
The Parliament of the Commonwealth of Australia

Review of Security and Counter Terrorism Legislation

Parliamentary Joint Committee on Intelligence and Security

December 2006
Canberra

© Commonwealth of Australia 2006

ISBN 0 642 78856 1 (printed version)

ISBN 0 642 78857 X (HTML version)



Contents

Foreword	vii
Membership of the Committee	ix
Terms of reference	xi
List of abbreviations	xiii
List of recommendations	xv
1 Background	1
Security Legislation Review Committee	2
Review by the Parliamentary Committee on Intelligence and Security	2
2 Rationale and Accountability	5
Introduction	5
Modern terrorism	6
The continuing influence of Al-Qa'ida's world view	7
Characteristics of Islamist terrorism	8
Violent radicalisation	8
Justification for specialist terrorism offences.....	10
Global terrorism policy	12
Democratic freedoms, counter-terrorism measures and public safety	14
Investigations and prosecutions in Australia	15
Post enactment review: the case for an Independent Reviewer	16
Independent Reviewer	20
Conclusion	21

3	Effectiveness and Implications: Impact on Arab and Muslim Australians....	23
	General rise in prejudicial attitudes	23
	Fear and alienation	24
	Discrimination and selectivity	25
	Confusion and uncertainty	26
	Alienation and withdrawal	27
	HREOC: the <i>IsmaU</i> project.....	29
	Media commentary.....	30
	Education and consultation	33
	The Muslim Community Reference Group (MCRG).....	35
	Conclusion	37
4	Treason	39
	Treason.....	39
	Assisting a country or organisation to engage in armed hostilities against the Australian Defence Forces.....	40
	Assisting the enemy	41
5	International Terrorism.....	49
	Definition of Terrorism	49
	International law background	49
	Definition of terrorism in Australian law	50
	Sheller Committee Recommendations	51
	Advancing a political, religious or ideological cause.....	53
	Advocacy, protest, dissent and industrial action.....	58
	Psychological harm	60
	Threat to commit a terrorist act	62
	International organisations	63
	Terrorism and the law of armed conflict	63
	Personal terrorism offences – Division 101	65
	Hoax offences	66
	Terrorist organisation offences – Division 102	67
	Advocacy	68
	Terrorist organisation offences	71

Membership of a terrorist organisation	71
Training offences.....	74
Getting funds to and from or for a terrorist organisation	75
Providing support to a terrorist organisation.....	77
Reverse onus provisions.....	81
6 Suppression of the Financing of Terrorism	85
Financing terrorism	86
Fault element	86
Specificity of section 103.1 and 103.2.....	88
Charter of the United Nations Act 1945.....	89
Criminal offences	90
Proscription mechanisms	91
Review and delisting	93
Right to review under Australian law	94
7 Border Security	97
Firearms.....	98
Privacy and Passenger Name Records.....	99
Scope of Passenger Name Records	100
European Union Privacy Directive.....	101
Office of Privacy Commissioner Audits	104
Customs seizure warrants.....	105
A Appendix A – COUNTER TERRORISM TREATIES.....	107
B Appendix B - List of Submissions.....	111
C Appendix C – List of Witnesses appearing at Public Hearings.....	113
Canberra – 31 July 2006	113
Canberra – 1 August 2006	114



Foreword

I present the report of the Committee's review of the first package of anti-terrorism and security legislation passed by the Commonwealth Parliament in 2002.

On behalf of the Committee, I would like to express our particular gratitude to Mr Simon Sheller AO QC and the Sheller Committee, which reported on the legislation under review in April this year. The Sheller Report reflected the views of major stakeholders and has provided a valuable contribution to our own deliberations.

Since 2001, a series of terrorist events have served as a reminder of the risk and consequences of terrorist violence. Australia is not immune from these influences. Like the Sheller Committee, we have concluded that a special terrorism law regime is justifiable and forms an important, although not exclusive, tool in Australia's counter-terrorism strategy. Much of the report deals with the detail of legislative provisions. It proposes a series of modest refinements to improve specificity, clarity and fairness in a way that we believe is consistent with Australia's anti-terrorism objectives.

It is clear that Australia now has a highly developed legal framework and stronger institutional capacities to deal with the threat of terrorism. The terrorism law regime is, essentially, a preventive model, which differs in many respects from our earlier legal traditions. Bearing in mind the significance of these changes and the importance of terrorism policy into the future, we have recommended the appointment of an Independent Reviewer to provide comprehensive and ongoing oversight. The Independent Reviewer, if adopted, will provide valuable reporting to the Parliament and help to maintain public confidence in Australia's specialist terrorism laws.

I commend the report to the Government and the Parliament and thank my fellow Committee members and the Secretariat for their contributions, which have made the review possible.

The Hon David Jull MP
Chair



Membership of the Committee

Chair The Hon David Jull MP

Deputy Chair Mr Anthony Byrne MP

Members The Hon Duncan Kerr SC MP

Mr Stewart McArthur MP

Mr Steven Ciobo MP

Senator Alan Ferguson

Senator the Hon Robert Ray

Senator the Hon John Faulkner

Senator Fiona Nash

Committee Secretariat

Secretary Ms Margaret Swieringa

Inquiry Secretary Ms Jane Hearn

Administration Officer Mrs Donna Quintus-Bosz



Terms of reference

29 Functions of the Committee

- (1) The functions of the Committee are:
 - (ba) to review, as soon as possible after the third anniversary of the day on which the *Security Legislation Amendment (Terrorism) Act 2002* receives the Royal Assent, the operation, effectiveness and implications of amendments made by that Act and the following Acts:
 - (i) the *Border Security Legislation Amendment Act 2002*;
 - (ii) the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*;
 - (iii) the *Suppression of the Financing of Terrorism Act 2002*.



List of abbreviations

ADF	Australian Defence Forces
ADJR	Administrative Decision Judicial Review Act 1975
AFP	Australian Federal Police
AGD	Attorney-General's Department
ALRC	Australian Law Reform Commission
AMCRAN	Australian Muslim Civil Rights Network
ASIO	Australian Security Intelligence Organisation
ATA	Anti-Terrorism Act 2005 (No. 2) (<i>Cth</i>)
AUSTRAC	Australian Transaction Reports and Analysis Centre
BSLA	Border Security Legislation Amendment Act 2002
CDPP	Commonwealth Director of Public Prosecutions
COAG	Council of Australian Governments
COUNA	Charter of the United Nations Act 1945
DFAT	Department of Foreign Affairs and Trade
DIMA	Department of Immigration and Multicultural Affairs
EC	European Community

ECJ	European Court of Justice
EU	European Union
FATF	United Nations Financial Transaction Task Force
FBI	Federal Bureau of Investigation (United States of America)
GSMG	FN Herstal General Support Machine Gun
HREOC	Human Rights and Equal Opportunity Commission
ICRC	International Committee of the Red Cross
IGIS	Inspector-General of Intelligence and Security
IISCA	Islamic Information and Support Centre of Australia
ISYS	International Sikh Youth Federation
MCRG	Muslim Community Reference Group
MOU	Memorandum of Understanding
MRG	Muslim Reference Group
PAU	Passenger Analysis Unit
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PNR	Passenger Name Record
POAC	Proscription of Organisations Appeals Commission
SFTA	Suppression of the Financing of Terrorism Act 2002
SLCLC	Senate Legal and Constitutional Legislation Committee
SLR	Security Legislation Review (the Sheller Report)
UK	United Kingdom
UN	United Nations
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution



List of recommendations

2 Rationale and Accountability

Recommendation 1

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

Recommendation 2

The Committee recommends that:

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

3 Effectiveness and Implications: Impact on Arab and Muslim Australians

Recommendation 3

The Committee recommends that Australian police forces review their media policies to ensure that official statements do not prejudice the right to fair trial and are sensitive to the wider implications for the community.

Recommendation 4

The Committee recommends that AGD increase its effort to ensure that comprehensive information about the terrorism law regime is available to the public in appropriate community languages.

Recommendation 5

The Committee recommends that Australia's counter terrorism strategy encompass:

- a commitment to the rights of Muslims to live free from harassment and enjoy the same rights extended to all religious groups in Australia;
- wide dissemination of information about mechanisms for complaint or redress in relation to law enforcement, intelligence agencies and the media; and
- a statement on the importance of informed and balanced reporting to promote social cohesion.

4 Treason

Recommendation 6

The Committee recommends that:

- the offence of treason be restructured so that conduct constituting treason apply only to persons who owe allegiance to Australia or who have voluntarily placed themselves under Australian's protection;
- the conduct of others, which falls within the scope of paragraphs 80.1(1) (a)(b)(c), should be dealt with separately;
- the offence of assisting the enemy under paragraph 80.1 (e) and (f) be clarified to cover 'material assistance';
- paragraph 80.1 (f) be amended to require knowledge of the existence of armed hostilities.

5 International Terrorism

Recommendation 7

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

Recommendation 8

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

Recommendation 9

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

Recommendation 10

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

Recommendation 11

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

Recommendation 12

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

Recommendation 13

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

Recommendation 14

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

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

Recommendation 15

The Committee recommends that the Government consider:

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

Recommendation 16

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

Recommendation 17

The Committee recommends that:

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

Recommendation 18

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

Recommendation 19

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

Recommendation 20

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

6 Suppression of the Financing of Terrorism

Recommendation 21

The Committee recommends that:

- section 103.1 be amended by inserting 'intentionally' after 'the person' in paragraph (a) and removing the note;
- that recklessness be replaced with knowledge in paragraph (b).

The Committee recommends that paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.

Recommendation 22

The Committee recommends that:

- external merit review of a decision to list a person, entity or asset under section 15 of the COUNA should be made available in the Administrative Appeal Tribunal;
- section 15 and regulation 6 be amended so that the Minister must be satisfied on reasonable grounds that the person, entity, asset or class of assets falls within the scope of UNSCR 1373;
- COUNA should be amended to provide that a person or entity listed by regulation is entitled to seek review as a step in the process of review by the Sanctions Committee.

7 Border Security

Recommendation 23

That the Customs Act be amended to specify that access to passenger information for the purpose of another law of the Commonwealth is limited to the investigation of serious crimes prescribed by regulation.

Recommendation 24

The Committee recommends that:

- the Customs Act be amended to specify that retention of passenger information be permitted for a limited time in order to conduct analysis;
- that the Minister for Customs report to the Parliament on the status of negotiations with European States in relation to passenger information.

Recommendation 25

The Committee recommends that the Privacy Commissioner retain an ongoing oversight role in relation to passenger name records, which includes biannual monitoring of the Passenger Analysis Unit.

Recommendation 26

The Committee recommends that:

- the subject of a seizure warrant involving entry to premises should be provided with a statement of rights and obligations;
- that Customs bear the onus of proving the basis of the seizure.

Background

- 1.1 In mid 2002 the Commonwealth Parliament passed a package of security and counter terrorism legislation to strengthen Australia's capacity to respond to the threat of international terrorism.¹ This was the first phase of the Commonwealth's legislative response to the terrorist attacks on the World Trade Center and the Pentagon in the US on 11 September 2001.
- 1.2 The bills were passed subject to an agreement that a review of the operation, effectiveness and implications of the new laws would be conducted after three years. Provision was made for:
 - an independent committee of review to be initiated by the Commonwealth Attorney-General and to report to the Attorney-General and the Parliamentary Joint Committee on Intelligence and Security;² and,
 - Parliamentary Joint Committee on Intelligence and Security (PJCIS) to conduct a separate review on behalf of the Parliament.³

1 *Security Legislation Amendment (Terrorism) Act 2002; Suppression of the Financing of Terrorism Act 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002; Border Security Legislation Amendment Act 2002; Telecommunications Interception Legislation Amendment Act 2002; Criminal Code Amendment (Terrorism) Act 2003.*

2 Section 4 of the *Security Legislation Amendment (Terrorism) Act 2002*

3 Paragraph 29 (1) (ba) of the *Intelligence Services Act 2001*.

Security Legislation Review Committee

- 1.3 The Attorney-General established the independent Security Legislation Review Committee on 12 October 2005 under the Chairmanship of the Honourable Simon Sheller AO QC (the Sheller Committee). The Sheller Committee was made up of representatives of major stakeholder organisations. It conducted a public inquiry, receiving 29 submissions and taking evidence from 18 witnesses over 5 days of hearings in Melbourne, Sydney, Canberra and Perth.
- 1.4 On 21 April 2006 the Sheller Committee reported to the Attorney-General and the PJCIS. The report was tabled by the Attorney-General on 15 June 2006 and is available at: www.ag.gov.au/agd (the Sheller Report).

Review by the Parliamentary Committee on Intelligence and Security

- 1.5 Under paragraph 29(1)(ba) of the *Intelligence Services Act 2001 (Cth)* the PJCIS must review the operation, effectiveness and implications of the:
- *Security Legislation Amendment (Terrorism) Act 2002*;
 - *Border Security Legislation Amendment Act 2002*;
 - *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*;
 - *Suppression of the Financing of Terrorism Act 2002*.⁴
- 1.6 Subsection 4 (9) of the *Security Legislation Amendment (Terrorism) Act 2002* requires the PJCIS to take into account the Sheller Report. Consequently, the Sheller Report forms an important part of the evidence to this inquiry and reference is made to evidence submitted to that review and to parts of the report where it is appropriate to do so. However, the PJCIS is not limited by the content, recommendations or findings of the Sheller Report and has departed from it where appropriate.
- 1.7 It should also be noted that the PJCIS has a separate statutory obligation to review the operation, effectiveness and implications of the legislative provisions governing the listing of an organisation as a

4 The review mandate of the PJCIS did not include the *Telecommunications Interception Legislation Amendment Act 2002* or the *Criminal Code Amendment (Terrorism) Act 2003*.

'terrorist organisation' under the *Criminal Code Act 1995 (Criminal Code)*.⁵ The PJCIS's inquiry into the proscription process is scheduled to take place in early 2007. Consequently, the listing provisions do not form part of the current inquiry and are not dealt with in this report.

- 1.8 To avoid unnecessary duplication, the PJCIS decided to focus attention on the recommendations and findings of the Sheller Committee. On 16 June 2006 the PJCIS wrote to all organisations and individuals who participated in the Sheller Inquiry seeking comments on the recommendations of the Sheller Report. The PJCIS also wrote to two defence counsels with experience of Australia's terrorism laws. The review was announced on 20 June 2006 by press statement and via the Parliamentary website.
- 1.9 Twenty-five written submissions were received, one of them confidential. The Prime Minister and all relevant Ministers agreed, in accordance with Schedule 1 subclause 20(2) of the *Intelligence Services Act 2001*, that hearings should be conducted in public session. Thirteen witnesses were heard over one and a half days of public hearings held on 31 July and 1 August 2006 at Parliament House, Canberra. In addition, answers to questions on notice were received and are published as supplementary submissions.
- 1.10 The *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* attracted no adverse comment during the Sheller Inquiry. The Act inserted Division 72 (international terrorist activities using explosive or lethal devices) into the *Criminal Code* to give effect to the International Convention for the Suppression of Terrorist Bombings. The Committee received no submissions on the Act and it is not discussed in this report.

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

Rationale and Accountability

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

Introduction

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

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

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

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

Modern terrorism

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

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

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

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

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

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

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

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

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

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

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

Characteristics of Islamist terrorism

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

Violent radicalisation

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

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

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

Most extremists are influenced by foreign events – some in Australia view the Coalition action in Iraq as an attack on all Muslims. Others believe they do not fit into Australian society or into the society of their parents. Despite a strong

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

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

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

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

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

Recommendation 1

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

Justification for specialist terrorism offences

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

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

12 Low- terrorist attack is not expected; Medium- terrorist attack could occur; High- terrorist attack is likely; and Extreme- terrorist attack is imminent or has occurred.

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

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

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

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

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

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

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

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

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

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

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

Global terrorism policy

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

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

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

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

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

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

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

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

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

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

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

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

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

Democratic freedoms, counter-terrorism measures and public safety

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

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

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

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

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

Investigations and prosecutions in Australia

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

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

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

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

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

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

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

Post enactment review: the case for an Independent Reviewer

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

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

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

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

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

36 *Jabbour v Thomas* [2006] FMCA 1286

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Independent Reviewer

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

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

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

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

Conclusion

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

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

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

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

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

Recommendation 2

The Committee recommends that:

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

Effectiveness and Implications: Impact on Arab and Muslim Australians

- 3.1 This chapter discusses the impact of the new security environment on Arab and Muslim Australians as part of a wider assessment of the operation, effectiveness and implications of anti-terrorism laws.
- 3.2 Laws, policies and practices which disproportionately impact on minorities risk undermining the principle of equality, which is the cornerstone of democracy and essential to the maintenance of community cohesion. The principle applies to all arms of government and should provide an ethical guide to public debate on these otherwise potentially divisive issues. The Sheller Committee quoted Justice Latham in this regard:

[I]t was easy for judges of constitutional courts to accord basic rights to popular minorities and individuals. The real test came when they were asked to accord the same rights to unpopular minorities and individuals.¹

General rise in prejudicial attitudes

- 3.3 One of the damaging consequences of the terrorist bombing attacks in the US, the UK, Europe and Indonesia, has been a rise in prejudicial

1 Sheller Report, p. 41.

feelings toward Arab and Muslim Australia.² The same problem has emerged in other western countries and requires careful consideration and a thoughtful response.³

- 3.4 Australia, the United States, Britain and many of the European countries are the birth place and chosen home of millions of people of the Muslim faith. Muslims in Australia are ethnically, linguistically and culturally diverse, with more than 36 percent of the 281,500 Muslims in Australia having been born in Australia.⁴ There is no single homogenous Muslim community in Australia or single interpretation of Islam.⁵

Fear and alienation

- 3.5 Over the past five years Islamic and other community based organisations have consistently raised their concerns about a rise in generalised fear and uncertainty within the Arab and Muslim Australian communities. During this review, it was reiterated that anti-terrorism laws impact most on Arab and Muslim Australians who feel under greater surveillance and suspicion. The Committee is especially concerned by reports of increased alienation attributed to new anti terrorist measures, which are seen as targeting Muslims and contributing to a climate of suspicion. The Sheller Committee said there is:

...a substantial increase in fear, a growing sense of alienation from the wider community and an increase in distrust of authority.⁶

-
- 2 Human Rights and Equal Opportunity Commission, *IsmaU – Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, 2004, p.3. Available at: http://hreoc.gov.au/racial-discrimination/isma/report/pdf/ISMA_complete.pdf
- 3 European Monitoring Centre on Racism and Xenophobia, *The Impact of & July 2005 London Bomb Attacks on Muslim Communities in the EU*, November 2005; Institute of Race Relations, *Arrests under anti terrorism legislation since 11 September 2001*, 2004. Available at: http://www.irr.org.uk/pdf/terror_arrests_study.pdf
- 4 Department of Immigration and Multicultural Affairs, *Muslims in Australia – a snapshot* (data taken from the 2001 census). Available at: www.immi.gov.au/living-in-Australia/a-diverse-australia/communities/MCRG/Muslims-in-Australia-snapshot.pdf. More recently, in an address to the Conference of Australian Imams on 16 September 2006, the Immigration Minister's Parliamentary Secretary stated that Australia's Muslim population is now 360,000.
- 5 Richard Kerbaj, Prophet not perfect, say Islamic scholar, *The Australian*, 4 October 2006 available at www.theAustralian.news.com.au.
- 6 Sheller Report p. 142.

- 3.6 In 2005, the Committee identified this trend in the review of ASIO's special questioning and detention powers under Division 3 Part III of the ASIO Act. During that review it was evident that the Muslim community believed that the expanded intelligence gathering powers were principally aimed at Muslims.⁷ In the current context, the Committee was told that much of the concern and confusion was grounded in the wide definition of terrorism and terrorist organisations, and the related offences that criminalise possession of things, and support, training, membership, and association with a terrorist organisation. Uncertainty about the scope of the law was said to be affecting the normal dynamics of the community.
- 3.7 An important function of the criminal law is to express society's moral opprobrium about certain conduct and to have a symbolic and deterrent effect. In hearings, AGD explained that:
- It is a deliberate policy of the offences to change behaviour where people are dealing with terrorist organisations. When they are dealing with terrorist organisations that is something they need to be very cautious about.⁸
- 3.8 It is not the intention of the Parliament that anti-terrorism laws should have a negative impact on the integrity of normal life of Arab and Muslim Australians or any other sector of Australian society. It is central to Australian democratic values that people are free to practice their religious beliefs in community with one another. A healthy and robust civil society promotes both social interaction and political participation. The voluntary involvement in faith based, social and welfare organisations, and the participation of young people in group activities are all aspects of the Australian way of life that promote social inclusion and personal development.

Discrimination and selectivity

- 3.9 AMCRAN stated that:

The first concern people have is that the laws are selectively applied to Muslims. In a survey we conducted of 150 members of the Muslim community at the end of 2005 and the beginning of 2006... we found that approximately two thirds of the respondents felt that the Muslim community was

7 See Chapter 4 of Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers*, Commonwealth of Australia November, 2005.

8 AGD, *Transcript*, 1 August 2006, p.2.

targeted. These perceptions, although they are perceptions, have some basis in fact.⁹

- 3.10 The fact that only Muslim organisations had been listed as terrorist organisations under the *Criminal Code*, triggering related terrorist organisation offences, was a source of criticism. Consequently, the crime of association is regarded as only applying to Muslims.¹⁰
- 3.11 The restriction on disclosure of security sensitive evidence as compared to the high profile media coverage of raids and arrests was cited as increasing perceptions of unfairness. Official statements and media coverage of Operation Pendennis was said to demonstrate a ‘disproportionate bias against Muslims’, when contrasted to the public statements about the John Howard Amundsen case.¹¹ The new AA prisoner classification system, which applies to people remanded or convicted of terrorism related crimes, was also criticised as excessively harsh. Concern was also raised that defendants in terrorism cases are less likely to get bail. It was argued therefore that steps should be taken to reduce the period of time on remand and get cases quickly to trial.
- 3.12 These policies and practices were seen as interfering with the presumption of innocence, and the right to fair trial and to humane treatment. They were said to feed perceptions that Muslims will be subject to differential standards. More recently, differential attitudes toward Australians who wanted to defend Lebanon or supported the right of Hezbollah or the Palestinians to defend themselves compared to Australians who supported Israel and participated in the Israeli armed forces, were said to illustrate a wider problem of systemic bias.¹²

Confusion and uncertainty

- 3.13 As noted above, the breadth of offences and uncertainty about the definition of terrorism and terrorist organisation and related offences were said to have caused confusion and exacerbated fear and alienation. It was common ground that some of the perceptions about

9 AMCRAN, *Transcript*, 1 August 2006, p.51.

10 AMCRAN, *Transcript*, 1 August 2006, p. 51.

11 Islamic Information and Support Centre of Australia, *Submission 13*, p. 6.

12 AMCRAN, *Transcript*, 1 August 2006, pp. 54 and 62; Cynthia Banham, *Don't take up arms with the enemy*, *Sydney Morning Herald*, 29 July 2006, p.15.

the laws are based on incorrect information.¹³ However, the Committee was told that this was not simply a question of access to information, the complexity and breadth of offences made it more difficult for people to know with certainty whether they had committed an offence. As the Islamic Information and Support Centre of Australia (IISCA) explained:

Most people know that what they are doing is either right or wrong. With this...anti-terrorism legislation...we do not know what, how or when these laws can apply to an individual, or organisation or a group.¹⁴

- 3.14 The frequency of legislative amendments had also made dissemination more difficult and reinforced the view that legislation would be changed in response to particular circumstances.¹⁵ Importantly, witnesses said that the law had led people to change their behaviour and there was a widespread perception among Muslims that the laws limited the free exercise of speech, expression and religious beliefs and worked against community participation.

Alienation and withdrawal

- 3.15 AMCRAN explained that the impact of the anti-terrorism measures was being felt in various ways:

Firstly, people self-limit their behaviour. In other words, they overestimate the reach of the laws and they are unnecessarily cautious. For example, we have seen people not wanting to go to normal Islamic classes, or similar things, because they fear that ASIO may be watching. We have heard people telling their children not to go to protests because they would be just exposing themselves once again.¹⁶

- 3.16 IISCA expressed the same concerns. For example, it was said that parents restricted their children's participation in the mosque and youth activities because of the fear of attracting the interest of ASIO. Even attending information sessions about anti-terrorism laws had been avoided because it might be interpreted as demonstrating an

13 See generally, IISCA, *Submission 13*; AMCRAN, *Submission 5*; IISCA, *Transcript*, 31 July 2006 p.45; AMCRAN, *Transcript*, 1 August 2006, p. 51-52; AGD, *Transcript*, 1 August 2006, p. 2.

14 IISCA, *Transcript*, 31 July, p.45.

15 AMCRAN, *Transcript*, 1 August, p.51.

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

interest in terrorism.¹⁷ Apart from the general criminal law, it was said that this self-limiting behaviour was to avoid the risk of questioning by ASIO, and, in particular, the risk of prosecution and imprisonment for discussion of operational information (arrest, location, questions etc) related to an ASIO questioning warrant.¹⁸

3.17 The pervasiveness of the problem is partly related to the informal way Muslim communities function. IISCA told the Committee that, the mosque plays a central role in daily life of practising Muslim and there is little distinction between religious bodies and social and welfare associations. People will not necessarily know much about the people they associate with in this context and formal notions of association or membership have little relevance and are difficult to define. Moreover, it is a religious duty to give Zakat¹⁹ anonymously through the mosque or community organisation for welfare purposes in Australia and overseas.²⁰ This has raised concern that a person may be accused of financing terrorism if a recipient is later accused of having some connection with terrorist activity however remote. Efforts within the community to counteract these concerns appear to have had limited impact.

3.18 AMCRAN reported that the complexity of the law was inhibiting contributions to welfare assistance for Muslims in Lebanon and Palestine:

I will give another example of the current complexity – and this is only one example. People are talking to us about wishing to make donations to help people whom they see as their brothers and sisters in Palestine and Lebanon. And we have to tell them that it is very difficult to give advice on that because there are difficulties to do with a government in Palestine, one wing of which is on the proscribed list of terrorist organisations.²¹

3.19 Dr Kadous said, based on his personal experience outside of AMCRAN, that

17 IISCA, *Submission 13*, p.3.

18 IISCA, *Supplementary Submission 25*, p.4

19 Zakat is 2.5% annual surplus wealth.

20 IISCA, *Submission 13*, p. 2.

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

... donations to worthwhile charities ... have been dropping.
And that is very unfortunate.²²

- 3.20 Although this evidence is anecdotal, it is consistent with the findings of the Human Rights and Equal Opportunity Commission (HREOC) study and the representations made to the Parliament over a number of years.²³

HREOC: the *IsmaU* project

- 3.21 In 2003, HREOC interviewed 1423 people in 69 consultations in all states and territories and distributed 1475 questionnaires in New South Wales and Victoria. The *IsmaU* project found a widespread perception that the Muslim community has been unfairly targeted and that there was an increase in various forms of prejudice because of race or religion. These incidents ranged from offensive remarks on the bus to physical violence and high rates of reporting to the survey of innocuous events.

- 3.22 The *IsmaU* project found that the problem is worse for people who appear to be readily identifiable as Muslim. Muslim women, who wear traditional Islamic dress (*hijab*), were found to be 'especially afraid of being abused or attacked'. It is also concerning that:

Arab and Muslim youth felt that they were particularly at risk of harassment which has led to feelings of frustration, alienation and a loss of confidence in themselves and trust in authority.²⁴

- 3.23 Overall the study identified three main trends within the Muslim communities:
- an increase in fear and insecurity;
 - the alienation of some members of that community; and

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

23 See Chapter 4 *Implications for the Muslim Community*, in Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, November, Canberra 2005.

24 HREOC, *IsmaU - Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, 2004, p.3. Available at: http://hreoc.gov.au/racial-discrimination/isma/report/pdf/ISMA_complete.pdf

- a growing distrust of authority.²⁵

3.24 The report's findings are consistent with the experience of organisations like AMCRAN and IISCA²⁶ For example, it was reported that prejudice manifested in a range of ways, from hostile remarks on the street and at school to more serious incidents. The Committee was told that religious or racially motivated crimes were not always reported to the police because people felt that the police were unsympathetic.²⁷ In response to a question on notice HREOC confirmed that:

The IsmaU Report found that most incidents of discrimination raised in the consultations were not reported to police or other government authorities due to fear of victimisation; lack of evidence and a general lack of trust in authority; lack of knowledge about the law and complaints processes; the perceived difficulty in making a complaint and the perception that outcomes were unsatisfactory.²⁸

3.25 It is difficult for the Committee to assess accurately the extent of the problem. Whether it peaks in response to specific incidents, which create a temporary backlash or is a deeper more pervasive and entrenched problem.

Media commentary

3.26 The role of the media is critical in how a society responds to challenges and threats. The volume of media interest in Muslims has grown significantly and is a new experience for many faith based organisations. While most journalists try to ensure balanced reporting, Muslim groups told the Committee that biased media reporting and alleged incidents of vilification on radio were promoting prejudicial attitudes toward Arab and Muslim Australians.

3.27 Witnesses outlined the genuine distress experienced by many people across the community and their concern that the heated public debate

25 See HREOC, *IsmaU* – Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians, 2004. Available at: http://hreoc.gov.au/racial-discrimination/isma/report/pdf/ISMA_complete.pdf Accessed 12 September 2006.

26 AMCRAN, *Transcript*, 1 August, 2006, p.51.

27 IISCA, *Submission 13*, p.12.

28 HREOC, *Supplementary Submission 22*, p. 1.

and excessive focus on ordinary Muslims were damaging community relations. Public debate about the wearing of the hijab and Sharia law were cited as recent examples, which unnecessarily inflamed community feeling.²⁹

- 3.28 As noted earlier, the result of Operation Pendennis, which led to the arrest of eighteen young men in Melbourne and Sydney, was announced by senior officials and attracted extensive media coverage. The Committee was told that the way the public disclosure was handled had increased the sense of alienation, especially among many Muslim youth.
- 3.29 The language used in submissions to describe the impact of the anti-terrorism measures was strong and reflected the level of distress in the community: 'an overwhelming sense of fear', 'a general lack of confidence in the decision making process', 'severe financial penalties suffocate individual opinion', some campaigns were 'ignorant' and implementation of the laws was often seen as 'duplicitous and hypocritical'.³⁰
- 3.30 IISCA listed some examples of what they saw as official bias and sensational reporting. These included:

New South Wales police chief Ken Moroney said a 'potentially catastrophic attack' had been averted. I am satisfied that we have disrupted what I would regard as the final stages of a terrorist attack or the launch of a terrorist attack in Australia.

Victoria's Police Commissioner, Christine Nixon, agrees that police have prevented a major terrorist attack from occurring. 'We believe that they were planning an operation,' she said, 'We weren't exactly sure when nor, more importantly, what they planned to damage or do harm to.'

A recent example of this was the books of hate campaign championed by the media. The campaign was levelled

29 For example, Get out if you want Sharia law, Australia tells Muslims, *The Daily Times*, 26 August 2005; AAP, Accept our Law or Leave: Costello, 10 November 2006; AAP, If you want sharia law, move: Costello, www.theage.com.au/news/Nation...670199148.html, 23 February 2006; Yusra Khreegi, No hijab ban in Australia just now - but if you Sharia, "get out", www.iwitness.co.uk/foreign/0905f-09.htm, 24 September 2005; Tim Martin, Efforts to Ban Muslim Attire Blasted, *The Mercury*, 30 August, 2005; AAP, Bishop backs ban on Muslim headscarves, 28 August 2005; AAP, Bishop accused of keeping bomb in skirt, 6 September 2005; AAP, Danna Vale defends Muslim comments, 16 February, 2006.

30 IISCA, *Submission 13*, pp.4-5 and AMCRAN, *Transcript*, 1 August, 2006, p.56 and 62.

against Muslim bookshops who were accused of inciting hatred by selling particular texts albeit these same texts were available in public libraries, at universities and other bookshops around Australia.

The regular commentary from John Laws, Alan Jones and Steve Price in Sydney are examples of talk back hosts who seemingly incite open hatred towards Muslims, their beliefs and culture. All too often they incite the hatred of their audience 'egging them on and then encouraging callers to make derogatory statements about Muslims.' ... An example of this was during the Cronulla riots, when untruths about the circumstances surrounding the events were deliberately manipulated into a story of Us versus Them.

[I]n 2005 senior members of the government started the 'if you don't like it get out campaign'. This campaign was aimed exclusively at Muslims of all ages, even Muslim primary school children were not immune to the constant barrage of insults and ridicule.³¹

3.31 The Committee has not conducted a survey of media coverage and notes that there has been little comprehensive empirical research on this subject.³² However, we are concerned about the increased attention focused on the Muslim community and the lack of balance and rationality in some reporting. Freedom of speech carries with it a responsibility not to promote hostility and prejudicial attitudes. It was suggested that the Commonwealth should consider laws to prohibit incitement of racial and religious hatred however, the Committee considered this to be outside the terms of reference.³³

3.32 In 2005, the Committee said that:

...there is also a broad community responsibility to discourage inflammatory attacks which undermine community values of tolerance and freedom. Muslims too are being affected by intolerant and inflammatory opinions which are being aired on talkback radio and such opinions create community conflict, give licence to verbal and physical attacks on Muslim people and alienate Muslim youth from

31 IISCA, *Submission 13*, pp. 6-13.

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

33 IISCA, *Supplementary Submission 25*, p.1.

mainstream Australia.³⁴

Recommendation 3

The Committee recommends that Australian police forces review their media policies to ensure that official statements do not prejudice the right to fair trial and are sensitive to the wider implications for the community.

Education and consultation

- 3.33 The Sheller Committee recommended that the Government increase its community education efforts, especially in the Arab and Muslim communities.
- 3.34 It was apparent that there is little 'plain English' material available that would assist the situation. The efforts AMCRAN are notable in this regard. AMCRAN has published clear and accurate information about the new laws.³⁵ They printed 4000 copies of the first edition of their booklet, the second edition was released in October and the website gets 'about 100 hits a week'. However, AMCRAN said that the extensive legislative program has made keeping information up to date difficult.³⁶
- 3.35 AGD has attended several conferences and community based forums, which have provided an opportunity to explain the anti-terrorism laws. In response to a question on notice, AGD advised that:

Departmental officers are invited to speak at about the Australian Government's counter-terrorism legislation.

Departmental officers spoke at the following forums:

27 February 2006 - Departmental staff briefed the Muslim Community Reference Group on the new counter-terrorism laws;

34 Parliamentary Joint Committee on ASIO ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the operation, effectiveness and implications of Division 3 Part III of the ASIO Act 1979*, tabled November 2005, p. 79.

35 *Anti-terrorism Laws: ASIO, the Police and You* booklet available at: http://www.amcran.org/index.php?option=com_content&task=blogsection&id=3&Itemid=27

36 AMCRAN, *Transcript*, 1 August 2006, p. 54.

19 April – Departmental staff participated in a legislation and policy forum held at Monash University to discuss the counter-terrorism legislation;

19 and 20 May 2006 – Departmental staff provided a presentation on the Government’s counter-terrorism legislation at a forum hosted by the Citizens for Democracy in Armidale.

28 May 2006 – Departmental staff provided a presentation on the Government’s counter-terrorism legislation to a forum hosted by the Young Lawyers Association in Sydney;

2 June 2006 – Departmental staff addressed the Attorney-General’s Non-Government Organisation Forum on Human Rights; and

19 July 2006, Departmental staff provided a presentation on the implications of Australia’s new terrorism laws on specific ethnic communities at a conference of The Northern Migrant Resource Centre Inc. in Melbourne.³⁷

3.36 While all these efforts are important, the majority of these meetings appear to have been ad hoc ‘as the opportunity arises’.³⁸ Except for the specific briefing of the Muslim Reference Group (MRG) the events above are not targeted toward Muslim communities or Muslim organisations. It was suggested that Muslims need more education about their rights and this was best achieved by delivering that information through schools and mosques, and other places frequented by the Muslim communities.³⁹ There was no discussion about who was best placed to deliver that information, but the Committee considers that it would be important that information be comprehensive and neutral.

3.37 AGD has also produced pamphlets that give answers to basic questions about the ATA No.2. The Committee was advised that:

In January 2006, the Department arranged for 4500 copies of the pamphlet to be printed. This number included 1000 pamphlets printed in English, 500 printed in French, 500 in Vietnamese, 500 in Traditional Chinese, 500 in Spanish, 500 in Arabic, 500 in Bahasa Malay and 500 in Turkish. In addition,

37 AGD *Supplementary Submission*, p. 4

38 AGD, *Transcript*, 1 August 2006, p. 9.

39 IISCA, *Supplementary Submission 25*, p.1.

in July 2006 the Department ordered a further 4400 copies of the pamphlet to be printed.⁴⁰

- 3.38 The pamphlets are set out in simple terms and deal with preventative detention and control orders. While all efforts to explain the laws are worthwhile, what has occurred so far is too limited to make an impact and does not appear to be part of a comprehensive communication strategy, which addresses the new anti-terrorism laws in their totality. A more detailed publication on the legislative regime, greater use of the departmental website and face to face community level forums would increase AGD's effectiveness. Consideration should also be given to publishing material in Urdu, which appears to be missing from the list of community language.

Recommendation 4

The Committee recommends that AGD increase its effort to ensure that comprehensive information about the terrorism law regime is available to the public in appropriate community languages.

The Muslim Community Reference Group (MCRG)

- 3.39 The most valuable initiative to date is the Muslim Community Reference Group. The Prime Minister established the Muslim Community Reference Group in mid-September 2005 under the umbrella of the COAG to act as an advisory group to Government. The Group is made up of senior members of the Muslim community and representatives of Muslim community organisations. Seven sub-groups have been established to target areas of concern including youth, women, schooling, education and training of clerical and lay leaders, employment outcomes and workplace issues, crisis management, and family and community.⁴¹
- 3.40 Witnesses told the Committee:

One of our objections to the process of the creation of the Muslim Community Reference Group was that it was not

40 AGD, Response to Question on Notice, *Supplementary Submission 19*, p.4.

41 DIMA, *Security Legislation Review (SLR) Submission 34*, p.5.

open and transparent – nor was it representative. ... My understanding of the process was that the Department of Immigration and Multicultural and Indigenous Affairs suggested a list to the Prime Minister, who then looked at the list in consultation with the Minister for Citizenship and Multicultural Affairs, John Cobb, and they collectively came up with a list. ... Since [it has been] formed there have not been many instances where they have gone back and consulted their communities [with the exception of the Islamic Council of Victoria] [and] there has not been much in the way of promulgation of information about what is happening in those forums.⁴²

3.41 AMCRAN expressed some concern about ‘some of the more complex decisions that are deeply troubling to the Muslim Community – for example the training of imams, which brings with it, at least to some Muslim eyes, a concern about government interference in the practice of religion.’⁴³

3.42 Nevertheless, the creation of MCRG is an important acknowledgement of the need to communicate directly with the Muslim community. The MCRG has had input into the National Action Plan⁴⁴ being developed by the Government combat intolerance and extremism and is part of the wide social cohesion program. The initiatives include:

- Programmes, including pilots in some disadvantaged suburbs, including some Muslim communities, involving:
 - ⇒ A new values based education initiative;
 - ⇒ Employment coordinators;
 - ⇒ Employment workshop for young job seekers;
 - ⇒ A sporting programme to increase participation of children in local sporting clubs;
 - ⇒ A mentoring programme to increase participation of young people in work, education, training and community life.

42 AMCRAN, *Transcript*, 1 August 2006, p. 60.

43 AMCRAN, *Transcript*, 1 August 2006, p. 60.

44 It should be noted that this plan is directed at the whole community not only at the Muslim community. The first two pilots are in Lakemba and Macquarie Fields. Address to the Muslim Community Reference Group by Andrew Robb, Wednesday 2 August 2006, www.andrewrobb.com.au/news

- The creation of a world class centre of research and educational excellence in Islamic studies within a major Australian university, to play a leadership role in exploring the place of Islam in modern society;
- Interfaith dialogue projects;
- Continuation of the Muslim Community Reference Group (MCRG);
- A volunteer staffed counselling and support helpline for the Muslim community;
- Specialist training, educational materials and forums to bring law enforcement agencies and Muslim communities together to resolve issues; and crisis management training to help empower the Muslim community to plan for and respond to issues, incidents and crises.⁴⁵

3.43 The Government has committed \$8 billion for its overall counter terrorism strategy. A commitment of \$35 million over four years has been made to support National Action Plan initiatives.⁴⁶ This list of initiatives is long and further funding and resources may be necessary if the Plan is to achieve its objectives.

Conclusion

3.44 The Committee endorses the Sheller Committee's findings about the impact of counter terrorism laws on Arab and Muslim Australians:

The SLRC also has serious concerns about the way in which the legislation is perceived by some members of the Muslim and Arab communities. ... Misunderstandings and fearfulness will have a continuing and significant impact and tend to undermine the aims of the security legislation. The negative effects upon minority communities, and in particular the escalating radicalisation of young members of such communities, have the potential to cause long term damage to the Australian community. It is vital to remember that

45 Address to the Muslim Community Reference Group by Andrew Robb, Wednesday 2 August 2006, www.andrewrobb.com.au/news

46 Address to the Muslim Community Reference Group by Andrew Robb, Wednesday 2 August 2006, www.andrewrobb.com.au/news

lessening the prospects of 'homegrown' terrorism is an essential part of an anti-terrorism strategy.⁴⁷

- 3.45 Measures to promote social inclusiveness are an important part of the strategy to combat intolerance and extremism and to deal with the conditions that contribute to the spread of terrorist violence.

Recommendation 5

The Committee recommends that Australia's counter terrorism strategy encompass:

- **a commitment to the rights of Muslims to live free from harassment and enjoy the same rights extended to all religious groups in Australia;**
- **wide dissemination of information about mechanisms for complaint or redress in relation to law enforcement, intelligence agencies and the media; and**
- **a statement on the importance of informed and balanced reporting to promote social cohesion.**

47 *Report of the Security Legislation Review Committee*, June 2006, p. 142.

Treason

- 4.1 The *Security Legislation Amendment (Terrorism) Act 2002* (the Act), inserted new Chapter 5, 'The Security of the Commonwealth', into the *Criminal Code*. The Act modernised the offence of treason, and introduced the:
- definition of a terrorist act;
 - definition of terrorist organisation;
 - terrorism offences and offences related to terrorist organisation offences; and
 - an administrative power to proscribe a 'terrorist organisation'.
- 4.2 This chapter deals with the offence of treason.

Treason

- 4.3 The Act moved the offence of treason from the *Crimes Act 1914* into the *Criminal Code*, replaced the death penalty with life imprisonment; and removed gender specific references to the sovereign.
- 4.4 Under section 80.1 a person commits treason if he or she:
- causes the death or harm, resulting in death, imprisons or restrains the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or Prime Minister;
 - levies war, or does an act preparatory to levying war against the Commonwealth;

- intentionally assists, by any means whatsoever, an enemy, at war with the Commonwealth;
- intentionally assists, by 'any means whatever', another country or organisation that is 'engaged in armed hostilities' against the Australian Defence Force (ADF);
- instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
- forms an intention to do any of the above acts and manifests that intention by an overt act.

4.5 The Sheller Committee rejected the proposition that the offence of treason is not appropriate in a modern democratic society.¹ The ALRC has also considered aspects of the treason offences as part of its inquiry in sedition law, which has provided additional matters for consideration by the Committee.²

Assisting a country or organisation to engage in armed hostilities against the Australian Defence Forces

4.6 Section 80.1 replicated the existing offences from the *Crimes Act* and added a new offence of against the Australian Defence Forces (paragraph 80.1(1)(f)). In a submission to the Sheller Committee, the AFP argued that:

...the new offence takes into consideration the increasing changes in global and political circumstances in relation to terrorism. The enhanced treason offence is required to ensure that Australians in armed conflict with a terrorist organisation, such as Al-Qa'ida, can be dealt with under Australian law, where life imprisonment is the penalty. The extended jurisdiction of the offence means that an Australian committing treason as a member of a terrorist organisation against the Commonwealth of Australia, whether within or outside of Australia can be captured under the legislation.³

4.7 The underlying rationale for the new offence was the view that the *Crimes (Foreign Incursions and Recruitment) Act 1978* was insufficient to

1 Sheller Report, 2006, p.42.

2 ALRC, *Fight Words A Review of Sedition Laws in Australia*, Report 104, July 2006. <http://www.alrc.gov.au/inquiries/title/alrc104/index.html>

3 AFP, *SLR Submission 12*, p.5.

deal with alleged activities of Australians in support of, for example, Al-Qa'ida post 11 September 2001 in Afghanistan.⁴ 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 the other country).⁵

Assisting the enemy

- 4.8 The offences under paragraph 80.1(e)-(f) apply where a person intentionally 'assists' an enemy at war with Australia, or a country or organisation in armed hostilities with the ADF. During the 2002 Senate inquiry, a number of witnesses raised concerns that in its original form, the definition of 'assist' was broad enough to encompass the provision of humanitarian relief. That problem was rectified by subsequent amendment which inserted sections 80.1 (1A) and (1B) to provide an express exemption where assistance constitutes humanitarian relief.⁶
- 4.9 However, the question of the meaning of 'assists', which is not defined in the *Criminal Code*, has remained a live issue. The ALRC has recommended that the term be amended to 'materially assists' to avoid uncertainty about the scope of its application.⁷ The intention is to clarify that 'assist' relates to conduct such as funding, provision of troops or armament, intelligence or other strategic support.

4 The *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence to recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil. It is an offence to 'engage in hostile activity in a foreign state' or to 'enter a foreign state with intent to [do so]'. It is also an offence to do preparatory things for the same purposes. And it is an offence to 'give money or goods to, or perform services for, any other person or any body or association of persons for the purpose of supporting or promoting [these activities]'. 'Hostile activities' include any acts done for the purpose of overthrowing a government by force or violence, engaging in armed hostilities in a foreign state, placing a foreign public in fear and causing damage to foreign public property. The offences exclude activities undertaken in the service of a foreign power's armed forces; Hancock N., *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, 19 March, 2002 p.17.

5 Patrick Emerton, *Submission 9*, p.4; s. 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

6 The defendant bears an evidential burden in relation to the matter.

7 ALRC, *Review of Seditious Laws*, Discussion Paper 71, May 2006, 158 -165; and for discussion see ALRC, *Fighting Words, A Review of Seditious Laws in Australia*, Report 104, July, 2006, p.226-227 and p.p. 232-234.

- 4.10 ALRC have also argued that a closer connection between the conduct and the capacity of the country, organisation or state to 'engage in war' or 'engage in armed hostilities' should be drawn to remove any residual ambiguity. It follows that the 'by any means whatever' should be deleted from both subsections to ensure internal consistency in the drafting. Additionally, ALRC proposed that an explanatory note be added to the provision to clarify the intended meaning of 'materially' to 'make clear that mere rhetoric or expression of dissent are not sufficient.'⁸
- 4.11 In our view, given the seriousness and penalties attached to the offence it is crucial that the law achieves the highest degree of certainty. The removal of ambiguity and greater precision are important legal policy principles and the Committee sees considerable merit in ALRC recommendations.

Jurisdiction

- 4.12 A more contentious issue concerns the application of extended geographical jurisdiction category D, to the crime of treason. Under section 15.4 of the *Criminal Code*, extended geographical jurisdiction (category D) means that the offence applies:
- whether or not the conduct constituting the alleged offence occurs in Australia; and
 - whether or not a result of the conduct constituting the alleged offence occurs in Australia.⁹
- 4.13 There is no citizenship or residency qualification. That is, the offence can be committed by anyone acting any where in the world.
- 4.14 Historically, the crime of treason was based on the principle of allegiance to the Crown. On the basis of its comparative research, ALRC argues that the principle of allegiance has retained its importance in the law of treason.¹⁰ For example, in the US, misprision of treason applies only to those 'owing allegiance to the United States'¹¹ and the concept of allegiance is part of the offence of

8 ALRC, *Fighting Words A Review of Sedition Laws in Australia*, Report 104, July, 2006, p. 232.

9 Extended geographical jurisdiction also applies to the ancillary offences of attempt, complicity and common purpose, innocent purpose, incitement and conspiracy; see Part 2.4 Extension of Criminal Responsibility sections 11.1 – 11.6 of the *Criminal Code*.

10 See for example, *Historical Concept of Treason: English and American* (1960), 35 *Indiana Law Journal*, p. 70 as cited ALRC, Discussion Paper 71, May, 2006, p.169.

11 18 USC 2382.

treason in the UK under the *Treason Act of 1351 (Imp)*¹², which remains in force in the UK.¹³

- 4.15 By way of background, the Gibbs Committee argued the case for the extension of treason to apply to Australia's defence force in the following terms:

31.49 On the other hand, it can be argued with considerable force, that if Australia sends part of its defence force overseas to oppose any armed force, it owes it to the defence force members to prohibit other Australians from doing any act to assist the other force.

31.50 A provision on the broad lines of the Canadian or New Zealand formulation; that is, making it an offence for an Australian citizen or a person voluntarily resident in Australia, to help a State or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities would express this principle....

Given a situation short of war, the proposed offence must, it is thought be distinguished from treason. Further, the right of a citizen to express his or her dissent must be recognised. However, there could be situations where, at least to the man or woman in the street, it would not be clear that hostilities involving Australian Defence Force members had commenced. Therefore, the operation of the provision must be dependent on a proclamation as to the existence of such hostilities.¹⁴

- 4.16 As the ALRC has noted, treason offences in the repealed *Crimes Act* had no citizenship qualification

...although the Gibbs Committee observed that the treason offences 'must obviously be construed so as not to apply to an enemy alien in time of war outside Australia' and recommended that the offence of treason should be stated to apply to:

(i) an Australian citizen or a member of the Public Service of Defence Forces anywhere; and

12 25 Edw III c 2.

13 ALRC, *Review of Sedition Laws*, Discussion Paper 71, May 2006, p.169.

14 Sir Harry Gibbs, *Review of Commonwealth Criminal Law*, Fifth Interim Report, June, 1991 as cited in the Sheller Report, p.154.

(ii) any person (including enemy aliens) voluntarily in Australia.’¹⁵

- 4.17 Under existing paragraph 80.1(1)(e), during wartime (whether or not it is declared) any person (either a national or a non national) inside or outside Australia who ‘assists’ an enemy of the Commonwealth is liable for prosecution in Australia for treason. The effect of paragraph 80.1(1) (f), is to extend the crime of treason to assisting a country or an organisation in situations of ‘armed hostilities’.
- 4.18 In 2002, during the SLCLC inquiry into the Bill, it was argued that the effect of paragraph (f) is to ‘render guilty of treason any person involved in the Afghanistan civil war that fought against an Australian soldier’.¹⁶ The matter was raised again during the ALRC inquiry in the law of sedition and has been the subject of further discussion during this review.¹⁷
- 4.19 It is legitimate for Australia to defend itself by criminalising conduct that might generally be described as ‘assisting the enemy’, covered by paragraphs (e) and (f). Indeed, there are comparable provisions in Canadian and New Zealand law, and the new provisions recognise that the ADF are deployed in a range of scenarios. Nevertheless, two substantive issues arise under the current formulation.
- 4.20 First paragraphs (e) and (f) apply to people who have no allegiance and do not benefit from the protection of the Australian state. In this sense, the provisions depart from the traditional underpinning of the concept of treason, which is a breach of ones obligation to the Crown and loyalty to Australia. This would suggest that either the offence is misconceived or that the label ‘treason’ is simply inappropriate to those persons.
- 4.21 Secondly, the case has been argued that as presently drafted paragraphs 80.1(e) and (f) would apply to enemies and anyone who assists the enemy. To the extent that the provisions overlap with the law of armed conflict, there is a potential to put at risk the principle of combatant immunity and Australia’s obligations under the Geneva

15 ALRC, *Review of Seditious Laws*, Discussion Paper 71, May 2006, p.170.

16 The Hon Justice Dowd, International Commission of Jurists, at LCLC Hansard, 8 April 2002, p.p. 2-3 as cited in LCLC Report, May 2002, p.30. In *Hamden v Rumsfeld, Secretary of Defense*, et al, USSC No.05-188, 29 June 2006 the Supreme Court confirmed that the laws of war applied to hostilities in Afghanistan.

17 ALRC, *Review of Seditious Laws*, Discussion Paper 71, May 2006, p.167-68; see also B Saul, *Submission SED 52*, 14 April 2006;

Conventions to treat captured enemy as prisoners war.¹⁸ If paragraphs (e) and (f) are restricted to apply only to those owing allegiance to Australia and those who have voluntarily placed themselves under the protection of Australia, the potential conflict with the law of armed conflict falls away.

- 4.22 The ALRC propose other provisions of the *Criminal Code*, including terrorism, might be more appropriate where the conduct is committed by a person who does not owe allegiance or is not voluntarily under Australia's protection. Similarly, those provisions dealing with causing death or harm to the Sovereign, Governor-General or Prime Minister could be dealt with by the normal criminal law, that is, simply not placed under the label 'treason'.

Knowledge of the hostilities

- 4.23 The Sheller Committee recommended that the paragraph 80.1(1)(f) be amended to require that the person have knowledge of the existence of armed hostilities.¹⁹ The requirement for 'knowledge' is intended to give clarity and certainty to the offence, and provide the same standard of protection obtained by a proclamation of war under paragraph (e). The Committee agrees with this proposition.

Retrospectivity

- 4.24 The ALRC has also accepted that the offence of assisting an enemy at war with the Commonwealth is open to being interpreted as having retrospective application. Although it is a requirement of paragraph 80.1(1)(e) that the existence of a state of war be specified by Proclamation, there is no express requirement that the Proclamation must have been made before the offending conduct took place.²⁰ The ALRC has recommended that the Proclamation under 80.1(1)(e)(ii) be expressed clearly so that must have been made before the relevant conduct is engaged in.

Attorney-General consent for prosecution

- 4.25 All the offences set out in Division 80 (treason and sedition) require the written consent of the Attorney-General before prosecution can

18 Violations of the law of armed conflict may be prosecuted as a war crimes provided for in Chapter 8 of the *Criminal Code*.

19 Sheller Report, p.157.

20 ALRC, *Fighting Words A Review of Sedition Laws in Australia*, Report 104, July, 2006, p. 234.

commence. A person can be arrested, charged and remanded in custody or placed on bail but no further proceedings may be taken until the Attorney-General's consent. This issue was also raised during the 2002 Senate inquiry, but remains in place. Although the matter was not touched on by the Sheller Committee, the ALRC recommends that section 80.5 be repealed.²¹

4.26 The ALRC reasoned that terrorism offences do not require the Attorney-General's consent and that the CDPP is independent, and must take account of a range of factors when exercising the discretion whether or not to prosecute. The factors that must not influence CDPP prosecution decisions include:

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved...

(c) possible political advantage or disadvantage to the Government or any political group or party...²²

4.27 On this basis, the ALRC has recommended that the requirement for the Attorney-General's consent be removed. The Committee does not agree with this conclusion. The requirement for the Attorney-General's consent is a safeguard, it may be exercised to prevent prosecution but not to initiate one and does not, in our view, represent an impermissible intrusion in the independence of the CDPP.

21 Section 16.1 of the *Criminal Code* still applies, requiring the Attorney-General's consent where conduct occurs wholly outside Australia and the person charged is not an Australian citizen.

22 CDPP, *Prosecution Policy of the Commonwealth*, as cited in ALRC, *Review of Sedition Laws*, Discussion Paper 71, May 2006, p.175.

Recommendation 6

The Committee recommends that:

- the offence of treason be restructured so that conduct constituting treason apply only to persons who owe allegiance to Australia or who have voluntarily placed themselves under Australian's protection;
- the conduct of others, which falls within the scope of paragraphs 80.1(1) (a)(b)(c), should be dealt with separately;
- the offence of assisting the enemy under paragraph 80.1 (e) and (f) be clarified to cover 'material assistance';
- paragraph 80.1 (f) be amended to require knowledge of the existence of armed hostilities.

International Terrorism

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

Definition of Terrorism

International law background

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

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

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

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

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

Definition of terrorism in Australian law

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

The conduct falls within the definition if it:

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

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

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

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

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

Sheller Committee Recommendations

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

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

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

Breadth of Australian terrorism laws

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

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

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

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

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

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

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

Advancing a political, religious or ideological cause

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

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

14 Sheller Report, p.15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 7

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

Advocacy, protest, dissent and industrial action

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

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

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

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

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

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

5.29 Justice McClellan has also commented:

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

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

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

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

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

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

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

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

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

Recommendation 8

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

Psychological harm

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

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

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

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

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

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

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

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

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

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

Recommendation 9

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

Threat to commit a terrorist act

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

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

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

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

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

Recommendation 10

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

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

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

International organisations

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

Recommendation 11

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

Terrorism and the law of armed conflict

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

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

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

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

49 Division 71 of the *Criminal Code*.

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

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

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

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

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

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

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

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

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

53 Art. 51, paragraph 4, Protocol I.

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

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

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

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

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

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

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

Recommendation 12

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

Personal terrorism offences – Division 101

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

- an act of terrorism (s.101.1);

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

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

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

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

Hoax offences

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

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

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

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

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

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

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

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

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

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

Recommendation 13

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

Terrorist organisation offences – Division 102

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

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

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

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

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

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

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

(c) directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment) to engage in a terrorist act.

Advocacy

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

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

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

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

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

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

- 5.62 The Explanatory Memorandum states that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

74 Sheller Report, p.71.

75 Sheller Report, p. 73.

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

Recommendation 14

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

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

Terrorist organisation offences

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

Membership of a terrorist organisation

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

76 Section 102.1 of the *Criminal Code*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 15

The Committee recommends that the Government consider:

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

Training offences

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

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

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

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

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

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

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

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

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

Recommendation 16

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

Getting funds to and from or for a terrorist organisation

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

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

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

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

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

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

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

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

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

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

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

Recommendation 17

The Committee recommends that:

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

Providing support to a terrorist organisation

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

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

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

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

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

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

93 For discussion, Sheller Report, p.122.

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

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

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

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

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

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

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

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

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

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

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

Recommendation 18

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

Associating with a terrorist organisation

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

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

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

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

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

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

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

Recommendation 19

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

Reverse onus provisions

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

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

Presumption of Innocence

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

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

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

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

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

Views of the Sheller Committee

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

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

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

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

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

Recommendation 20

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

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

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

Suppression of the Financing of Terrorism

- 6.1 This Chapter deals with the financing of terrorism offences contained in Division 103 of the Criminal Code and list and offence regime under *Charter of the United Nations Act 194*.
- 6.2 The *Suppression of the Financing of Terrorism Act 2002* (SFTA):
- created an offence of financing terrorism directed at persons who provide or collect funds with the intention that the monies be used to facilitate terrorist activities;
 - requires cash dealers to report suspicious transactions;
 - enables the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Commissioner of the AFP and Director-General of Security - ASIO to disclose financial transaction reports directly to foreign countries, foreign law enforcement and foreign intelligence agencies; and
 - amended the *Charter of the United Nations Act 1945* to increase the penalties for the offence of providing assets to or dealing in assets of those engaged in terrorist activities.
- 6.3 The SFTA implements Australia's international legal obligations under the International Convention on the Suppression of the Financing of Terrorism and United Nations Security Council resolutions 1267 and 1373. It also responded to the United Nations Financial Transaction Task Force (FATF) recommendations on terrorist financing.

Financing terrorism

- 6.4 Division 103 of the *Criminal Code* contains two financing of terrorism offences. It is an offence to:
- intentionally provide or collect funds where the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act;¹
 - intentionally makes funds available to another person (whether directly or indirectly); or collect funds for or on behalf of another person (directly or indirectly) where the person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.²
- 6.5 Both offences attract up to life imprisonment and apply whether or not:
- a terrorist act occurs;
 - the funds will not be used to facilitate or engage in a specific terrorist act; or
 - the funds will be used in relation to one or more terrorist acts.³

Fault element

- 6.6 Each offence applies the fault element of intention to the actual provision, collection, the making of funds available or collection of funds on behalf of another. The fault element that applies to the connection between the conduct to acts of terrorism is the lower threshold of 'recklessness'. Chapter 2 of the *Criminal Code* defines the fault elements of 'intention', 'knowledge', 'recklessness' and 'negligence'.⁴ Recklessness requires awareness of a substantial risk that the result will occur and, having regard to the circumstances known to the person, it is unjustifiable to take the risk.⁵ The question whether taking a risk is unjustifiable is one of fact.⁶

1 Paragraphs 103.1 (1)(a)(b) of the *Criminal Code*; the offence was repealed and substituted in the same terms by *Criminal Code Amendment (Terrorism) Act 2003*.

2 Subsection 103.2 (1) of the *Criminal Code*; the offence was inserted by the *Anti Terrorism Act (No.2) 2005* (Cth).

3 Paragraphs 103.1(2) (a)(b)(c) of the *Criminal Code*.

4 See Chapter 2 Division 5 – Fault Elements sections 5.1 – 5.6 of the *Criminal Code*.

5 Section 5.4(4) of the *Criminal Code*.

6 Section 5.4(3) of the *Criminal Code*.

6.7 UNSCR 1373 and Article 2 of the International Convention on the Suppression of the Financing of Terrorism require 'specific intent' or at least 'knowledge' that the funds are to be used in order to carry out terrorist acts. For example, UNSC 1373 1(b) obliges Member States to:

Criminalise wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

6.8 Under the *Criminal Code* 'knowledge' is a higher fault element than recklessness and appears to be more in keeping with the intention of UNSCR 1373.1(b). Knowledge is defined as:

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.⁷

6.9 The Sheller Committee recommends that, for clarity and consistency of drafting that section 10.3(1) (a) be expressed clearly to require intention to provide or collect funds. While this is desirable, it addresses only the drafting issue and not the substantive question, which is the appropriate fault element to be applied.

6.10 The maximum penalty for each of the financing of terrorism offences is life imprisonment. This is the highest possible penalty available under the *Criminal Code* and means that financing terrorism offences are treated as seriously as if the person had carried out an act of terrorism themselves. For example, the maximum penalty of life imprisonment is available where 'a person engages in a terrorist act' or 'does any act in preparation for, or planning a terrorist act'.⁸

6.11 AGD has also previously argued that applying 'intention' to the conduct and 'recklessness' as to the connection with funding terrorism is consistent with the *Criminal Code*. However, we note that, personal terrorism offences in Division 101, which attract a lower maximum penalty, require the higher standard of 'knowledge' of the connection between the conduct and a terrorist purpose.⁹ It would not

7 Section 5.3 of the *Criminal Code*.

8 See sections 101.1 and 101.6 of the *Criminal Code*.

9 For example, a person who provides or receives training that is connected to the preparation, engagement or assistance must have knowledge of that connection to attract the penalty of 25 years (s.101.2). Similarly, the offence of possession of things connected

be inconsistent to raise the fault element in section 103.1 and 103.2 at least to 'knowledge' in respect of the second limb of the offence.

- 6.12 A requirement of 'knowledge', rather than 'recklessness', would improve the certainty about the intended scope and application of the offence. This would seem appropriate in light of the penalty of life imprisonment and the fact that the offences do not require proof of any connection to a specific act or acts of terrorism.¹⁰
- 6.13 The offence has potentially wide reach. For example, it is possible that if a person who donates to a charity may be alleged to be reckless as to whether their donations will facilitate acts of terrorism. During hearings, a number of witnesses raised concerns about donations to Tsunami relief efforts. The Australian media has reported that some members of an Indonesian medical relief organisation (which uses a Commonwealth Bank account to collect funds) have close links to extremist groups.¹¹ The question of terrorist financing has also been raised in the context of the Cole Inquiry.

Specificity of section 103.1 and 103.2

- 6.14 The Sheller Committee observed that section 103.1 is unclear as to whether the recipient of the funds is an individual or an organisation but the offence is broad enough to cover both. Further, that section 103.2, was introduced to confirm Australia's commitments to FATF's Special Recommendations on Terrorist Financing but does not identify that the recipient should be an individual terrorist. The Sheller Committee recommends that 103.2(1) (b) be amended to make clear the intended recipient of the funds is a 'terrorist' to bring the provision in line with the FATF's recommendation.¹²

with a terrorist act requires knowledge to attract the higher penalty of 15 years imprisonment (s.101.4). The offence of collecting or making documents likely to facilitate a terrorist act requires knowledge for the 15 years maximum penalty (101.5). Each of these offences is structured so that where the person is reckless as to the circumstances or the result lower maximum penalties applies to the same conduct.

- 10 Nor are sections 103.1 and 103.2 limited to proscribed terrorist organisations or individuals or entities listed under the *Charter of the United Nations Act 1945*.
- 11 Morgan Mellish, *CBA caught in terrorism funding alert*, Australian Financial Review, 27 September 2006, p. 1; AAP, *CommBank denies terrorism funding claims*, Sydney Morning Herald, 27 September 2006 see also, *Muslim Scholar Barred by US Denies Support for Terrorism*, New York Times, 26 September, 2006 concerning an Swiss born Oxford University academic denied a visa on the grounds that he has provided \$770 to the French based Committee for the Charity and Aid to the Palestinians in 2000.
- 12 Sheller Report, p.161.

- 6.15 The Government has rejected the proposal on the ground that it introduces a new concept and that, in any case, the offence only applies to a person (an individual) who will engage in a terrorist act (a terrorist), which would necessarily make that person an 'individual terrorist'.¹³ Given that the offence is not linked to the commission of any acts of terrorism and requires recklessness not intention (that the funds be used for a terrorist purpose), it is theoretically possible to apply the offence in the absence of any terrorist conduct.

Recommendation 21

The Committee recommends that:

- section 103.1 be amended by inserting 'intentionally' after 'the person' in paragraph (a) and removing the note;
- that recklessness be replaced with knowledge in paragraph (b).

The Committee recommends that paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.

Charter of the United Nations Act 1945

- 6.16 This section deals with amendments to that introduced new Part 4 to the *Charter of the United Nations Act 1945*, (COUNA) which provided offences directed at those who provide assets to, or deal in the assets of, persons and entities involved in terrorist activities and associated provision allowing for the Minister for Foreign Affairs to list persons and entities, for the purpose of those offences.
- 6.17 On 8 October 2001 the Government made the *Charter of the United Nations (Anti terrorism Measures) Regulations 2001* (the Regulations) to give effect to United Nations Security Council Resolution 1373 1 (c) and (d). The SFTA superseded the Regulations, brought the offences into the principal statute and imposed higher penalties.
- 6.18 AGD advised the Sheller Committee that 538 individuals and entities (plus their various aliases) have been listed under the COUNA. Eighty-nine of these individuals and entities have been listed by the Foreign Minister under section 15 as being associated with terrorism

13 AGD, *Submission 14*, p.10.

as provided in paragraph 1 (c) UNSCR 1373. The remainder, 492 are individuals or entities that have been listed by the United Nations 1267 Sanctions Committee as being affiliated with the Taliban or Al-Qa'ida.

- 6.19 It was reported that there has been only one case in which assets have been frozen. On 27 August 2002, three bank accounts held by the International Sikh Youth Federation (ISYF) totalling \$2,196.99 were frozen. The ISYF had been listed by the Minister for Foreign Affairs under the earlier *United Nations (Anti- terrorism Measures) Regulations 2001*. It was also reported that the AFP receive about five inquiries per week from financial institutions who think they have found a match with the Consolidated List.¹⁴

Criminal offences

- 6.20 Unless authorised under section 22, it is an offence punishable by five years imprisonment for a person:

- who holds a freezable account to use or deal or allow the asset to be dealt with¹⁵; or
- to directly or indirectly make an asset available to a proscribed person or entity.¹⁶

- 6.21 These offences give effect to Australia's international obligations, however, there were a number of criticisms including:

- no knowledge is required on the part of the offender that the asset is listed or is an asset of a proscribed organisation, and
- there is no requirement that the asset dealt with or given to a proscribed person or entity is connected to a terrorist activity;
- the offences are ones of strict liability.

- 6.22 The Sheller Committee accepted the offences are necessary to implement United Nations Security Council 1373. However, consistent with the view of strict liability generally, the Sheller Committee recommended that strict liability should not apply.

14 AGD, *SLR Submission 14*, p.26.

15 Section 20 of the COUNA.

16 The Taliban, Usama bin Laden, a member of Al-Qai'da, or a person or entity names in the list of the Committee established under paragraph 6 of the UNSCR 1267; section 21 COUNA and COUNA Regulation 6A.

Proscription mechanisms

- 6.23 The listing of a person, entity or assets is separate to the proscription of an organisation as a terrorist organisation under Division 102 of the *Criminal Code*. The listing of person, entities and assets for the purpose of the COUNA may occur in two ways: listing by the Minister under section 15 or by regulation made by the Governor-General under section 18. Assets may only be listed by the Minister.
- 6.24 Listing by the Minister is intended to implement UNSCR 1373. The Minister must list a person or entity¹⁷ and may list an asset, or class of asset¹⁸ if satisfied of prescribed matters, which may be set out in regulations and must be related to:
- a decision of the Security Council has made under Chapter VII of the Charter of the United Nations; and
 - article 25 requires Australia to carry out, and
 - relates to terrorism and dealings with assets.¹⁹
- 6.25 Regulation 6²⁰ prescribes that:
- the Minister must list a person or entity if the Minister is satisfied that the person or the entity falls within the definition of paragraph 1 (c) UNSC 1373 for the purpose of subsection 15(1); and
 - may list an asset, or class of asset, if the Minister is satisfied that the asset of class or asset is owned or controlled by a person or entity mentioned in paragraph 1 (c) of UNSCR 1373.
- 6.26 Listings by regulation for the purpose of section 18 include the Taliban, Usama bin Laden, members of the Al Qai' da organisation and a person or entity named on the listed by the United Nations Sanctions Committee as it exists from time to time.²¹

17 Subsection 15 (1) of the COUNA.

18 Subsection 15 (3) of the COUNA.

19 Subsection 15(5) of the COUNA.

20 *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*.

21 Resolution 1267 established the Al-Qai' da and Taliban Sanctions Committee (which consists of all members of the UNSC). UNSCR 1267 paragraph 4(b), UNSCR 1333 paragraph 8 (c); and UNSCR 1390 paragraph 2 require States to freeze the assets of persons mentioned in regulation 6A, and of entities directly or indirectly controlled by them. The Sanctions Committee has a mandate to list individuals and organisations, which is updated and reviewed based on information provided by Member States or regional or international organisation. See Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qa'ida and the Taliban and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of its Work*, adopted on

Notification of listing to the financial services sector

- 6.27 It is the responsibility of banks and financial institutions to ensure they comply with any requirements to freeze the assets of their clients. However, the Department of Foreign Affairs (DFAT) has a duty to maintain a consolidated list of all persons, entities and all assets or classes of asset currently listed in an electronic version and publicly available on the internet.²² DFAT may give notice of decisions of the Minister under section 15 to list a person or entity, or an asset or class of assets to any person who is engaged in the business of holding, dealing in, or facilitating dealing in assets before the listing is published in the *Gazette*.
- 6.28 From the moment a person or entity is listed in the *Gazette* an obligation to freeze the assets of that individual or entity under Australian law is automatically activated.²³ There is no separate provision for notification in relation to listing by regulation but, in practice, the Consolidated List is updated when the Sanctions Committee amends its own list and, therefore, is incorporated into the notification system.
- 6.29 DFAT has established a computerised search facility, using software developed for the purpose, and an electronic notifications system: see http://www.dfat.gov.au/icat/freezing_terrorist_assets.html#8. The system enables the financial sector and other professional dealers in assets to receive information in advance of official listing.
- 6.30 However, it is unclear how widely the financial sector is aware of their obligations and how widely the notification system is used. Australia said in its 2003 report to the United Nations Sanctions Committee, that the system will 'enable banks and other large asset

7 November 2002, as amended on 10 April 2003 and revised on 21 December 2005; see also UNSCR 1390 paragraph 2.

22 Regulation 8 of the Regulations.

23 Australia has reported that no designated individual had been identified in Australia; Australia has not sought to submit additional names to the Sanction Committee for listing and none of the designated or listed individuals had brought a lawsuit or engaged in legal proceedings against Australian authorities for inclusion in the list; see *Note Verbale dated 15 April 2003 from the Permanent Mission of Australia to the United Nations addressed to the Chairman of the Committee, Security Council Committee (established under UNSCR 1267 1999), S/AC.37/2003/(1455)/13*, p.3; Australia has reported that no designated individual had been identified in Australia; Information about the UN Sanctions Committee list is available at:

<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>

holders to perform searches of their holdings, which can take longer than twenty-four hours, in advance of formal dissemination.²⁴

Review and delisting

6.31 The Sanctions Committee Guidelines provide that individuals, entities and groups may petition the government of residence or citizenship to request a review of the case.²⁵ The European Court of Justice (First Instance) has confirmed that individuals and entities in the European Community (EC) have a right of petition to the Sanctions Committee through their national government.²⁶ The Court also found that EC Members are bound to observe the fundamental rights of the person. In particular:

- to ensure, so far as possible, the person concerned is in a position to argue their point effectively before competent national authorities;
- may not refuse to initiate the review procedure solely because the person could not provide precise and relevant information, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question, on account of the confidential nature of those reasons; and
- are bound to act promptly in order to ensure that such persons' cases are presented without delay and fairly and impartially to the Sanctions Committee, if that appears to be justified in the light of the relevant information supplied;

6.32 The Court also found that, in addition, the persons concerned may bring an action for judicial review before the national courts against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination.

24 *Note Verbale dated 15 April 2003 from the Permanent Mission of Australia to the United Nations addressed to the Chairman of the Committee, Security Council Committee (established under UNSCR 1267 1999), S/AC.37/2003/(1455)/13, p.7.*

25 The Guidelines provide that national level consideration with bilateral and subsequently multilateral consideration of the request for delisting.

26 On 19 October 2001 Mr Chafiq Ayadi, a Tunisian national resident in Dublin, Ireland and on 20 November 2003, Fraja Hassan, a Libyan national held in Brixton Prison, UK were added to the European Community List. They appealed to the ECJ seeking review of their inclusion on the List; see *Chafiq Ayadi v Council of the EU Case T -253/02*; *Faraj Hassan v Council of the EU and Commission of the EC, Case T-49/04*.

Right to review under Australian law

- 6.33 It has been argued that the administrative listing processes pursuant to UNSCR 1267 and 1373 lack democratic and juridical control. Listings by regulation may be subject to disallowance by the Parliament but, unlike the listing of terrorist organisations under section 102.2 of the *Criminal Code*, listing under COUNA is not subject to scrutiny through a parliamentary committee. There is no suggestion that there are systemic or egregious mistakes in the Consolidated List, rather that provision for review would guard against a listing, which cannot be objectively justified, is based on incorrect or out of date information or mistaken on some other basis.
- 6.34 The importance of procedural safeguards was argued on the basis that, while the Sanctions Committee list is restricted, the effect of UNSCR 1373 combined with broad definitions of terrorism in domestic law significantly extends the reach of COUNA provisions and the criminal offences, which are triggered by a listing. It was said that the lack of procedural safeguards should be addressed in order to ensure that right of access to the court is preserved. The same issues have been raised in the comparable jurisdictions, and, especially within the European Community.²⁷
- 6.35 The Sheller Committee accepted evidence that hearings prior to listing would defeat the objective of listing assets. This Committee agrees with that position. However, it is conceivable that, in the future, an Australian or a person within Australia or an asset, which affects the interests of an Australian person or company may be subject to listing. A person suspected of involvement in terrorism, is clearly open to listing for the purpose of freezing his or her assets. There are potentially significant consequences including, for example, the ability to remain in the country, to access employment, conduct a business, the need to meet financial and domestic needs of a family, which may arise from such circumstances.
- 6.36 Under the current law, a person or entity may apply to the Minister to have the listing of a person, entity or asset under section 15 revoked.²⁸ The provision for first instance internal review by the Minister was

27 For example, Professors Bill Bowring and Douwe Korff, *Terrorist Designation with Regard to European and International Law: The case of the PMOI*, November 2004.

28 Sections 15, 16 and 17 of the COUNA; the application must be in writing and set out the circumstances to justify the application. There is no obligation to consider the application if one has previously been made within 12 months of the current listing

introduced by the SFTA amendments. However, there is no provision for external merit review and judicial review is limited.

- 6.37 It has been said that in the UK the Proscription of Organisations Appeals Commission (POAC) provides external merit review of the equivalent decision to list in the UK. However, the POAC jurisdiction appears to be limited to review of proscription for the purpose of the *Terrorism Act 2000* and does not orders to freeze terrorist assets, which are dealt with by separate legislation.²⁹ Nevertheless, the principle is a valid one and warrants consideration. The UK Government has also recently announced that it will create a special advocate system, to facilitate the use of closed source evidence in appeals and reviews of decisions to freeze assets and report quarterly to the Parliament on the operation of the UK's asset freezing regime.³⁰
- 6.38 Nor is there separate provision for internal review if the listing has occurred by regulation. There may be a lacuna in the law in this respect, however, it does not seem appropriate to us that where a person or entity is listed by the United Nations Sanctions Committee it would be subject to separate review by an administrative tribunal. The matter is one for the United Nations Sanctions Committee and not a domestic tribunal. Nevertheless, as noted above, the guidelines of the Sanctions Committee and the existing European jurisprudence indicates that a person or entity listed regulation under section 18, should also have the opportunity to seek review of the UN Sanctions Committee listing through the national government.
- 6.39 Further, in principle, the decision of the Minister that he is 'satisfied' that prescribed matters have been met is subject to judicial review under the *Administrative Decision Judicial Review Act 1975* (ADJR). The ADJR allows for review of 'decisions of an administrative character' on grounds such as denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law. It is arguable that a court will only be able to inquire as to whether the opinion could be considered as having been 'formed by a reasonable man who correctly understands the meaning of the law under which he acts'.³¹

29 Part 2 and Schedule 3 of the *Anti-Terrorism, Crime and Security Act 2001* (UK); *The Al-Qa'ida and Taliban (United Nations Measures) Order 2002*.

30 Ministerial Statement of Mr Ed Ball, Economic Secretary to the Treasury, Terrorist Finance, 10 October 2006 available at: <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm061010/wmstext/61010m0001.htm#061010148000123>

31 *R v Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at 430.

On this view, unless the discretion is framed in terms of 'on reasonable grounds' that a court would be unable to assess the decision by reference to any objective criteria.³² There appears to be an inconsistency between COUNA and section 102.2 of the *Criminal Code* in this regard.

Recommendation 22

The Committee recommends that:

- **external merit review of a decision to list a person, entity or asset under section 15 of the COUNA should be made available in the Administrative Appeal Tribunal;**
- **section 15 and regulation 6 be amended so that the Minister must be satisfied on reasonable grounds that the person, entity, asset or class of assets falls within the scope of UNSCR 1373;**
- **COUNA should be amended to provide that a person or entity listed by regulation is entitled to seek review as a step in the process of review by the Sanctions Committee.**

³² Tapley M, *Suppression of the Financing of Terrorism Bill 2002*, Bills Digest No.127 2001-2002, Department of the Parliamentary Library, May 2002, p.13.

Border Security

- 7.1 The *Border Security Legislation Amendment Act 2002* (BSLA) amended the *Customs Act 1901* (Customs Act) and four other Acts.¹ Among other things the BSLA:
- increased the role of Customs enabling customs officer to patrol airports, expanded the areas under restriction and conferred powers to remove a person from a restricted area;
 - expanded provisions relating to the authorisation of the carriage of firearms and personal defence equipment by Customs officers;
 - required employers of staff in restricted areas and issuers of security identification cards to provide information to Customs on people who work in restricted areas;
 - increased reporting of goods in transit through Australia and powers of inspection and search and seizure of goods in transit;
 - required certain airlines and shipping operations to report passenger and crew information to Customs and Department of Immigration and Multicultural Affairs (DIMA) electronically and certain airlines to provide Customs with access to their computer reservation systems (advance checking).
- 7.2 The key issues raised during the Sheller Inquiry and considered during this review include:

¹ See Ireland I., *Border Security Legislation Amendment Bill 2002*, Bills Digest No.123 2001-2002, Department of the Parliament Library, April 2002.

- regulation of issuing and use of firearms;
- privacy issues – access to passenger information from Europe;
- expansion of search and seizure powers.

Firearms

- 7.3 Firearms have been available for use since 1999 by Customs marine crews when operating far from shore and away from the support of armed Defence or police personnel. The BSLA introduced a system of ‘arms issuing officers’, which are regulated through CEO Directions and Orders. The section 189A of the Customs Act provides that, subject to directions from the CEO, firearms may be issued and used for purposes, including the safe exercise of powers conferred on an officer (authorised to carry arms) under the Customs Act or any other Act. The type of firearms are specified in Customs Regulation 168 and include: Colt M16 automatic rifle; Glock 9 mm semi-automatic pistol; Remington 870 Marine Magnum shotgun; CZ.22 Bolt Action Rifle; Browning 0.50 Calibre Infantry Machinegun; FN Herstal General Support Machine Gun (GSMG) MAG 58 (7.62mm).
- 7.4 The Sheller Report canvasses the objections to extending the use of firearms by Customs. Submissions argued that carrying firearms significantly increases risk of injury and death to Customs staff, the public and others working where firearms are being carried. Earlier practice was to rely on AFP for armed support if necessary. It was said that the use of firearms should be, reserved to the police who are subject to a police integrity and accountability framework and who are specifically trained in the use of firearms.² There was also concern that expanding the number of agencies allowed to use firearms fetters and disperses the powers of the AFP.³
- 7.5 The Sheller Committee concluded that it was satisfied that the training of Customs officers and the protocols for the use of force and rules of engagement have been developed in consultation with the AFP. The AFP gave evidence that it believes that Customs has established the accountability requirements equivalent to the AFP for

2 Sheller Report, p.174-176.

3 Sheller Report, p. 175.

the issue, use and handling of incidents involving the use of force in a Customs environment.⁴

- 7.6 As noted, under the Act the use of firearms must be dealt with by CEO directions, which in turn rely on CEO orders. CEO orders on the use of force and rules of engagement are not publicly available and are classified Protected. The Committee has seen these documents and is satisfied that they are both comprehensive and appropriate.

Privacy and Passenger Name Records

- 7.7 Customs has operated a voluntary scheme to access passenger information on the basis of a series of Memorandum of Understanding (MOU) with various airlines for some time. The introduction of section 64AF of the BSLA, made it mandatory for an operator of an international passenger air service to Australia to provide on-going access to its passenger information on request from the CEO of Customs.⁵
- 7.8 During the Sheller Inquiry, it was reported that the CEO had written to forty-seven airlines operating international flights into Australia; that the Passenger Analysis Unit (PAU) is connected to twenty-eight airlines with full analytical capability for nineteen and limited analytical capability for nine airlines. This gives Customs 92.5% of total passenger movements into and out of Australia.⁶ During the Committee's hearings, this number had increased to thirty-two airlines covering approximately 95% coverage. Connections with Jetstar, Virgin Atlantic, Royal Tongan Airlines and Milne Bay Airlines are yet to be established.⁷
- 7.9 Under subsection 64AF(6) 'passenger information' means 'any information' the operator keeps electronically in relation to:
- operator scheduled flights (inc. departures, arrivals and routes);
 - payments by people of fees relating to scheduled flights; and

4 Sheller Report, p.176.

5 It is an offence for an operator of an international passenger air service to fail to provide access to passenger information in a manner and form in which it is requested by the CEO of Customs. Penalty: 50 penalty units; s.64AF of the Customs Act.

6 Customs, *SLR Submission*, p.14.

7 Customs, *Transcript*, 1 August, 2006, p.42.

- people taking, or proposing to take, flights scheduled by the operator;
- passenger check in and seating;
- baggage, cargo or anything else carried or proposed to be carried and the tracking and handling of those things; and
- itineraries (including any information about things other than flights scheduled by the operator) for people taking, or proposing to take operator scheduled flights.

7.10 The Committee asked for clarification about the precise nature of the information obtained. Customs advised that the following information is obtained through the reservation system:

- name, title;
- date and place of ticket purchase;
- ticket details such as number, fare class, travel itinerary, payment mode;
- flight book date;
- whether the passenger is a member of a tour group;
- check in details such as number of hold baggage items and weight, whether bags are pooled, bag tag numbers, allocated seating, check in time; and
- reservation/check in agency remarks such as contact details, seating preferences, whether passenger is a frequent 'no show' for booked flights, travel agency details and any other information relevant to a passengers travel.⁸

Scope of Passenger Name Records

7.11 The compulsory acquisition of passenger information is broader than terrorism, and extends to import or export of prohibited goods or other offences against Commonwealth law.⁹ An authorised officer may only access passenger information for the purpose of:

- performing his or her function under the Custom's Act or

8 Customs, Response to Question on Notice, *Supplementary Submission 21*, p.2.

9 Explanatory Memorandum, p. 45.

- another law of the Commonwealth prescribed by regulation.¹⁰
- 7.12 The Committee notes that the regulations now prescribe thirty-four different Commonwealth Acts for the purpose of access to the passenger information.¹¹ Although the policy rationale for access relates to possible offences under other Commonwealth Acts, this is not specified in the provisions of the Customs Act itself.

Recommendation 23

That the Customs Act be amended to specify that access to passenger information for the purpose of another law of the Commonwealth is limited to the investigation of serious crimes prescribed by regulation.

European Union Privacy Directive

- 7.13 The Committee is aware that the question of Passenger Name Records (PNR) is highly sensitive in the European context. European airlines, or airlines with their head office based in a Member State of the European Union (EU), have obligations under the European Privacy Directive 95/46/EC.¹² The European Parliament has given the European Commission the power to determine,¹³ whether a third country ensures an adequate level of protection by reason of its domestic law or of the international commitments it has entered into. The Sheller Committee notes that Australia's privacy laws and PNR transfers have not been deemed 'adequate' and negotiations are ongoing.
- 7.14 Since the Sheller Committee reported in April 2006, the European Court of Justice (ECJ) has also ruled that the EU agreement with the US and Canada is defective. On 30 May 2006, the ECJ issued a ruling, annulling the decisions of the European Commission and European

10 For example, *Migration Act 1958 and Financial Transactions Reports Act 1988*.

11 Customs Regulation 31 AAA

12 Direction 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data., Official Journal of the European Communities of 23 November 1995 No.L.281, p.31.

13 Article 25(6) of the Privacy Directive.

Council on which the agreement was based.¹⁴ The European Parliament argued that the legal basis of the decisions were flawed and infringed fundamental rights.¹⁵ Although the decision turned on the question of the lawfulness, it illustrates the extent to which the issue of privacy protection is a very live one in Europe. The ECJ imposed a deadline of 30 September 2006 for the annulment to come into effect.

- 7.15 From an Australian perspective, this creates a further complication in the negotiation of clear and binding agreement between European states and Australia. The European Parliament has agreed that it would authorise access by public authorities to passengers personal data for security purposes when necessary for identification purposes and for the purposes of cross checking them against a 'watch list' of dangerous persons or known criminals or terrorists.¹⁶ But expressed its concern about the systematic access by public authorities of data linked to the behaviour of 'normal' passengers to check against a theoretical pattern whether such a passenger might constitute a 'potential' threat to the flight, his or her country of destination or a country through which he or she will transit.¹⁷

14 There were a number of interveners including Mr Hustinx, the European Data Protection Supervisor, who argued that the US commitments in relation to privacy rights were unsatisfactory. The German Federal Data Protection Commissioner and Chair of the Art.29 Working Party of the European State Protection Commissioners has also stated that the US is failing to comply with undertakings about the use of personal information; Council of the European Union, Note from the General Secretariat of the Council of the European Council, Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, *Information Meeting with the national parliaments of the Member States: "The consequences of the judgement of the European Court of Justice on the 'Passenger Name Records' (PNR) at the national and European level (Joined Cases C-317/04 and C-318/04)"*, Brussels, 10925/06, PE 224, 22 June 2006.

15 European Convention on Human Rights and Fundamental Freedoms protects the right to privacy and permits derogation only in exception cases (art.8) The ECHR is supervised by the European Court of Human Rights. The right to privacy is also a protected by the Charter of Fundamental Rights of the EU, which has constitutional status and is binding on the EU Parliament, the Council of the European Union and the European Commission (art.7).

16 As stated in the European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Recommendation, 3 July 2006.

17 Resolution on transfer of personal data by airlines in the case of transatlantic flights 13/3/03/ doc. P5_TA (2003) 0097, resolution on transfer of personal data by airlines in the case of transatlantic flights: state of negotiations with the USA (9/10/02)doc. P5_TA (2003) 0429, and the Resolution on the draft Commission decision noting the adequate level of protection provided for personal data contained in the PNR transferred to the US Bureau of Customs Border protection (2004/20011 (INI) (31/3/04)doc. P5_TA (2004) 0245.

- 7.16 The European Parliament's Committee on Civil Liberties, Justice and Home Affairs has raised concerns that sharing passenger data is developing into a blanket security screening and 'catching a plane will license the screening of passengers for any sort of crime, for instance, tax offences or detention for the personal use of drug..'.¹⁸
- 7.17 The Committee sought some clarifying information about the extent of the PNR system under Australian law. Customs reported that:
- Customs does not conduct predictive profiling on passenger information. The analysis software used by Customs automatically profiles against PNR data elements to identify passengers who travel or other information indicates one or more factors that indicate risk.¹⁹
- 7.18 The Committee also notes that the BSLA does not impose any time period restrictions on the retention of personal information. Customs advised that:
- Customs does not retain or store any passenger information unless the passenger has been identified undertaking an illegal activity or the information is needed as intelligence to assist in investigation of a suspected offence.²⁰
- 7.19 During the Sheller Inquiry, Customs recommended that section 64 AF be amended to permit retention of passenger information and during hearings it was said that section 64 AF should be amended to permit the retention of passenger information for a limited time in order to conduct analysis if the European Commission does not accept the adequacy of the Australian PNR access system.²¹ On 6 October 2006, the President of the EU and USA concluded an interim agreement on PNR, which, among other things, includes a time limit of three and a half years on retention of data.²²

18 Explanatory Statement, Proposal for A European Parliament Recommendation to the Council, on Recommendation from the Commission to the Council for an authorisation to open negotiations for an agreement with the USA on the use of passenger name records (PNR) data to prevent and combat terrorism and trans-national crime, including organised crime.

19 Customs, Response to Question on Notice, *Supplementary Submission 21*, p.2.

20 Customs, Response to Question on Notice, *Supplementary Submission 21*, p.2.

21 Transcript of Public Hearings, Canberra, 3 February 2006, as cited Sheller Report, p.178.

22 Note from the Presidency of the EU to EU Council 13668/06: Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, Brussels, 6 October 2006. The Interim Agreement also changes the

Recommendation 24

The Committee recommends that:

- the Customs Act be amended to specify that retention of passenger information be permitted for a limited time in order to conduct analysis;
- that the Minister for Customs report to the Parliament on the status of negotiations with European States in relation to passenger information.

Office of Privacy Commissioner Audits

7.20 The Office of Privacy Commissioner has conducted two audits of PAU of the Customs Service to ensure that new powers to access advance airline passenger information is done consistently with *Privacy Act 1988* (Cth) (the Privacy Act). However, while handling practices comply, because they are 'required by law' the Privacy Commissioner said such powers detract from the spirit of the Privacy Act and should remain subject to ongoing oversight and accountability.

7.21 Suggestions have been made that:

- passengers should be provided with more information about access by agencies to their personal information;
- an industry code should be developed; and
- Customs should have a 'read only' access to passenger and crew information.²³

7.22 The Sheller Committee noted that this is one of the few areas of operation where the law is actively monitored and recommended that it remain subject to bi-annual audit. The Committee agrees that the Privacy Commissioner should have an ongoing oversight role, which includes regular monitoring.

existing 'pull system', that is, automatic access to airline reservation databases to a 'push' system, which relies on provision of information in response to a request.

23 Law Institute of Victoria, *Submission 23*, p.9.

Recommendation 25

The Committee recommends that the Privacy Commissioner retain an ongoing oversight role in relation to passenger name records, which includes biannual monitoring of the Passenger Analysis Unit.

Customs seizure warrants

- 7.23 Finally, in relation to new seizure warrants, the Law Council of Australia suggest that the subject of a seizure warrant involving entry to premises should be provided with a statement of rights and obligation.²⁴ Also, the onus of proof should be on Customs to prove the basis of the seizure rather than on an owner during application for return of the goods.
- 7.24 We note that there was no discussion of this issue in the Sheller Report. However, these are relatively minor and practical changes that ensure that Customs operates under an appropriate level of accountability.

Recommendation 26

The Committee recommends that:

- **the subject of a seizure warrant involving entry to premises should be provided with a statement of rights and obligations;**
- **that Customs bear the onus of proving the basis of the seizure.**

²⁴ Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report, 6 April, 2000, paragraph 4.76.

A

Appendix A – COUNTER TERRORISM TREATIES

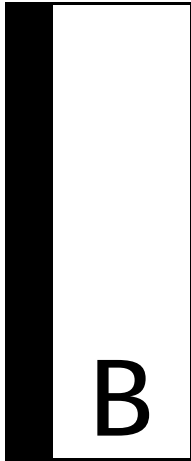
	Title	Date	Implementing legislation	Commencement date
1	Convention on Offences and Certain Other Acts Committed on Board Aircraft	1963	Civil Aviation (Offenders on International Aircraft) Act 1970 [now the Crimes (Aviation) Act 1991]	Ss. 1, 2 and 5: Royal Assent (12 June 1970) Remainder: 20 Sept 1970 (see Gazette 1970, p. 6262)
2	Convention for the Suppression of Unlawful Seizure of Aircraft	1970	Crimes (Hijacking of Aircraft) Act 1972 [now the Crimes (Aviation) Act 1991]	Ss. 4, 5 and 7-23: 28 Aug 1973 (see Gazette 1973, No. 113, p. 3). Remainder: Royal Assent (27 Oct 1972)
3	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation	1971	Crimes (Protection of Aircraft) Act 1973 [now the Crimes (Aviation) Act 1991]	Ss. 1-3, 6 and 21-23 commenced on Royal Assent (27 May 1973); remainder commenced 1 October 1975 (see Gazette 1975, No. G36, p. 2)

	Title	Date	Implementing legislation	Commencement date
3a	<i>Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation</i>	1988	<i>Crimes Legislation Amendment Act 1991</i>	4 March 1991
4	United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents	1973	Crimes (Internationally Protected Persons) Act 1976	S. 11: 20 July 1977 (see Gazette 1977, No. S145) Remainder: Royal Assent (28 Feb 1977)
5	Convention against the Taking of Hostages	1979	Crimes (Hostages) Act 1989	20 June 1990 (see Gazette 1990, No. S145)
6	Convention on the Physical Protection of Nuclear Material	1980	Nuclear Non-Proliferation (Safeguards) Act 1987	Ss. 1 and 2: Royal Assent (17 Mar 1987); Ss. 23-26: 31 Mar 1988 (see Gazette 1988, No. S68); Ss. 32-38: 28 Oct 1987 (see Gazette 1987, No. S284); Remainder: 31 Mar 1987 (see Gazette 1987, No. S57)
7	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation	1988	Crimes (Ships and Fixed Platforms) Act 1992	Parts 2 and 3 (ss. 8-29): 20 May 1993 (see Gazette 1993, No. GN19); Remainder: Royal Assent (11 Dec 1992)

	Title	Date	Implementing legislation	Commencement date
7a	<i>Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf</i>	1988	<i>Crimes (Ships And Fixed Platforms) Act 1992</i>	<i>See above</i>
7b	<i>Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 ([1993] ATS 10)</i>	2005	<i>Australia signed on 07/03/2006. No legislation</i>	
7c	<i>Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988 ([1993] ATS 11)</i>	2005	<i>Australia signed on 07/03/2006. No legislation</i>	
8	Convention on the Marking of Plastic Explosives for the Purpose of Detection	1991	Treaty tabled 11/10/2005. JSCOT report tabled 14 August 2006. Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006 introduced 7 September 2006.	
9	International Convention for the Suppression of Terrorist Bombings	1998	Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002	Schedule 1: 8 Sept 2002 (see Gazette 2002, No. S331); Remainder: Royal Assent (3 July 2002)

	Title	Date	Implementing legislation	Commencement date
10	International Convention for the Suppression of the Financing of Terrorism	2000	Suppression of the Financing of Terrorism Act 2002	Schedule 1 (item 1): Royal Assent (5 July 2002); Schedule 1 (item 2): 6 July 2002; Schedule 1 (item 3): 6 July 2002
11	International Convention for the Suppression of Acts of Nuclear Terrorism [2005] ATNIF 20	2005	Australia signed 14/09/2005. Australian Nuclear Science and Technology Organisation Amendment Bill 2006. Introduced 30 March 2006.	

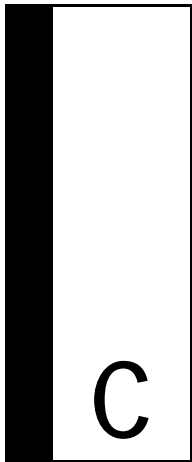
* Current as at 10 October 2006.



Appendix B - List of Submissions

1. Australian Press Council
2. Law Institute of Victoria
3. Human Rights and Equal Opportunity Commission
4. Gilbert+Tobin Centre of Public Law
5. Australian Muslim Civil Rights Advocacy Network
6. Public Interest Advocacy Centre
7. Confidential
8. National Legal Aid
9. Mr Patrick Emerton
10. Federation of Community Legal Centres (Vic) Inc
11. UnitingCare NSW.ACT
12. Mr Lex Lasry QC
13. Islamic Information and Support Centre of Australia
14. Australian Government
15. Department of Premier and Cabinet
Government of Western Australia
16. The Hon Simon Sheller AO QC
17. The National Children's and Youth Law Centre

18. Gilbert+Tobin Centre of Public Law
(Supplementary Submission – Answers to questions on notice)
19. Attorney-General’s Department
(Answers to questions on notice)
20. Australian Federal Police
(Answers to questions on notice)
21. Australian Customs Service
(Answers to questions on notice)
22. Human Rights and Equal Opportunity Commission
(Supplementary Submission – Answers to questions on notice)
23. Commonwealth Director of Public Prosecutions
(Answers to questions on notice)
24. Mr Jim Stewart
25. Islamic Information and Support Centre of Australia Inc
(Supplementary Submission – Answers to questions on notice)
26. Islamic Information and Support Centre of Australia Inc
(Supplementary Submission)



Appendix C – List of Witnesses appearing at Public Hearings

Canberra – 31 July 2006

Security Legislation Review Committee

The Hon Simon Sheller AO QC – Chair

Mr Ian Carnell – Inspector-General of Intelligence and Security

Gilbert+Tobin Centre of Public Law (University of New South Wales)

Professor George Williams – Anthony Mason Professor and Centre Director

Dr Andrew Lynch – Director, Terrorism and Law Project

Ms Edwina MacDonald – Senior Research Officer

Islamic Information and Support Centre of Australia Inc

Mr Mustafa Kocak – Senior Advisor

Canberra – 1 August 2006

Attorney-General's Department

Mr Geoff McDonald – Assistant Secretary, Security Law Branch

Ms Kirsten Kobus – Principal Legal Officer, Security Law Branch

Australian Federal Police

Federal Agent John Lawler – Deputy Commissioner

Federal Agent Frank Prendergast – National Manager, Counter-Terrorism

Mr Peter Whowell – Manager, Legislation Program

Commonwealth Director of Public Prosecutions

Mr Damian Bugg AM QC – Commonwealth Director of Public Prosecutions

Mr James Carter – Senior Assistant Director,
Legal and Practice Management Branch

Ms Stefanie Cordina – Principal Legal Officer,
Commercial, International and Counter-Terrorism Branch

Australian Customs

Mr Jeffrey Buckpitt – National Director, Border Compliance and Enforcement

Ms Jan Dorrington – National Director, Border Intelligence and Passengers

Mr John Valastro – National Manager, Law Enforcement Strategy and Security

Ms Roxanne Kelley – National Manager, Research and Development

Mr Brian Hurrell – National Manager, Enforcement Operations

Mr Terry Price – Director, Enforcement Development

Human Rights and Equal Opportunity Commission

Ms Joanna Hemingway - Lawyer

Australian Muslim Civil Rights Network

Dr Waleed Kadous - Co-convenor

Ms Agnes Chong - Co-convenor

