GILBERT + TOBIN
CENTRE
OF
PUBLIC
LAW

THE UNIVERSITY
OF
NEW SOUTH WALES

FACULTY OF LAW

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Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Secretary

Security Legislation Review Committee recommendations

Thank you for inviting the Gilbert + Tobin Centre of Public Law to comment on the recommendations of the Security Legislation Review Committee (the Committee) to the Parliamentary Joint Committee on Intelligence and Security.

We welcome the *Report of the Security Legislation Review Committee*, which provides a comprehensive review of the selected security legislation. We look forward to the Government's response to the Report's recommendations and urge the Government to amend the relevant legislation to ensure that Australia has effective and appropriate national security legislation in place.

We support all of the Committee's recommendations and have provided some further comments on several of the recommendations and findings below. We have not included comments on the proscription process as we understand this will be the subject of a separate PJCIS review in early 2007.

Further review (Recommendation 1)

We strongly support the recommendation to establish a legislative-based timetable for continuing review of the security legislation by an independent body to take place within the next three years.

In particular, we support the 'Independent reviewer' model that is set out on page 203 of the Report and is currently working effectively in the United Kingdom.

Debate and consideration of existing and proposed legislation is currently hindered by the reactive nature of amendments, limited access to security intelligence and an unwillingness to oppose amendments for fear of being seen to expose the community to danger. Under the

SYDNEY 2052 AUSTRALIA
Email: @unsw.edu.au
Telephone: +61 (2) 9385 2875
Facsimile: +61 (2) 9385 1175
Web: www.gtcentre.unsw.edu.au

'independent reviewer' model, consideration is given to the operation and effectiveness of current and proposed amendments to ensure that counter-terrorism laws and amendments are necessary and appropriate. This would result in a more sustainable counter-terrorism framework, with carefully targeted offences and sufficient enforcement powers subject to adequate safeguards and forms of review.

Definition of 'terrorist act' (Recommendations 6 and 7; key finding, page 15)

'Harm that is physical'

We support the recommendation to amend the definition of 'terrorist act' to cover serious harm to a person's mental health. We agree with the Committee that harm to a person's mental health can be as great a concern as physical harm.

We note that the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2], as introduced, did not limit the definition of 'terrorist act' to harm that is physical. This limitation was introduced as part of a package of government amendments responding to the May 2002 recommendations of the Senate Legal and Constitutional Legislation Committee. That Committee did not make a recommendation on this point, although it referred to the NOWAR – Adelaide's submission, which argued that 'harm' should be restricted to physical harm. The Supplementary Explanatory Memorandum does not shed any light on why this change was made.

'Threat of action'

We also support the recommendations to remove references to 'threat of action' and 'threat' from the definition of 'terrorist act' and to include a new offence of 'threat of action' or 'threat to commit a terrorist act'. It is important that threats of terrorist acts are criminalised but agree it is clearer and more straightforward for threats to be covered by a separate offence rather than be included as part of the definition of 'terrorist act'.

'Political, religious or ideological cause'

We strongly support the Committee's key finding that the requirement that 'the action is done or the threat is made with the intention of advancing a political, religious or ideological cause' remains in the definition.

Coercive powers and anti-terrorism offences carrying high penalties were developed and justified on the basis that they were necessary to address a specific form of serious threat to national security, such as the September 11 attacks. It is the intention of advancing a political, religious or ideological cause that distinguishes such terrorist activities from other forms of criminal conduct. Given the specific objective of anti-terrorism legislation and the serious nature of the offences and powers, the definition of 'terrorist act' should not be broadened to include other forms of criminal conduct.

'Protest, dissent or industrial action'

We note that the Committee did not accept the suggestion by the Commonwealth Attorney-General's Department to remove the exception for 'protest, dissent or industrial action' from the definition of 'terrorist act' (submission 14(b), page 13) . We strongly support the retention of this exception in the definition.

A recent comparison of definitions in national legal systems concluded that the Australian definition is one of the best in the common law world in capturing the elusive qualities that distinguish terrorism from other forms of violence.[1] The inclusion of a 'protest, dissent or industrial action' exception was a key reason for this conclusion.

Definitions that do not exempt protest, dissent or industrial action may capture non-violent groups that have no intention of harming a person or the public. For example, an industrial dispute involving essential services, such as hospitals or emergency services, could create a serious risk to the health or safety of the public and, if directed at the government, could be carried out with the intention of advocating a political cause and of influencing the government. Without a protest, dissent or industrial action exemption, such a dispute could fall within the definition of 'terrorist act'.

We acknowledge it is possible that a protest would fall outside the definition of 'terrorist act' because it is not intended to influence the government *by intimidation*. However, it is crucial that the protest, dissent or industrial action exemption remain for several reasons:

- It is not clear what 'influencing by intimidation' captures and it is possible that some forms of legitimate dissent may fall within this definition.
- Unlike the United Kingdom, Australia does not have human rights legislation to ensure that legislation is interpreted consistently with principles of free speech. As such, the Australian definition must be far more explicit in this regard.
- The inclusion of the exemption makes it clear on the face of the legislation that protest, dissent or industrial action is not understood to be a 'terrorist act'. It is important that members of the community reading the legislation understand this to ensure that there is no unnecessary fear or confusion about the legislation.

Section 102.8 – Associating with terrorist organisations (Recommendation 15)

We strongly support the recommendation to repeal section 102.8 and do not agree with the Attorney-General's belief that there is no justification for removing the association offence.[2]

We agree with the Committee's findings that an association element need not be included in an offence targeting people who provide support to a terrorist organisation with the intention that the support assist the organisation to expand or to continue to exist. The core culpable conduct is not the person's association with a member of a terrorist organisation, rather it is the provision of support to the terrorist organisation. Section 102.8 does not properly target this culpable conduct.

We note that section 102.7 already makes it an offence to provide support or resources to a terrorist organisation but that the offence is limited to the provision of support or resources that would help the organisation to engage in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs). The support referred to in section 102.8 need only assist the organisation to expand or to continue to exist, and may not be captured by section 102.7.

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[1] Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27 University of New South Wales Law Journal 270.

[2] Philip Ruddock, 'Tabling of Security Legislation Review Committee Report', Media Release 111/2006, 15 June 2006.

Repealing section 102.8 and replacing it with a properly targeted offence that does not rely on association would also address the constitutional and community concerns about an association offence. It is unjust to place the evidential burden of establishing the constitutional limitations of the offence on the defendant. The limits of the offence should be clearly established in the section. With a clearer and more certain offence, law enforcement agencies and members of the community can more easily determine when an offence is being committed.

Definition of 'member' (key finding, page 15)

The Committee does not recommend that informal members should be removed from the definition of a 'member' of an organisation. We suggest the definition should be limited to formal members of the organisation.

We agree with the Australian Muslim Civil Rights Advocacy Network's submission to the Committee that the term 'informal member' is unreasonably vague. It is not clear what is meant by an informal member but, under section 102.3, being an informal member is an offence punishable by up to 10 years imprisonment.

We accept that terrorist organisations would be unlikely to have formal membership lists. However, it is not clear what culpable behaviour the offence of being an informal member captures that would not fall under another offence. It is already an offence if a person directs the activities of a terrorist organisation, recruits for a terrorist organisation, trains or receives training from a terrorist organisation, gets funds to, from or for a terrorist organisation, or provides support to a terrorist organisation. If a person is not a formal member of a terrorist organisation and has not been involved in any of the other terrorist organisation offences, then we do not see how the person has any culpability that justifies an offence punishable by up to 10 years imprisonment.

Sections 101.2, 101.4, 101.5, 101.6, 102.1 and 103.1 – Terrorism offences (key finding, pages 15-16)

The Committee does not recommend changes to the offences in sections 101.2, 101.4, 101.5, 101.6 and 103.1, and the definition of 'terrorist organisation' in 102.1.

These offences were subject to a minor textual amendment by the Anti-Terrorism Acts of 2005. This was popularly referred to as the '"the" to "a" change' and was motivated by concern that preparatory acts could only be prosecuted under the offences as originally drafted if they pointed to some specific planned terrorist act. This interpretation of the provisions was expressly excluded by amendments to subsections 101.2(3); 101.4(3); 101.5(3); 101.6(2) and 103.1(2) made by *Anti-Terrorism Act (No 1) 2005*; and subsections 102.1(1)(a) and (2) made by *Anti-Terrorism Act (No 2) 2005*.

As we outlined in our submission to the Committee, assuming that change was necessary in order to have such an effect, the provisions in Division 101 have the effect of criminalising people for conduct committed before any specific criminal intent has formed. While preparatory conduct should certainly constitute an offence, two key objections may be raised to an attempt to provide for this in the absence of an intention to pursue a sufficiently detailed plan:

- This is contrary to ordinary principles of criminal responsibility, since people who think in a preliminary or provisional way about committing crimes may always change their

mind and not implement their plans. The provisions allow a person to be prosecuted before a genuine criminal intention has taken shape.

- The wide scope of the offences may give rise to prosecutorial difficulties. It might encourage authorities to act precipitately. Of course, with delay may lie danger, but to arrest persons on the basis of activities or possessions which cannot, at that point in time, be connected to any specific terrorist act risks failure in convincing the courts that a crime was in fact being prepared. It also, by corollary, might be said to expose a range of innocent activities to criminal sanction by casting the net so very wide.

Another concern is that the offences in sections 101.4 and 101.5 are not properly targeted. A matter central to the question of culpability is that the possession of the thing, or collection or making of the document, was intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. Without this circumstance a person, such as an academic, would be guilty of an offence for possessing a document the person knows is connected with preparation for a terrorist act even if that person had no involvement in the proposed terrorist act.

As this circumstance is a crucial matter central to the question of culpability, it should be included as an element of the offence that the prosecution must prove. Instead, this crucial circumstance is included as a defence in subsections 101.4(5) and 101.5(5) and the defendant bears an evidential burden in establishing that the possession was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. The defendant must adduce or point to evidence that suggests a reasonable possibility that there was no such intention before the prosecution is called upon to establish there was such an intention. This is a significant departure from accepted notions of prosecutorial responsibility to prove all the central elements of an offence committed by the accused before that person has to defend themselves.

This shifting of an evidential burden on to the defendant is particularly worrying in the context of these offences due to the breadth of their expression. Doubtless the kinds of activity for which these provisions were designed to enable arrests are significant stockpiling of chemicals or reconnaissance of strategically important sites. But these laws do not provide other individuals with sufficient certainty as to when they will have exposed themselves to prosecution. This is compounded by the lack of any requirement for the Crown to show that the alleged preparatory activity or thing or document possessed was connected to a particular terrorist plot, the details of which may be identified. That sets a very low bar for authorities who have great discretion as to when to lay charges as a consequence.

Yours sincerely,

Dr Andrew Lynch
Director
Terrorism and Law Project

Ms Edwina MacDonald
Senior Research Director

Professor George Williams
Anthony Mason Professor
and Centre Director