, on the other hand, we have a sort of a criminal mastermind who actually has a sort of a genuine - for example, suppose that person also actually has - so as opposed to telling the truth, they actually have a nuclear device in storage somewhere.

I mean, suppose that had happened six years ago prior to this framework. If that remark was made and if Australian police and security agencies believed there was an element of truth to it, they would already be pulling out all the stops in ways which - I mean, not having ever worked in that area - I can't even imagine the resources they would draw on at that point. But, for example, I think the Americans would get involved. I suspect the Americans have capacity of sort of detecting higher than average levels of background radiation in very sophisticated ways, probably from reasonably great heights in the air, which would in a sense, to my mind, make the operation of Division 102 or even really the operation of Division 101, really quite superfluous.

MR INNES: But if the threat was a genuine threat - and no doubt the stops would be pulled out - but if the concept of threat were removed from the - and this is the obverse of the scenarios that you talked about. If the converse of threat were removed from the definition and the threat was a genuine threat, what capacity would the police and others have to take action until the actual circumstances occurred?

MR EMERTON: Because the person has confessed committing a crime; namely the crime of unlawfully possessing nuclear materials.

MR INNES: No, but I'm not talking about necessarily a nuclear threat. I'm talking about some conversation which is overhead in some place that an action of some sort which will cause major damage to other people or to infrastructure is going to take place.

MR EMERTON: ASIO have very extensive powers to get - I'm not

talking now about the special questioning and detention warrants, but I'm saying their pre-existing powers under the special powers sections, Part III, the special powers part of the ASIO Act. They have had prior to 2001 extensive powers to get warrants, covert warrants allowing sort of entry into premises, taking of materials for investigative purposes. In fact, those powers have recently been amended to include retention of property confiscated for so long as is necessary for the purposes of security.

Now, I have doubts about that sort of wide-ranging property confiscation but given that that is in place, we can't ignore that in thinking about the raft of investigative powers in existence. I mean, ASIO don't have to believe that any offence has been committed under Australian law in order to go to the Attorney-General and seek to have all those sorts of warrants issued.

On the other hand, if it was believed the activity had taken place abroad, I mean, ASIO have connection to foreign intelligence agencies and there's also ASIS - and ASIS obviously is a far more shadowy organisation than ASIO. But I assume that if they genuinely believe that there is stuff happening abroad which is going to cause catastrophic violence in Australia - I assume that's the sort of thing to which ASIS responds.

I mean, as I say, my image of ASIS is practically James Bond-ish. I mean, there are sort of already existing ways of going. Now, that does not get criminal prosecution involved, but of course, the police don't need to believe they have a prosecutable offence in order to engage in various sorts of activity. I mean, if the

police believe an offence is likely to be committed in the future - say, a drug offence - they here and now can get all sorts of warrants including covert telecommunications intercept warrants, issued - and I think in Victoria, covert search warrants under the community protection part of the terrorism legislation. They can get them to carry out their investigations with a view to either preventing that offence or laying charges, as it were, once the offence crystallises.

In the context we are thinking about, the offence crystallising doesn't mean the bomb goes off. It means, for example, that someone actually comes into possession of materials with an intention to build a bomb. I mean, that's the crystallising of an offence.

So I accept that there needs to be capacity to intervene before the bomb goes off, if a bomb is being threatened. But my contention is, the police do that all the time and have been doing that ever since kind of like the Bobby Peelers were founded. And we have ASIO as well which can do that and ASIO has far more scope of operation than the police because it doesn't need to go to a magistrate or a judge to have its warrants issued. It needs to go to the Attorney-General which is a quite different sort of process, in certain sense - and if not more relaxed, a more kind of politically or community safety responsive process as it natural for that kind of executive process. But that doesn't involve anyone going to prison for life or anyone's free speech being interfered with.

So there can be different approaches to investigation and to some obstruction and so on. I guess again part of

my line is we need to look at different ways this can be done and not bring down the extremely heavy hand of a politicised prosecutorial discretion, when there are other ways of going.

THE CHAIRMAN: But why is this politicised if somebody makes a threat and has a prosecution?

MR EMERTON: Because to count as a terrorist act it has to be done with a political or ideological or religious motive and it's my very firm conviction that before prosecuting authorities taking actions here, they in fact take note of - I should say, before executive authorities take action, they take notice of the politics. The reasons I say this are several. There's not even a hint that anyone is being looked at for various remarks that we should invade Iraq or Iran or whatever, although they are perhaps threats of political violence, because that is kind of good politics. I mean, that is kind of our politics.

ASIO list as one of their criteria before they make a recommendation to the Attorney-General that an organisation should be banned under 102 - they say they have regard to the ideology of the organisation. So clearly ASIO exercise - as they have said in sort of testimony to the Parliamentary Joint Committee on ASIO, ASIS and DSD as it then was - they have said that before recommending the government exercise the banning power, they look at the ideology of the organisation. So that's why I say it's a politicised discretion.

THE CHAIRMAN: I understand what you say. I am asking you about if there is a known threat and you say, in what you've already said, that the reaction immediately for

ASIO - you point out various ways in which that could take place. I take on board what you say about the statement of intention. There is of course a question as to whether the act should be changed to remove that as a requirement of a terrorist act.

MR EMERTON: I did notice that in one of the submissions.

THE CHAIRMAN: When you say that an act to prosecute somebody for a threat is politicised I just don't follow that.

MR EMERTON: Okay, again - and to tread onto slightly sort of thinner ice - and again I hope that these remarks don't undermine the overall credibility of my testimony. It's my feeling that some of the conduct associated with the Cronulla riots may well constitute offences under Divisions 101 and 102. Now, because I live in Melbourne and not in Sydney - I mean, it was extensively reported here but I'm not quite as close to all the details. So this is more than mere conjecture. But my understanding, for example, is that certain text messages were circulated on mobile phones which urged people to congregate in certain places with the intention of engaging in politically motivated violence to intimidate a section of the public, and at least if this had been carried through, severe harm would have taken place.

I can't remember now how many people got injured but I remember seeing TV images of the police officers trying to form a barricade against a mob of several dozens of people, from inflicting severe harm on someone who I think was hiding in a storeroom. So it seems to me, for example, that this is activity which in principle could be prosecuted but at least I have heard no suggestion that this activity is being investigated in this fashion.

You know, I imagine for example one in fact could work out who sent those SMS messages because it's all digital communication transmissions so I suspect there are probably records of all this stuff in a Telstra sort of hardware database somewhere. But at least I have not heard any suggestion that these laws - which strike me as in principle applicable to some of that conduct, are being invoked.

MR CARNELL: It's probably a little early to talk about Cronulla. I mean, there's still a large, active police task force working on it and we need to see how all that plays out.

MR EMERTON: I accept that, but nevertheless when one looks at the way various parts of the community do or don't feel that they are being policed under this regime, that does lead to at least a perception of a certain degree of politicisation in the application.

MR CARNELL: I take it you don't criticise the prosecutorial process, I take it that you're talking about the stage of police investigation and laying of charges, not the Director of Public Prosecutions. You would accept that they act independently.

MR EMERTON: That's true, except that to some extent the conduct of the DPP depends upon the briefs that the police and ASIO bring them. So I don't know that the two - if that makes sense. I'm not sure that the two can be entirely separated. I mean, if the police and ASIO don't have it on their radar that certain sorts of conduct which is technically criminal under this law should be investigated as such, then it may be that that never comes under the DPP's radar, so the DPP in a sense

inherits a certain sense of politicised jurisdiction as that with the police.

I guess my concern is - and again, as you say, it may be too early to talk about Cronulla, but then again when one hears stories of terrorist acts in Australia, the fire bombings of Chinese restaurants in Perth by white supremacists are never mentioned. Although if by terrorism in Australia we mean the stuff that Part 5.3 looks at, they are clear instances in our history, in my view, of terrorist activity but they are never mentioned in political or public discourse. Again that suggests to me that political or public discourse has a certain politicised character.

My feeling is - at least initial impressions over the past couple of years - that to some extent that politicised dimension carries through perhaps into the outlook that the authorities take. I mean, it is true that the Director-General of ASIO in what I think on that occasion was sworn testimony said to - as it then was - the Parliamentary Joint Committee of ASIO agents and DSD - that Muslims should feel like they're sort of under scrutiny because they are.

I mean, he didn't say white supremacist groups should feel that they're under scrutiny. Perhaps they are also but he wanted to keep that secret, or perhaps they're not.

MR CARNELL: No, I think you'll find public comment about that in ASIO's publicly available annual report.

MR EMERTON: So there is an apprehension that - nevertheless the Muslim community, as you probably know, did feel a certain apprehension. I mean, those remarks by

Mr Richardson did create a certain response of apprehension on the part of the Muslim community.

MR CARNELL: Yes. I don't know the particular remarks but, I mean, clearly there is an issue about community relations that arises from all this legislation. I was interested in your response to Mr Innes' question. I mean, is it a logical extension of your answer that in fact control orders and preventative detention orders might be in fact a preferable mechanism to have on the statute book compared to some of the offences like possessing things connected or making or collecting documents? They seemed abhorrent to some people last year but are they in fact preferable mechanisms to some of the criminal offences that we've put on the statute book?

MR EMERTON: If I can speak first to preventative detention - no, I have extremely grave concerns about preventative detention. My view is that in many respects, preventative detention from a purely structural point of view in terms of investigation and policing is redundant because it is in reality - in my view I find it fairly difficult to conceive of situations in which the relevant suspicions can be triggered under the preventative detention provision, that a police officer wouldn't be confident to err on the side of caution and make an arrest.

I mean, I know there's a subtle distinction between suspicion and belief, but in the context of policing and the realities of policing, the legal subtleties of these distinctions aren't so great, and in practice I'm not persuaded that if police, for example, came upon people who appeared to have an explosive device, I think they

would be prepared to arrest and wouldn't feel hamstrung because they didn't have access to a reasonable suspicion based preventative detention order.

My objection to preventative detention is that in fact it seems to be intended to create a tougher parallel regime of inquiry, where instead of being brought before a magistrate, sort of habeas corpus style, and charged and/or bailed and/or whatever, one gets taken into secret detention and then sent off to ASIO for interrogation - and I believe the remarks from Mr McDonald from the Attorney-General's Department in front of the Senate Legal and Constitutional Committee confirmed that this is a significant part of the intention of the preventative detention regime that is to circumvent certain difficulties in having ASIO detention warrants issued.

By having the detention executed under preventative detention, the person is then sent into ASIO under a questioning warrant, but is kind of, in a sense, detained for the time when they're appearing before the proscribed authority for questioning and then is released back into preventative detention. So it seems that preventative detention has that kind of structure, that parallel, sort of non-habeas corpus style process of investigation. I do have doubts about that.

Control orders are a different matter for a start, they don't have the element of secrecy that preventative detention has, and they are a judicial process. They are so wide ranging - - -

MR CARNELL: By all means think about this and come back to us if you want. I mean, I found it a puzzling thing to think about it at first but I must say I still haven't

dispelled why it's not a good idea in my mind.

MR EMERTON: I guess at least I wanted to make it clear that I have the concerns I just said about preventative detention. Control orders to some extent differ, but I guess I worry about liberty and I look and think the very important thing about the traditional ASIO warrants, they don't actually interfere with anyone's liberty. I mean, ASIO can sneak around and do things covertly and they kind of learn things and they build up dossiers. There are civil libertarian responses to that, but on the other hand, I mean, you better than anyone would know that given your role.

But no-one actually gets sort of put in prison or detained or restricted in sort of where they can and can't go. That strikes me as one great virtue of the traditional approach to sort of security policing or kind of security enforcement in Australia that you have secret agencies but they're not sort of secret police, that mingling or that certain trend. I mean, that causes me concern again. I accept your remarks about the way that things have changed since Hope J's report and that's manifestly true.

On the other hand, institutions in my view are in part shaped by the legislative and policy framework in which they operate. So if certain legislative changes are made down the track, particularly if they invest certain discretions, and those discretions invite a type of politicisation in their exercise, because they're triggered by certain types of political intent, this change in the legislative framework can then down the track produce changes in institutional culture. I mean,

we see it all the time. For example, the Victorian Human Rights and Equal Opportunity commissioner had a column in last year's Age where she was saying an important change in culture to do with sort of sexism and racism, the legislation has been there and has brought about a change.

Things can go the other way. A new legislative framework can change culture in ways - or invite changes in institutional culture that aren't what we would want. So I'm not in any sense accusing ASIO of being anything like a secret police. I mean, that would be absurd, but they're in a framework that invites it to be that.

MR CARNELL: There are some important overarching protections, if you like, in the ASIO Act that, however one might construe the charter, there are - I don't have the act with me but 17A, I think, that it "must not inhibit lawful advocacy protest or dissent". The other provisions that I can't recall the specific reference of about not doing anything which would lend any colour to the suggestion, which is wonderfully broad language by the legislature, that they favour one section of the community over another. So there are strong warnings in there that, you know, "Do not mess in domestic politics," and they're overarching restrictions that govern whatever else they might interpret provisions as allowing them to do.

MR EMERTON: I accept that.

MS CURTIS: Your contention is there's politicisation with these terrorism laws and their application. Would you say that that politicisation - is there an application of other laws, for instance, say drink-driving in the

states? Do you see that because law and order - it's been suggested that it's important to politics, that that's why they come out and try and enforce that further? Are there any other parallels?

MR EMERTON: Sorry, as in that the terrorism laws are sort of a state law and order policy to be carried out at the Commonwealth level? I certainly have colleagues at Monash University in the criminology department - I'm thinking of Jude McCullogh and I think Colleen Lewis and others - who I think run that argument. I mean, I don't know if I would kind of pretend to be a political scientist, which I'm not. I can kind of see where they're coming from. But really that's not the grounds of my - that, I mean - - -

MS DAVIES: So you're not seeing a trend in all areas of the application of Australian laws.

MR EMERTON: Not really, and furthermore, the mere fact that governments make laws out of political motivation to win elections - well, in a sense, that's what democratic politics is about. I think it's different to the 19th Century conception of the function of statute and so on which is it's not fundamentally about implementing a program to win elections. But the 19th Century wasn't really, in Australia or England, a fully democratic century.

So I've got no objection, in that sense, to democratic politics. My concern is really - I mean, I try to sort of intervene, if you like, in the course of democratic politics, to argue that it's not consistent with certain of our fundamental political ideals to have laws which, because of the way they are structured,

interact with and intersect on people's political activity and criminalise some of that, and they are so broadly framed that there is inevitable discretion in the application and application of that discretion invites a politicised response by the executive agencies who are in charge of the process of investigation and enforcement. That's my concern.

As I say, Division 72 also reflects a government with the political desire to be seen to be protecting Australians from catastrophic violence but I've got no objection. I mean, that's a sensible motive. I mean, it sounds like the Medicare Act is there because the government wants to protect people from being stuck without hospitals. I mean, governments responding to what people want is very sensible. That's what we elect them for. It's doing it in a way which undermines certain fundamental political values which I'm concerned that Part 5.3 and the framework built around it heads in that direction. So does that sort of make sense?

MS DAVIES: Sure, thank you. I had another question just on proscription. I think it was in section 2.3 of your submissions. You talk about there ought to be community consultation, you know, before an organisation is proscribed and afterwards.

MR EMERTON: Yes.

MS DAVIES: What do you see as the ideal sort of process for that community consultation?

MR EMERTON: I mean, I hesitate because again, I mean, I'm not sort of really a sort of coal-face policy worker. So, kind of, community consultation raises its own controversies because there's, I mean, all the

controversy about, say, the industrial relations advertisements and so on which are, if you like, a species of the community consultation. But I mean, for example, to the best of my knowledge, the only person who has talked to what are potentially elements of the PKK in Melbourne about the possible impact of these laws on them is me - because someone connected to them sort of gave me - had seen my material and gave me a telephone call and said, "Would you come and talk at our meeting?", and I said, "Sure."

So if you like, that's kind of pretty ad hoc. So when I think of community consultation, ASIO are intending to recommending an organisation be listed without knowing - I suspect they have a fairly good idea of at least in general where that organisation might have some members, some representation, some presence in the Australian community. Presumably thoughts about that are part of what motivate their recommendation to list.

Then whether there was attempts made by the Attorney-General's department, for example, to actually make contact with some of those organisations - I mean, it's not that hard to find the cultural - I mean, I'm not actually inclined to give the actual name. I don't want the police to come down on them. But it's not hard to find community centres in Sydney Road and so on.

So that could be one way of doing, or there could be at least more high level consultation. For example, if it was a sort of self-identified religious Islamic group that was being banned, well, the Prime Minister has the Muslim Consultation Task Force. Members of that could be spoken to and discussions had about who should we talk

to; how this could be done.

MS DAVIES: You're not really proposing a transparent public process then.

MR EMERTON: Well, you are thinking, for example, of inquiries and so on.

MS DAVIES: Perhaps.

MR EMERTON: That could also take place. I mean, that currently takes place, although admittedly after the event. I guess my feeling is that's not sufficient because my view is that, for example, if you say, like, "We're thinking of listing the PKK. If you or anyone you know are interested in talking about that, come to the County Court and tell us about it," I don't think people will turn up, to be honest. Some of these people have already had visits from ASIO. Some of them have had visits from the police.

So, kind of, it's very easy for me as a lecturer at Monash University to sort of write some issues and come along to this sort of process. I have to confess, being in front of seven sort of very eminent people, I sort of find it reasonably intimidating. I'm imagining the people I was dealing with at the cultural centre, in this forum, for example, aren't well placed to talk about it. Now, that's partially what we have peak bodies for but the problem is that in the current environment many of those peak bodies feel very cowed.

THE CHAIRMAN: You will be pleased, I hope, to hear that Islamic bodies have come - I mean, they have volunteered and come to talk to us and they indeed expressed the view that members of those communities are fearful of various parts of this legislation and I think probably they found

it - I hope they did, at any rate - easier to talk to us than probably talk to other people who may want to come and talk to them.

MR EMERTON: And I'm pleased to hear that.

THE CHAIRMAN: But we have, I think, achieved a little bit along that track.

MR EMERTON: Just so you know, I wasn't meaning to - - -

THE CHAIRMAN: No, I knew what you were saying. Of course, for anybody it's forbidding to have to come into the County Court and talk about anything, I guess, and I appreciate what you say it.

MR EMERTON: When I think about consultation, again, I think my understanding, for example, is before, say, new regulations were introduced which might impact significantly the way certain sorts of mining are carried out, not only might there be public inquiries of various sorts, but I think there would also be a practice whereby the minister or members of the minister's staff or members of the department would consult more informally, for example, with CEOs of mining companies and certain sort of prominent individuals and enterprises in that area.

My understanding also is to some extent in policy formation in other areas of life, a lot of it is shaped by those sorts of contacts, as well as by the more formal process. I think community consultation on the other side - I mean, in Victoria before Mr Hulls got off any recommendation for radical reform of the law profession, he talked to the LIV informally as well as. So I think informal communications can be important.

You don't sort of want ASIO knocking on someone's

door saying, "We're here to talk to you informally about whether we should ban you." I mean, that has problems as well. But I'm sure it's not beyond the ingenuity of the Attorney-General's Department to think about relaxed, perhaps, sort of comfortable ways as well as formal ways of consulting. I think both are important, particularly so that people - who can resign their membership of the PKK. Otherwise they are still members.

THE CHAIRMAN: You have been talking to us for an hour and a half now and I suspect you are probably getting quite tired through that process. Would there be much more that you wish to put to us - and I haven't spoken to my colleagues as to whether they have got further things they would like to ask you. But it occurred to me it might be appropriate just to take a short break if you would like to do that.

MR EMERTON: I'm happy to take a short break if - - -

THE CHAIRMAN: Does anybody want to raise anything more?

MR CARNELL: No.

MR INNES: No.

MS DAVIES: No.

THE CHAIRMAN: Well, I think that being so, can I say to you if there's something further you'd like to put as a conclusion, or whether you feel you've said all you need to say, because we'll bring it to an end fairly soon.

MR EMERTON: No, I think I've sort of said - I mean, particularly in response to Ms Curtis's question - I think I was able to sort of redirect my point really there. I think my sense is that the members of the committee have a sceptical or otherwise - you made me understand the points that I'm making, so I'm quite happy

that I've got to sort of say my bit.

MS CURTIS: Just one thing if I may, the Attorney-General's Department presented to us in Canberra last Friday and when the transcript goes up on the web site that may trigger some thoughts for you, so it would be useful maybe if you wanted to make any comments back to us about some of their testimony. I think that would be quite useful.

MR EMERTON: Thank you. Yes, once the transcript goes up, yes, I'll have a look and that might produce a bonus of a supplementary submission.

MR CARNELL: But we also wish you well in finishing your work first.

MR EMERTON: Just may I ask, in terms of this kind of evidence gathering phase, I mean, up to what sort of time frame does one have to make a supplementary submission?

THE CHAIRMAN: Unfortunately, as you probably know, section 4 requires us to present our report within six months of our being instituted, which takes us roughly - - -

MR EMERTON: That's April?

THE CHAIRMAN: - - - to early April.

MR EMERTON: Okay.

THE CHAIRMAN: As you could imagine, there's a lot of work ahead of us. But having said that, first you will be provided with a draft of the transcript of what you've said today.

MR EMERTON: Okay.

THE CHAIRMAN: If you could read that.

MR EMERTON: Yes.

THE CHAIRMAN: And first and foremost make certain that it's an accurate transcription. If there's inaccuracy in it, if

you could bring it to our attention.

MR EMERTON: Yes.

THE CHAIRMAN: Second, if having read it you feel that there's something more you would like to have said, or you feel you would like to correct something you said, please feel free to do so. But it would be good if we could do it within a matter of days rather than a matter of weeks. Further, if there are other submissions that you have a chance to read or if there's anything that comes to mind which you wanted to form into a further submission, again please, we welcome that. All I say is that it would be great if we could have it within days or a week or two. Once we get beyond that, it becomes more and more difficult for us to handle it.

MR EMERTON: Thank you, and, as I say, having a dissertation due it may realistically, in terms of a supplementary submission, if I was to prepare something within - because I'm thinking it's now the 7th. See, before the last week of February I must confess it's difficult for me. But I will have a look through material and see what I can do in the time.

THE CHAIRMAN: You do what you have to do and if you get beyond the end of February and you can still produce something to us, you can rest assured that we'll have it, we'll be able to take it into account, but - - -

MR EMERTON: So I'll certainly - - -

THE CHAIRMAN: We are short of time, as you'd understand.

MR EMERTON: I do, yes. No, I appreciate that and I'll sort of do my best to get my material prepared and out, if I have further material.

THE CHAIRMAN: Good. Well, thank you very much again for being

here and for the help you've given us. We appreciate it very much.

MR EMERTON: Thank you very much for the opportunity to appear and it has been a very interesting conversation. Thank you.

MS CURTIS: Thank you.

THE CHAIRMAN: Yes, all right.

MR CARNELL: Yes, thank you.

THE CHAIRMAN: We'll take a short adjournment.

ADJOURNED 11.16 AM

RESUMING 11.38 AM

AUSTRALIAN FEDERAL POLICE

THE CHAIRMAN: We now resume and for consideration we have now the submission presented to us by the Australian Federal Police and we welcome to speak to it Mr John Lawler, the deputy commissioner, and Mr Frank Prendergast and Mr Peter Howell, and thank you all for being here. As I indicate, it has been our practice to take an introductory statement of whatever you'd like to say about your submission or otherwise and then in due course we'll move forward to a questioning process. So, Mr Lawler, if you'd like to speak to us then by all means - - -

MR LAWLER: Yes, thank you.

THE CHAIRMAN: I also indicated to you before that it's very informal and if anybody wants to take their coat off, well, they're welcome to do it.

MR LAWLER: Thank you. I think we had a little joke about that.

THE CHAIRMAN: Did you? I see, yes.

MR LAWLER: But yes, thank you, Mr Chair, and if I may make a very short opening statement and then we would welcome questions from the committee. Can I firstly thank you for your invitation to appear at this public hearing into the operation effectiveness and implications of the security legislation under review. The AFP welcomed the invitation to attend the informal briefing in December and to tender our re-submission to this review.

As the committee would appreciate, the AFP has a significant and continuing role in counter-terrorism in a national and international context. The legislation,

subject of this review, is crucial to the protection of the Australian community from terrorist attacks and enables the effective prevention, detection and response to terrorism and related serious criminal activity.

The AFP in partnership with other security, intelligence, law enforcement and other agencies is able to enhance its strategies for preventing terrorism and investigating terrorist activity through these laws. The AFP's operational experience is that those involved in suspected terrorist offences are often very different to other groups that the AFP deals with, such as organised crime groups.

The unpredictable nature of the activities involved and the potentially catastrophic effects on the community requires legislation to enable the pro-active targeting of terrorist threats, law enforcement powers have been balanced, civil libertarian concerns, to establish national offences for counter-terrorism activity, and provide appropriate powers.

Given the relatively short time frame since the introduction of the terrorism legislation it is difficult for the AFP to comprehensively identify all the issues or implications of the security acts. Our written submission addressed the implications of the security legislation from the current perspective of the AFP and it is recognised that full effectiveness to the operation of law enforcement to counter terrorism will become apparent during and on completion of ongoing trials and in the light of evolving terrorist activity.

The AFP view is that the security legislation introduced in 2002-2003 continues to be appropriate in

dealing with terrorist-related criminal activities. Counter-terrorism laws have been enhanced and strengthened with the introduction of the additional measures since 02-03 including those contained in the Anti-Terrorist Bill (No 2) of 2005. The security environment in which this legislation was introduced has not abated, as evidenced by global terrorist events in 2005 and the security acts remain relevant and necessary.

My colleagues and I are happy to address any questions the committee may now have.

THE CHAIRMAN: Yes, thank you, Mr Lawler. There are, I think, probably several questions that one or other of us will want to put to you. But can I just mention some heads of discussion. First, submissions have been put to us by responsible bodies that this raft, if one can call it that, of anti-terrorist law is not necessary and that the sorts of offences which are now described in a broad sense as terrorist offences are offences which could be dealt with under the pre-existing criminal law.

We've called for these organisations or some of them to explain exactly what they mean by that in the sense of pointing out where the particular sections of the code or whatever it may be are to be found that would, as it were, fill the gap that is said to exist.

The second thing - and it's perhaps part of the first - is there has been some discussion in submissions about the level of threat and whether there's some scale in which I think the word "medium" appears and it's said at the moment - and indeed since the catastrophe in the United States - that threat has remained, if one can describe in this way, the same on the thermometer or

whatever it may be. So it would be very helpful if you could assist us on that.

There's also been a good deal of discussion about the proscription of organisations as an act taken by the Governor-General by a regulation issue, if that's the right word, on the recommendation of the Attorney-General which would ordinarily be described as an executive act. The question whether a better process would be one which involved some judicial oversight, either at the initiating point or perhaps after there's been a proscription as a merits review - that type of thing. So perhaps one or all of you would care in an order you choose to deal with those general concepts in some detail because in a sense it's easy to see and easy to say but we have to do something that there is a strong proposition put to us that really all this is quite unnecessary that the criminal law is perfectly capable of coping with this. So I would put that before you and perhaps you would like to speak to that.

MR LAWLER: Thank you, Mr Chair, and for convenience I'll deal with the matters in the order in which you've brought them to our attention. Firstly, as I understood the question was why are terrorism offences needed - why are the acts important to us. Can I start off by saying that these acts, the legislation that your review committee is looking at, have a very strong focus on prevention.

We see in the terrorism context differences between the way police would normally operate and investigate which is typically not always but typically reactive, whereas in the terrorism context by its very nature it must be proactive and preventative. The legislative

regime provides that capacity around planning and preparation and the sort of activity that goes to prevention because of course security, law enforcement and other government agencies have a very onerous task of trying to prevent terrorist activity occurring.

They may well have knowledge or information, in some cases evidence, the degree and quality may vary from case to case, where they suspect a planning and various levels of preparation may be occurring, and how long does one wait while watching those preparation steps before the authorities properly act to prevent a terrorist act occurring. This is the purpose of the legislation, to give capacity for security and law enforcement agencies and others to move forward to prevent a terrorist activity occurring.

We've seen that, of course, in the events of last year with the arrest of the 19 persons in Sydney and Melbourne where these particular offences were put to, in our view, very good effect, notwithstanding matters of sub judice and are still to be before the courts in the appropriate way they should. But it has given us the opportunity to put those facts before the proper and appropriate judicial process.

So I make that observation as a sort of an opening scene-setter if I may. I would like to also say that prior to the introduction of the 2002-2003 legislation, we did have very limited anti-terrorism laws. The AFP relied on the provisions of the Crimes Act 1914 and other statutes for the investigation of possible terrorist links in Australia.

It's our view that the pre-existing legislation was

inadequate in its operation. There were shortfalls in covering many offences specific to terrorist activity - and I've spoken about a few of those - the planning, the training, the conspiracies. Whilst it's true that terrorism offences can often be committed with other serious offences, they are unpredictable by their very nature and the precise nature and means that terrorists will undertake or achieve their specific objectives are often difficult to predict.

If I can give the committee an example of the adequacy of pre-existing legislation which was evident during initial investigations into the alleged activities by Australians in support of terrorist organisations overseas following the September catastrophic events in 2001. At that time the only available legislation was the Crimes (Foreign Incursions and Recruitment) Act 1978 which based on the evidence available in these investigations was inadequate.

The modern and enhanced treason offence introduced in 2002-2003 means that Australians who now commit treason of members of a terrorist organisation against the Commonwealth of Australia, whether within or outside of Australia, can be effectively prosecuted under this legislation. It is important also to recognise that terrorism is a distinct and separate criminal activity in the Criminal Code and not an offence that is pursued by law enforcement through the targeting of other serious offences that may occur in the planning or during the commission of a terrorist act, such as aiding and abetting, the attempt provisions, incitement, conspiracy, kidnapping, murder or arson, to name a few.

For this reason, specific terrorist offences, such as providing or receiving training from a terrorist organisation, providing support to a terrorist organisation and possessing things connected with a terrorist act are needed and were in fact used in the recent arrests that I spoke about in my earlier comments.

As I said in the opening remarks, the terrorist threat has not abated - and I will talk specifically about the levels of threat in a minute or two - and we're seeing global terrorist events - let's take 2005 - such as the targeting of tourists and commuters, local and foreign, in the bombings in Bali on 1 October; the bombing attacks on the underground and bus network in London on 7 July; the bombings in Madrid and of course we had in Australia, fortunately and certainly in my view, the work of Australian law enforcement and security agencies in the prevention of potential terrorist attacks in Australia.

So in the context of all those points, it's our view that the security acts remain relevant, remain necessary and are certainly needed.

MR DAVIES: Mr Lawler, just on one point: one issue I think you have highlighted before but didn't here, but I think it's an important point that you may wish to address, is the issue of national consistency and the fact that obviously terrorism can be investigated by any police agency in this country, so what the implications are then of having something that's a nationally consistent approach as to a fragmented Commonwealth-state regime.

MR LAWLER: That's certainly true and we've seen that in the recent investigations, particularly where a terrorism by

virtue of its very nature will not be an attack against a specific state or territory, unlikely to be so. It will be an attack against Australia as a nation, its ideals and what it stands for, and in that context firstly a national framework are very necessary.

Also in an investigational context we've seen with recent terrorist investigations though they've moved across jurisdictions, where we have connections and multiple offences across one or two or more jurisdictions, and where able to be prosecuted in a national context is the appropriate way to move forward, and on the back end of, of course, an investigation process is hopefully a nationally consistent prosecution process and placing these matters, matters that are targeted against the nation, into a federal jurisdiction under strong, robust Commonwealth law.

MR CARNELL: Could I just pick up on this issue of national consistency - and we'll go back to the three areas the chair nominated. I don't want to deflect us from those. But one of the submissions, I think it was from the Tasmanian Premier's Department, expressed a concern that with admissibility of evidence there could be a situation where the Tasmanian police have interviewed under their particular regime about time limits et cetera and conditions that pertain to questioning, and that there is at least a question over the admissibility of that in a Commonwealth prosecution.

Would it be feasible, do you think, for all jurisdictions to legislate an approach that says providing the evidence was gathered lawfully in a particular jurisdiction it's admissible in whichever

jurisdiction the prosecution occurs? It's an attractive general proposition but I guess I'm interested in that are there any difficulties with it that might be there in practice or in the detail?

MR LAWLER: I might, if I may, in responding to that question make a number of observations that might assist the committee. We have been conscious of the perpetual difficulties of leading evidence taken under regimes that may not be consistent with the provisions and the requirements of the Crimes Act 1914, particularly as that relates to the interviewing of persons and the regulatory regime attached thereto. That having been said, as a way of treating that potential risk we have set up in each jurisdiction a joint Commonwealth of Australian Federal Police and state and territory police joint counter-terrorism team.

I've got to say I can't envisage a significant counter-terrorism operation being conducted in Australia without the active participation of the Commonwealth, the AFP, the state and territory jurisdictions that the matter may relate to, and the Australian Security Intelligence Organisation, without all of those agencies being collectively working together on the matter at hand. So we're working from a premise that there is strong partnership, there is strong collaboration, between the security and law enforcement agencies in the various jurisdictions and the base position is that we will and have been involved in these matters and there has not been a matter go forward that I'm aware of where that has not occurred.

So the joint counter-terrorism teams then give the

ability for the investigators to mitigate against that risk because we have as part of those teams people who are conversant with the Commonwealth regime and that's inculcated into the state and territory members who are also seconded in the context of those investigations, and often we have it where there is a state and territory member and a member of the AFP involved in interviews or in the execution of search warrants or other aspects of Commonwealth law, where the state and territory officer may not be that familiar with.

But to your general proposition it is one, as you say, on a broader context that has appealed. There's also, I think, a broader proposition beyond that which goes back to the standard gauge railway and maybe that's Utopia, where it would be useful of course to have one national standard framework. But of course in the context of our federated model, whether that's achievable in our lifetime, well, we'll have to wait and see.

THE CHAIRMAN: I think we've heard from the Director of Public Prosecutions in New South Wales when that sort of proposition was put to him, "Good luck."

MR CARNELL: Yes, expressions like "Holy Grail" et cetera come to mind.

MR LAWLER: He was obviously more eloquent than I.

THE CHAIRMAN: Can I ask you this, just to understand the position, and this demonstrates my own inexperience in this area. But assuming a trial is proceeding in New South Wales, then I take it that the law of evidence is the law of New South Wales. Is that right or not?

MR LAWLER: Correct.

THE CHAIRMAN: Yes.

MR LAWLER: Well, can I just correct my answer there, please, Mr Chair?

THE CHAIRMAN: Yes. Don't, please, accept what I say because I am slightly out of date or perhaps very out of date.

MR LAWLER: This would be the law of evidence if it was in a New South Wales state jurisdiction.

THE CHAIRMAN: Yes.

MR LAWLER: If it was a matter proceeding under Commonwealth law then the Commonwealth regime would be the regime that was deferred to.

THE CHAIRMAN: So by that you mean that if there was a prosecution under the Criminal Code there would be a different evidentiary regime, would there?

MR LAWLER: That's correct.

THE CHAIRMAN: I see, and that would be one common to Australia whereas if, for example, the same person was being, let's say, prosecuted for murder in New South Wales then it would be the law of evidence of New South Wales that would be applied.

MR LAWLER: Correct.

THE CHAIRMAN: Yes.

MR LAWLER: Which is why, in this latest investigation and cross-multiple jurisdictions, it was agreed early that the Commonwealth law would take primacy with prosecution by the Commonwealth Director of Public Prosecutions to overcome the differences between the application of the law in Victoria and New South Wales and South Australia or elsewhere.

THE CHAIRMAN: Yes, so that - and I don't know to what extent we ought to spend time going into this, but just to have a general idea - a problem arises if, for example, a

person whose evidence you want before the court as part of the prosecution has made a statement in some jurisdiction outside Australia, which may have different rules about what appropriate steps have to be taken in interviewing that witness.

MR LAWLER: Certainly that puts an added dimension to the difficulty. That difficulty is apparent in a more technical context within Australia. But of course our submission indicates - and I think in our earlier discussions - once one moves abroad into foreign jurisdictions where the Australian government and indeed the AFP has no way of ensuring our legal processes are followed, then of course often evidence is taken and is only available in a form that is in fact contrary to our requirements under Australian law, under Commonwealth law.

THE CHAIRMAN: Yes. Well, thank you. That was a diversion from what you were putting to us, but I'm grateful for - - -

MS CURTIS: Can I just pursue - - -

MR O'GORMAN: You also say - it would be a matter for the discretion of the judge though, wouldn't it, whether that evidence would be admissible?

MR LAWLER: That's a very topical point. Part 1C of the Crimes Act 1914 is quite prescriptive in what's required of law enforcement officers and ultimately what will be admissible in proceedings, so that any evidence gathered, admissions taken, confessions received that are not in accordance with Part 1C, are inadmissible in proceedings. That has been the understood position for a significant period of time.

That having been said, a more recent prosecution in this state has turned its mind - the judge has turned his mind - to that particular point. My understanding is that after all the evidence has been heard, admissions taken in an interview in another country, but not taken in accordance with Part 1C have been admitted in those proceedings. Now, that's a matter still ongoing and where that ultimately ends up will be important to - - -

THE CHAIRMAN: There may be an appeal, I take it, on that point, assuming there's a conviction.

MR LAWLER: There is every chance that that may occur but that's, of course, a matter for others.

MR O'GORMAN: Do you know off the top of your head the name of that case?

MR LAWLER: That's the Thomas matter. I'm just being advised that there is a suppression order in place in relation to that proceeding.

MR O'GORMAN: Right, okay.

MS CURTIS: Just going back to the first question that the chair has raised really about, was the pre-existing legislation inadequate. I note in your submission that you've said - and again you've said it orally today - about the planning, training and conspiracy in particular that weren't covered by existing legislation. It's something that has been put to us time and time again, so I just want to tease it out a bit further.

I thought if we looked at the Jack Roche matter because he was convicted under different legislation.

MR LAWLER: He was.

MS CURTIS: But if it wasn't to do with the bombing of an embassy, because it was under that Protected

International Persons Act - - -

MR LAWLER: The IPP Act.

MS CURTIS: So if it was something different, like not, you know, Australian premises, how would you have proceeded under the existing legislation?

MR LAWLER: Well, my understanding with the Jack Roche matter is exactly as you put it. We had and do have specific Commonwealth legislation that relates to diplomatic premises and that was of course the target of Mr Roche and others back I think in 2000, at the time of the Olympic Games when their plot was being constructed. But of course law enforcement did not become aware of that subsequent aborted plot until I think it was about 2002, and because of the specific diplomatic nexus there was specific Commonwealth offences to deal with that.

Had there not been such legislation, my understanding is that there would very likely have been difficulties in pursuing that particular prosecution. But leaving that particular case - and if one would need more specific legal advice on that I'd need to take that in the context of a hypothetical situation - that having been said, the current legislation is focused on rather than looking backwards to an event, is about looking before an event.

So the Jack Roche situation when police became aware of it was in fact an investigation in hindsight, whereas the current investigations predominantly that the AFP is focused on is investigations in a proactive context of which there was, prior to this suite of legislation, limited capacity for law enforcement, particularly at a Commonwealth level, to act.

MS CURTIS: Thank you.

THE CHAIRMAN: Perhaps if it's not too much of a problem for you, because the Jack Roche has been put to us as a case demonstrating that the pre-existing law is good enough, if perhaps your legal people could just have a look at that and tell us whether indeed that could have proceeded without - I mean, it was a special case because of Commonwealth legislation. That's the starting point.

MR LAWLER: Correct.

THE CHAIRMAN: But assuming that hadn't existed or it was in a different environment so that the Commonwealth legislation didn't apply, is it accurate to say that he could have been prosecuted under an existing criminal law?

MR LAWLER: I'm certainly happy to do that, Mr Chair. Prosecuted, or successfully prosecuted, what the likely assessment is, the chances of a conviction. Of course our close colleagues at the Commonwealth Director of Public Prosecutions may need to aid in that regard.

THE CHAIRMAN: Yes, of course. I don't think it requires a huge amount of exposition, it's just to know really what the result of that inquiry would be.

MR O'GORMAN: Mr Lawler, could I just very briefly return to the Thomas case. You indicated it's the subject of the suppression order. Is that interlocutory ruling also the subject of that suppression order, do you know?

MR LAWLER: My understanding is it is, and I'm just conscious, Mr Chair, that we are in a public hearing.

THE CHAIRMAN: Yes, I understand that.

MR LAWLER: In relation to my comments around the Thomas matter I wouldn't want to inadvertently be in contradiction of that order.

THE CHAIRMAN: That's entirely proper. Sure. Yes, we interrupted you.

MR LAWLER: That's fine. The second was in relation to the level of threat. I am fortunate, as members of your committee have also been fortunate to be a member of the National Counter-Terrorism Committee, the AFP's representative on that committee. Where the issue of the threat level is often reflected upon - and we see regular briefings from both the security organisations and law enforcement - there is a very detailed process around the formulation of threat levels, and as it has been articulated, the threat level in Australia has remained at medium for quite a long period of time.

Some people connote from the word "medium" that there is a lesser threat, it's not a threat to be worried about, it's only medium. But when looks at the definition that attracts the term or attaches to the term "medium", it means - and I would need to take on notice a clarification that I've got the wording exactly right - - -

THE CHAIRMAN: Yes, that would be helpful if you could get that.

MR LAWLER: - - - but it goes along the lines of "a terrorist medium means a terrorist attack is likely or could well occur". So in that context it's at a level that indicates exactly what the words say. I'll stand corrected on the terminology but I think I've got that right.

MR McMILLAN: What's higher and lower than medium? How many points on the scale?

MR LAWLER: There is two points above medium which is high and

extreme. Extreme means effectively that a terrorist act, a bombing, has occurred. When it's high - again I think there is a published graduated explanation of the various threat levels. There certainly is a graduated assessment of what the threat levels are in the various explanations of what those threat levels mean.

I can't recall whether it's a classified document or not, but in any event I would imagine that that would be able to be made available to the committee.

MR CARNELL: I think it is available on the national security web site.

MR LAWLER: Right.

MR CARNELL: It certainly was at one point. I may not be up to date.

MR O'GORMAN: Mr Lawler, who has made the assessment of "medium"?

MR INNES: Sorry, before you go there, Mr Lawler, can you just clarify, you said there was two points above; how many points below on that scale? Sorry to interrupt.

MR CARNELL: Only one, it's a four-point scale, so it's low, medium, high, extreme.

MR INNES: Right.

MR LAWLER: I'm just not sure whether "negligible" is there as well.

MR CARNELL: Yes.

MR LAWLER: I'd need to take that on notice and I think the best way of doing that is to see if we can't ensure that the committee is directed to where this is on the Web or to arrange for a document to be provided with appropriate clearances from those that have produced it.

MR DAVIES: That would be helpful but to put it in context,

your comments about medium, I think the next step "high" talks about being imminent.

MR LAWLER: That's right.

MR DAVIES: So there is a threat now - that is medium - so, as you said, it's not something that should be taken lightly because the next step is certainly "all but", so to speak.

MR LAWLER: The fact that it's at medium is very serious.

THE CHAIRMAN: You were just about to answer a question about who is it that makes this assessment.

MR LAWLER: My understanding is that ASIO have a key role in the process of setting the threat level, but again I'll need to take on notice the exact procedure that's followed. Certainly the National Counter-Terrorism Committee have, as I said, been regularly and are regularly briefed at each meeting on the threat level and take information on issues that may impact upon the threat level. But I will need - as to who has final say on the threat level - to take that on notice.

THE CHAIRMAN: I assume that it's effectively an independent body that does that. I mean, it couldn't be something, for example - and I do no more than put this as an example - be politically manipulated. Is that right?

MR LAWLER: I think that is right.

THE CHAIRMAN: Proceed on that basis.

MR LAWLER: Where my caution arises is that the National Counter-Terrorism Committee do affirm the threat level, but I don't know as a matter of strict practice exactly where that decision is made in fact, and I just want that absolutely right so we don't mislead the committee in any way.

THE CHAIRMAN: Thank you.

MR McMILLAN: Mr Lawler, can I just ask you for your response for the record, as much as anything, to two of the other common criticisms that have been made of this legislation in submissions to us. The first criticism is along the following lines that legislation is necessary to deal with terrorism but this legislation is badly worded in defining the offence because it could pick up activity which we would commonly regard as innocent, acceptable political activity in a free and democratic society.

A couple of examples were given in the submission this morning that legitimate political activity - even by the Liberal Party was given as an example concerning Iraq - would fall within the definition of this legislation. While it's conceded in those submissions that no prosecution would ever be brought and perhaps that a court would read the legislation in such a way that no conviction could be recorded, nevertheless, the legislation is broadly worded and in the hands of police authorities can be used to disturb legitimate political activity that police authorities can undertake activities that stop short of formal prosecution - investigation, questioning, just oversight, surveillance - and the consequence then of having legislation framed as broadly as this is not that we get convictions on the record book but that we get potential intimidatory activity by police authorities at their own discretion to pick on whatever targets they choose. Could you respond to that criticism.

MR LAWLER: I would reject that categorically. What I would say that the legislation that is the subject of the

committee's review, I find it difficult that any of those matters would fall within that category. I have heard debate of the kind that you're talking about in relation to the more recent legislative change, particularly around issues of incitement and such matters that were brought forward in the legislation in 2005. When I appeared before the Legal and Constitutional Affairs Committee I rejected that assertion also.

The processes certainly that the AFP undertake would negate such unilateral activity of the sort that you've raised with me this morning.

MR McMILLAN: If I can raise one of the other criticisms that's been made which is that this legislation, however well crafted, is discoloured by its association with victimisation of one section of the community, the Islamic section of the community. It's said that the debate about this legislation has been so tied to concern about activity from within the Muslim community and that much of the police activity under this legislation has been focused on this area, that that alone has made the whole thing - and undermined the legitimacy of the legislation. Could you respond to that.

MR LAWLER: Again I don't accept that. I reject that. The AFP and I believe the other agencies involved in countering the threat of terrorism, preventing terrorism attacks, are doing so based on intelligence and evidence. The AFP is about investigating impartially, fairly but thoroughly allegations of criminal offences. Issues of race or ethnicity play no part in that deliberation and in fact investigations we undertake are borne out by those facts.

We've investigated other than people of the Muslim

faith in our investigative processes. So the facts bear that out but I just reject that absolutely and categorically.

THE CHAIRMAN: If I can just interrupt for one moment, there is an example that has been put to us by several bodies, namely, that although there may be a considerable number of organisations that would fall within the definition which would enable them to be proscribed, in fact only 17 or 18 or 19, whatever it is, have been, and all but one have been Muslim organisations or Muslim people who are members of those organisations.

Now, that recurs in what is put to us in these arguments and we hear about other organisations which we are told would also qualify but that doesn't happen, and where it's pointed out apparently that in New Zealand there are many more organisations that are proscribed and so on. That is, I think - and I may be wrong on this - the sort of prime example that is put to us that there is some discrimination or apparent discrimination in what's been done.

MR LAWLER: If I can respond to that in this way, Mr Chair. The issue of proscription is one issue within the counter-terrorism offences framework and of course, as you've indicated in your third point, you would be pleased to hear from us about proscription and the proposition as to how that's best done and what process might be most effective in that context. So I will come to that a little later - - -

THE CHAIRMAN: Yes, of course.

MR LAWLER: - - - but the commentary around proscription - and that may very well be the case, and if it is the case

then of course the decision-making around proscription is of course for others and not for the AFP. But there are many matters that fall within the breadth of the legislation that don't relate to proscription and that cover the full ambit of people - all groups of people - who may be in our community committing criminal offences, and I reiterate that race or ethnicity does not enter the equation when deliberation is taken as to whether those matters should be investigated or not.

There is a very transparent and accountable process as to investigations that are taken on and a documented record by a collection of people, not one person, before such activity is initiated.

MR McMILLAN: One of the issues that has been raised with us is that any power to proscribe an organisation would be more legitimate if there were an independent review of it, whether by a judge or by some other process. Do you see any objection or practical difficulty to having that decision subject to an independent, decisive review?

MR LAWLER: Right. That takes me really to the response to Part 3 and we'll interpose the response then, if the questions come now. The issue of proscription particularly as it relates to terrorism financing, which I understand is where its predominant focus is, is really a conundrum for the AFP in the context of we're seeing two things occur.

The first if, if an organisation is proscribed under the mechanisms of the United Nations and then, as you've indicated, through the Attorney-General and the Governor-General, what we see is of course a difficulty once the proscription occurs and the assets are frozen

for there to be any prospect of likely evidence in determining whether that proscribed entity is involved in terrorist financing, because of course they can't be involved or very difficult to prove they're involved because their assets are frozen.

So by virtue of the proscription, it impedes an investigation as to the level of criminality because of course there isn't the retrospective nature to the proscription. So that's the first point.

The second point and observation we make in relation to terror financing, which in turn links in part to some of the observations that have been made around the success or otherwise of law enforcement in terrorist financing, is that the entities that are so proscribed can then quickly change to a new name and a new structure, and of course continue on with their financing activities.

We have already mentioned to the committee beyond the context of the broader financing specific terrorist offences of course can be financed with very small amounts of money, and of course our experience around the world shows that to be the case.

But we would advocate an examination of courses of conduct similarly to what they do in the FTRA Act, the Financial Transactions Reporting Act, where they have structuring offences where people are creating new organisations simply as a way of avoiding the scrutiny of the proscription would be a way of treating that latter experience that we've found. I don't know that I finally got to your question.

THE CHAIRMAN: No. Well, I'm sorry. We've been sort of

interrupting. The question I think we have in mind is, if you are going to have a process whereby people or organisations can be proscribed, whether that in accordance with our usual legal traditions isn't better done by the Attorney-General or law officer making a case before a judge that that organisation should be proscribed and added to that a published set of criteria which would guide the decision in the case.

Part of that of course is that it means that it's an open process and importantly the party concerned has an opportunity to meet the case against it and, as you point out, that is done before ever there is a proscription so it's done before the omelette has been made, as it were.

MR LAWLER: Those matters ultimately, from an AFP perspective, are a matter of government policy and how that should occur.

THE CHAIRMAN: Yes, I understand.

MR LAWLER: But I would make one observation and that is that the speed of the proscription can have a significant impact, could have a significant impact as to whether ultimately a terrorist act occurred or not, and one could well envisage circumstances where, if one was able to cut off the flow of funding to a particular terrorist organisation and do that quickly, as I've explained, that that may well lead to an interruption or prevention of a planned terrorist activity and I could conversely - if that process were to be a drawn-out legal process in an adversarial context, I could see possible motivators for those people, the subject of that action, wanting to continue or string that out as long as they could, so ultimately a matter for government but I can see some

benefit in the way it's presently constructed.

THE CHAIRMAN: I did observe in something that I was reading this morning fairly briefly, which is a report in England, in the United Kingdom, that one of the problems about publicising these things is that, as it's put, it makes the people alleged to be terrorists, or the terrorists - however one describes them - become nervous and act more quickly than they might otherwise have done. I don't know whether that's the sort of thinking that - - -

MR LAWLER: Well, there's another dimension that I haven't put my mind to, but I would say could be equally valid.

MR O'GORMAN: Mr Lawler, in your opening you indicated that in your belief the legislation struck a balance with civil liberties concerns. Could I ask you to put your civil liberties hat on because we haven't had the advantage of hearing from any civil liberties organisation. Could you just elaborate on that a little?

MR LAWLER: Can I just start off by saying that police officers are members of the community as well.

MR O'GORMAN: Sure.

MR LAWLER: So are the security agencies and we're equally interested in issues of civil liberties and privacy as other members of the community. But when we talk about civil liberties in the context of the statement that's made, it's about accountabilities. It's about transparencies to the community we serve and it's about mechanisms that give confidence that in actual fact particular powers that have been given by the community to police or to others are able to be looked at and examined, and for the community to have confidence that

they're being properly applied.

There are an array of such accountabilities that the police, the federal police particularly I can speak for, have before them. The first is an ultimate accountability to the courts and to be subject to scrutiny, often very intense scrutiny, as to the way they have conducted themselves, both in a criminal context and, as we saw in more recent times as an example in the Scott Rush matter in Indonesia, around matters of policy or administration, as to how we have dealt with ourselves.

We have of course, as one of the committee members knows, a significant oversight in the context of complaints that are made against police under the Complaints Australian Federal Police Act and also beyond that to issues of oversight by the Ombudsman around practice and procedure and mechanisms for the Ombudsman to self-initiate inquiries where he may feel that it's necessary to do so. We have accountabilities through the soon to be constructed ACLEI, the Australian Commission on Law Enforcement Integrity.

We have significant scrutinies through a range of committees, through the parliament, through the Legal and Constitutional Affairs Committee, and that array of oversight, that array of accountability is where the balance that the community can get as against protecting the rights of the individual versus the rights of the community as a whole and that that's the balance in play here, so that's the comments that underpin it.

MR O'GORMAN: While things are quiet, can I just ask one other thing. The committee has asked a few people who have

appeared before us to look at the issue of whether or not the law as it existed prior to 2002 could cover all types of scenarios that are now envisaged by the legislation we're looking at. We expect two or three organisations to put in further submissions in that regard. Would it be appropriate for the AFP or would it be more appropriate for us to ask the DPP to comment on those responses we get to make sure that they are in fact accurate?

MR LAWLER: We'd be very happy to comment on them and I think I've already stated my very firm view there.

MR O'GORMAN: Sure.

MR LAWLER: I think that for us the evidence is clear and unambiguous.

THE CHAIRMAN: I think we're going to have all the submissions, to the extent that we haven't got them all but we're going to have them on a web site and perhaps in due course you could, from that source and we'll have identified to you the particular ones that are doing this and what there response is, and it would be very helpful if you could look at that and if there's anything you want to say about it, that would be helpful.

MR LAWLER: We would be happy to assist the committee in that regard.

MR DAVIES: Mr Lawler, if I might just take off on a different tangent just for a moment. Your paper or submission to this committee raises a number of issues about possible amendments to legislation and how much of that is really in our bailiwick is open to interpretation because obviously our task is to examine the operational effectiveness of existing legislation. But in one

particular point you have raised or the AFP has raised the issue of whether homicide offences might be introduced into the criminal code to overcome the problem, I believe, from the individual approach to homicide offences in its Australian jurisdiction.

But I'm not quite sure I follow the argument, if you could just explain to me, because it would seem if there was an event in any jurisdiction, a terrorist event that ultimately ended up with death, it would be a terrorist act in itself with life imprisonment and the consistent approaches available under that mechanism. Is there a particular purpose when looking from this other particular point of view?

MR LAWLER: Thanks very much for the question, it's a good question. We have had a number of approaches by states and territories in this issue and it is an issue that goes to that issue of consistency and where there is the potential for the application of a particular law in a state or territory and whether there might be a preference for that law to be pursued in that state or territory or whether it's far preferable to have a national framework that captures all the circumstances that might flow from a terrorist incident.

I note that one of the particular acts subject to the review by this committee, the Criminal Code Amendment Suppression of Terrorism Bombings Act 2002, does provide for that eventuality, it talks about where it causes death which, of course, would be a murder scenario. But it does so in the bombing context and one could think of other scenarios where there may not be a bombing but another event that could cause death that may not

necessarily be captured under those provisions. So the question whether it - again, as has been raised by a number of committee by way of consistency, national consistency, whether it would be useful to have such an offence provision.

THE CHAIRMAN: This would be a sort of alternative, I suppose, to - - -

MR LAWLER: This would be an alternative potentially or there may be circumstances where this could be a principal offence in its own right.

THE CHAIRMAN: But, for example, if you charge somebody with the offence - whatever the language is - carrying out an action or whatever it is and it requires proof of the intention of an ideological, religious and so on, would the concept be if that failed because that intention wasn't proved or was defeated by whatever the defence said, that you then had a fall-back murder charge? Is that how it works?

MR LAWLER: That would be one application.

THE CHAIRMAN: What happens now in that situation? There's just - so far as your proceedings are concerned - the killing part of the charge just fails.

MR LAWLER: Well, fortuitously we haven't been confronted yet with an event of recent times where this has occurred. Of course, there was the Hilton bombing back in 1978 but I understand in that particular instance they may have state charges that were ultimately preferred against one person, a member of the public, who was killed as a result of that attack. Certainly the scenario that you've outlined would be one application for the law. The second was picking up on the point of the Suppression

of Terrorism provisions which provide for an offence where death is occasioned as a result of a bombing attack but it's restricted to bombing.

The point I was making was that there could well be other circumstances not covered by a bombing per se that could lead to death by a terrorist organisation that may have to be dealt with in a different way or by different parts of the legislation and whether it would be useful to have that nationally consistent platform. But I've got to say that thinking on this is still in its infancy.

MR O'GORMAN: Could you give an example of what you're talking about there?

MR LAWLER: It may be that there might be the spreading of a substance by a terrorist organisation which causes death, it wouldn't be a bombing necessarily. But it - - -

MR O'GORMAN: It would still be murder though, wouldn't it?

MR LAWLER: It would still be murder in a state context and whether, if this were to happen across jurisdictions, whether there would be utility in having a national framework.

THE CHAIRMAN: I got an impression, which may be quite wrong, but in that type of situation the state and the Commonwealth, as it were, combined in action - and I may be quite wrong about this - that in fact there was an indictment for murder under the state legislation but the prosecution was carried by the Commonwealth. Is that wrong?

MR LAWLER: I don't know. I don't know which prosecution you might be referring to.

THE CHAIRMAN: I'm not referring to a particular one and I'm probably not speaking about murder, but I had an

impression from what was said by the state DPP that in these sorts of prosecutions the Commonwealth and, if necessary, the state as it were combined in action and there could be but one trial, but I may be wrong.

MR O'GORMAN: I understood him to say what they did was they would have a conference and decide who would carry out the prosecution - - -

THE CHAIRMAN: Perhaps that's right.

MR O'GORMAN: - - - whether it be the state or the Commonwealth.

THE CHAIRMAN: Yes.

MR LAWLER: I think that's right but I'm certainly not aware of any prosecutions running at the moment where there is a dual - - -

THE CHAIRMAN: It wasn't suggested there were. But is there any inhibition in that? Is there anything to prevent a trial taking place in which the prosecution is based on both state and Commonwealth law?

MR LAWLER: I'd need to - - -

THE CHAIRMAN: I think it might be worth having a look at that because I'm not sure of that.

MR LAWLER: I think others might be best placed to answer that, the Commonwealth Director of Public Prosecutions.

THE CHAIRMAN: Because you'll get fierce opposition from the states in trying to do this because the states will probably say, "Well, here's the Commonwealth trying to take over the whole of the criminal law." Is that an unfair comment?

MR LAWLER: I think that's a fair - albeit that certainly with people I've spoken to that was where it was first raised. But it goes to this issue of national consistency and as

one looks at this phenomenon of terrorism and its multijurisdictional application, it's national and international focus, these sort of things are things that need to be considered.

THE CHAIRMAN: Perhaps if you wouldn't mind, if you could develop it, perhaps dealing with the sort of questions that have been raised and we can have a look at it. I'm not really certain that it falls within what we're asked to do, but it may, I'm not sure, and that doesn't necessarily dissuade us from saying something about it.

MR O'GORMAN: You may get some assistance from the evidence given to this committee by Mr Nick Cowdery QC, the New South Wales DPP.

MR DAVIES: Mr Lawler, if we could go back to the issue of proscription and if I could take you to p.6 of the submission from the AFP, in the second paragraph, you raise the issue of the emerging difficulty in obtaining sufficient evidence to establish an individual as a member of a proscribed entity. You've explained to the committee today of the difficulty in relation to accounts, money in accounts, frozen accounts. Has that been the sole area of difficulty in this or have there been other areas of difficulty other than financing for proscribed organisations- having this connection between a person and a proscribed entity in areas other than financial investigations?

MR PRENDERGAST: I guess what we are talking about there is the operational difficulty that we're encountering in proving that a person is a member of a proscribed entity. It's a general point, but one that needs to be made: quite often there's not real documentary evidence of that type

of membership. The organisations may be based overseas so that there's difficulty accessing witnesses who can give evidence about a person's membership and that type of thing. So it's just linked around the general difficulty about investigating issues around proscribed organisations.

MR DAVIES: I guess I was wondering if you had - not that I'd necessarily expect you to give them to us today - practical examples of matters away from the issue of the funding which you've specifically addressed today, whether there are other matters you may have been looking at possible charges against someone in the proscription area where this has been a difficulty.

MR PRENDERGAST: Yes, we would be able to provide the committee some examples of that, but perhaps if we could do that out of session.

MR DAVIES: Certainly. This would be something that would therefore obviously be a fairly serious shortcoming in proscription generally then because this would seem to be something that would arise virtually in every prospective case, won't it? It will always be a hard measure in a way to make that connection between the individual and the organisations.

MR PRENDERGAST: I think it essentially gets back to some other issues that we've been discussing, including the admissibility of evidence from foreign jurisdictions et cetera. It's the ability to have the proscription is very valuable and necessary in terms of disrupting terrorist activity. What we're looking at now are the practical operational difficulties around the offence provisions and I don't know whether you'll be able to

overcome all of those because some of them are inherent in what you're trying to prove. But essentially in terms of trying to prove that someone is a member of a proscribed entity, issues around having evidence submitted from overseas is certainly an issue, not only gathering the evidence but the technical and practical difficulties of getting that evidence in front of a court in Australia.

MS CURTIS: I have a question. On p.5 of your submission, you say that you've undertaken 450 counter-terrorism related investigations and that's resulted in 24 people being charged. I did some quick maths and that's about 5 per cent, and I wondered, is that sort of a normal strike rate or whatever for investigations in other non-terrorism related areas? If it's lower or higher than what you normally would expect, do you think the laws could be enhanced to either get a higher rate, if that's what you would expect? You might need to take that on notice.

MR PRENDERGAST: I'm happy to talk to it. I think in terms of the percentage, it's certainly lower. I don't think there's any question about that. I think there needs to be some context put around the 24 figure because I don't believe it includes the results of our overseas operations.

Having said that, because of the catastrophic effects of a terrorist act being successfully carried out, we're somewhat less selective about what investigations we take on. Where this is information about a possible terrorist threat, we will certainly investigate that to the fullest extent that we're able, and we think we need to do that

in terms of providing proper protection to the community and living up to community expectations, so I think there's an element of that.

If you look at our other work, we have a very strict case categorisation model which we use to select what work we will be doing. That's based on ensuring that our resources are put against the highest impact and most important work. In that, one of the criterias obviously is the ability of us to investigate that to a successful conclusion. We're somewhat - I wouldn't say less selective but the importance we put on counter-terrorism investigations means that we do take on investigations where the initial information is somewhat less developed, if I could put it that way.

MS CURTIS: Thank you.

MR O'GORMAN: Or to put it another way, Mr Prendergast, what you're saying, is this correct, is because the consequences can be so great, whereas you may not carry out an investigation if you had certain information in other areas. Because the consequences are so great, you really are impelled to carry it out.

MR PRENDERGAST: To investigate. That's correct, yes.

MS CURTIS: That's a risk strategy that you're applying, yes.

MR PRENDERGAST: I could also make the point that in that number of investigations, some of those are current investigations, so we don't have the results of those.

MS CURTIS: Okay.

MR LAWLER: Can I also too, for the committee, just indicate that as of today, the number of investigations undertaken is 469.

THE CHAIRMAN: So what we do is scratch out 450 and put 469.

MR LAWLER: Thank you.

MR CARNELL: I'd like to touch on an issue you mentioned earlier; that's the question of freezing of accounts or assets. You indicated that the very process of freezing creates difficulties in terms of subsequently being able to charge and prosecute. There will though, won't there, be occasions where it's in the public interest to disrupt by freezing an account, even though that may significantly or perhaps entirely remove the possibilities of a successful prosecution for the sake of disruption, so to prevent the million dollars moving and a terrorist act occurring, it may be in the public interest to simply disrupt.

MR LAWLER: I'd agree wholeheartedly and that was the conundrum that I spoke about.

MR CARNELL: Is it then that the regime doesn't have enough flexibility in it that that decision can be taken to freeze or not freeze at a particular point of time?

MR LAWLER: My understanding is that the way the process works, practitioner in relation to terrorist financing, is that it occurs under - I'm just trying to recount the title of the United Nations provisions which allow for proscription to occur, and that then I understand is a trigger for the Attorney-General to proscribe an entity in Australia. So in the context of flexibility, I understand that there is that United Nations determination which drives, as I understand it, the proscription process in relation to financing. But I take your point completely; I think it's right. My sense is that the default must be towards the prevention. It must be towards preventing the funds being dispatched and

the criminal prosecution for that specific offence a secondary outcome. But that wouldn't prevent of course a further investigation, as would naturally occur, of the circumstances of the movement of the money and other ensuing matters which could very well lead to a more comprehensive investigation.

MR O'GORMAN: Were you thinking of the convention for the Suppression of the Financing of Terrorism 1999?

MR LAWLER: No, I wasn't. I understood it was a - - -

MR CARNELL: There is a charter of the United Nations Act 1948 and regulations made under - - -

MR O'GORMAN: 48 or 45.

MR CARNELL: I mean, my thinking is that if by virtue - and I would need to check this - of an entity being on the UN list, it's automatic that you must freeze. You could imagine there's a difference between whether you wanted to freeze in the situation where there's a million dollars in an account and when there's a hundred dollars in an account. I mean, it might be that what you can achieve investigatively from the hundred dollar account, might be of such value that you don't want to freeze it and thereby give a signal. The million dollars you probably do want to grab it because you know it's bound to be disruptive at that amount of money. I mean, that's just the loose thinking going through my mind.

MR LAWLER: I don't know that I can answer that question as to whether there is a discretion not to freeze or not. My understanding is that the particular financial institution was notified and once that occurred the restraint or freezing of the assets occurred thereafter. It was a process thing and I understood there to be no

flexibility there but I'm happy to take that on notice.

THE CHAIRMAN: At one point during some of the submissions that were made was it occurred to me that it might be a way to go to get rid of the derivative offences, that the ground is covered by the Terrorist Act offences and I was going to ask you therefore how effective you think the derivative offences that flow from the consequence of there being a terrorist organisation, how effective those provisions are, whether you really need them in the sense that the ground is covered by other provisions in the legislation. That may be something again that you might like to think about.

MR LAWLER: I'm happy to consider that further, but I would make an observation around that statement in the issue of timing, and whilst the investigation - as I indicated to Mr Carnell - was likely to ensue to a much more comprehensive investigation possibly involving those offences that you are referring to. The act of proscription and the act of freezing the assets in a preventative context, quite separate to an investigational context, might be quite useful in a prevention context.

THE CHAIRMAN: Well, I can understand that. What I had in mind was you may have your proscription of an organisation and the freezing, that all the other offences that are set out that are said to flow from membership and association, some of which seem to be extraordinarily complex to me, particularly when you're talking about something like association, and one wonders how successful a prosecution relying on that is likely to be, whether they're really necessary; whether if you've got

your proscription you've got your freezing; whether it's not sufficient to proceed under the other offences that have come up as part of being a terrorist act that is planned or whatever it may be.

MR LAWLER: My belief is that those other various stages in the preparation process, a support association, are also very useful potential offences to be considered when one is looking at the criminality under examination. Certainly the array of offences that have in fact been brought and will proceed through the courts do pick up that wide variety - - -

THE CHAIRMAN: A lot of them are derivative offences, aren't they?

MR LAWLER: I'm sorry, I didn't hear that.

THE CHAIRMAN: I'm sorry, I'm speaking away from the microphone. A lot of the prosecutions are for derivative offences, are they not, from the said existence of a terrorist organisation?

MR LAWLER: Yes.

MS CURTIS: Just one thing, I think in your opening statement, Mr Lawler, you said that - I think I've got this right - through the operation of these laws, the AFP has enhanced its strategies for prevention and detection. I just wondered if it's appropriate for you to tell us what some of those strategies are or were.

MR LAWLER: I'll ask my colleagues to expand on this. The context of prevention is something that terrorism and terrorism investigation has brought to the fore. Whilst we often think of prevention in a community policing context, in a national law enforcement context it didn't have such a focus. But with the legislative framework

that the committee is looking at, those preventative, proactive offences gave us the ability to act before the commission of offences has actually occurred, the principal offence, if I can put it in that context.

So all of the strategies, all of the effort, is around ensuring that the offence does not occur; whereas in a national context we're often looking backwards at offences that have occurred and then investigating as to who's responsible. This is looking at it from the other perspective.

MS CURTIS: I guess you're saying you've worked more closely - you've set up the joint Commonwealth territory state - - -

MR LAWLER: We've done that. We've also done some significant work in relation to intelligence and intelligence processes and doctrines, ensuring that we have the ability to collect real time intelligence to be able to analyse it, to be able to circulate it to those that need to know about the intelligence, when they need to know about it, and to make sure that we're working closely with our partner agencies to ensure that we all have a collective intelligence picture, all targeted towards the prevention of a terrorist attack occurring and making sure that's reacted to in a timely way, because in this context time is of the essence.

As we've heard, every piece of information or intelligence may be crucial to the prevention mandate that we have. I think the 9/11 commission bore some of these observations out, and we're trying very hard to ensure that we're as effective as we can conceivably be in this context. They're the lessons and the strategies

we've learnt.

MS CURTIS: Thank you.

MR O'GORMAN: I have two questions, and I promise they will both be brief. In the AFP's submissions to the inquiry into the provisions of the Anti-Terrorism Bill (No 2) of 2005, the comment was made that the proposals take into account the AFP's experience with terrorist attacks since 2001 and the AFP's understanding of the potential nature of terrorist attacks that Australia may face in the future. I'm particularly referring to the AFP's understanding of the potential nature of terrorist attacks that Australia may face in the future. Does that bring us back to what you were saying earlier about other people make the assessment that it's currently medium?

MR LAWLER: I don't know if I have fully understood your question. Feel free to respond.

MR O'GORMAN: I'm sorry. The AFP is saying - and I quote - "the AFP's understanding of the potential nature of terrorist attacks that Australia may face in the future."

MR LAWLER: I think I understand the gist of the question. I don't think that comment was informed by the current threat rating. It was more informed by what was seen from terrorist attacks around the world and the nature of those terrorist attacks - - -

MR O'GORMAN: Right, thank you.

MR LAWLER: - - - and how that may be translated across into the Australian context.

MR O'GORMAN: The other equally brief but hopefully better put - p.6 of your submission, the third paragraph, you say, "While the legislation is silent on judicial review into the process for proscribing organisations, once an

organisation has been regulated as proscribed, it was the government's intention that judicial review would be available." You're not suggesting there that it's not available, are you - - -

MR LAWLER: No.

MR O'GORMAN: - - - because the Administrative Decisions (Judicial Review) Act would pick it up, I would have thought, because it refers to reviewing decisions of an administrative character made under an enactment.

MR HOWELL: Yes, that would be our understanding. We were also just responding to one of the questions from the background briefing that we had.

MR O'GORMAN: Thank you.

THE CHAIRMAN: Any more questions? Well, thank you all very much indeed. I'm afraid it has been quite a long session for you and you have been very helpful throughout and we're grateful to you. There are one or two things that I think we've sort of left over as homework if you could get onto that. The practice is that the transcript has been taken and the draft will be made available to you soon, and if you could look at it and first pick out any errors in transcription and point those out.

But also when you look at it, if there's anything in it which perhaps could have been put better or perhaps in some way a mistake has crept in, don't change the transcript but if you would, please, just let us know that you'd like to amend something or add to it, or explain it, whatever that may be, because that's a hopeful process for all of us and it's very easy when giving evidence that you've had to give in these sorts of circumstances for something perhaps not to be put quite

the way you'd like to put it, on greater reflection. Is that understood?

MR LAWLER: Thank you, yes.

THE CHAIRMAN: All right. Thank you all very much indeed and we will adjourn.

ADJOURNED 1.06 PM