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PARLIAMENTARY JOINT COMMITTEE ON
INTELLIGENCE AND SECURITY

REVIEW OF 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 and SUPPRESSION OF THE FINANCING OF TERRORISM ACT 2002

**Opening statement on behalf of the Security Legislation Review
Committee**

Although as Chair of the Security Legislation Review Committee (SLRC), I appear today at the invitation of the Parliamentary Joint Committee with the Inspector-General of Intelligence and Security, Mr Ian Carnell, also a member of the SLRC, the SLRC consisted of six other members.

On 21 April 2006 the SLRC made its report to the Attorney-General and to this Committee pursuant to section 4 of the first of the abovementioned Acts, as amended, following a review of the operation, effectiveness and implications of the amendments made by the four Acts, the subject of the PJC Review, together with the *Telecommunications Interception Legislation Amendment Act 2002* and the *Criminal Code Amendment (Terrorism) Act 2003*, which are not the subject of the PJC Review.

The SLRC was an independent Committee consisting of four Commonwealth statutory officers, two appointees by the Attorney-General including the Chair

and two members nominated by the Law Council of Australia. The SLRC and this Committee are expressly asked to consider the operation and effectiveness of the relevant legislation, that is to say, how the specified legislation has worked, whether it has worked to achieve its intended purposes and what, relevantly, follows or can be implied from this.

In its report, the SLRC pointed to the difficulty caused by the timing of its review so soon after significant amendments to the relevant legislation had been made and hence with only very limited knowledge of how the legislation had been used by or assisted law enforcement and security agencies and how the provisions had been interpreted and applied by the courts; see paras 1.4 and 1.12.

In its report, the SLRC acknowledged the responsibility of the Federal Government and other Australian Governments to take all reasonable steps to protect Australians from the consequences of terrorist activities. In particular, the SLRC accepted that it was appropriate to enact separate national anti-terrorism law additional to the existing Commonwealth, State and Territory criminal law. The prime object of the new and distinct anti-terrorism law is to prevent or discourage terrorist activity; see generally the executive summary at p3 of the report.

Legislation not well drafted or unclear or open to court challenge not only may fail to achieve its prime object but in the process may exacerbate the fears and concerns of minority groups in the community who feel affected by it.

No doubt it is accepted by all parties that, in Australia, a democratic and free society, consisting of citizens proud of their individual liberty, laws should not disproportionately or unnecessarily intrude upon well-recognised human rights such as the rights to liberty and security, freedom from arbitrary arrest, the presumption of innocence, the right to a fair trial, and the right to freedom of opinion, expression, association and assembling; see p42 of the report.

The SLRC's review of and report on the six Acts of Parliament and post 2002 relevant legislative amendments thereto covered a great deal of territory. The report extends over more than 200 pages. Although important, much of the legislation reviewed is not as significant as those sections introduced into the Criminal Code by the SLAT Act, which deal with Treason (Part 5.1 of Chapter 5, section 80.1) and Terrorism (Part 5.3 of Chapter 5), notably Division 101 Terrorism and Division 102 Terrorist Organisations.

It is convenient first to make some introductory remarks about those parts of the report dealing with amendments made by the *Suppression of the Financing of Terrorism Act 2002* (SFT) (Chapter 12, p157), the *Border Security Legislation Amendment Act 2002* (BSLA) (Chapter 13, p171) and the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (STB) (Chapter 14, p181).

As to the first, the SFT Act, the following points are made:

(a) The legislation is in part directed to the terms of an international convention on the suppression of the financing of terrorism and UN resolutions for the freezing of resources of persons involved in terrorist acts and to international co-operation on money laundering.

(b) Section 103.1 of the Criminal Code (p234 of the report) was introduced, as section 103 by the SFT Act. The *Anti-Terrorism Act (No 2) 2005* inserted a new offence of financing a terrorist which is section 103.2(1). These sections concern the providing or collecting of funds to be used in a terrorist act or to be made available to another person to be used to facilitate a terrorist act.

(c) Sections 103.1 and 103.2 as amended appear to overlap; see p160 of the report, para 12.8.

(d) The use of a note in section 103.1(1) to include intention as the fault element (Report p234) raises an unnecessary problem of inconsistency in drafting; compare section 103.2(1)(a).

(e) The language of section 103.2, despite its heading, takes no account of the intention, acknowledged in the heading, to criminalise the collection or provision of funds for an individual terrorist; see para 12.10 of the report.

(f) The SFT Act amended the *Financial Transaction Reports Act* (the FTA Act) to require financial institutions, security dealers, trustees and other cash

dealers to report suspected terrorist related activities; Division 2 of the SFT Act.

(g) The SFT Act inserted in the *Charter of the United Nations Act 1945* (COTUNA) offences dealing with freezable assets (section 20) and giving an asset to a proscribed person (section 21). Under both sections strict liability applies to the circumstance that the making available of the asset is not in accordance with the notice under section 22, ie Ministerial permission to use the asset in a particular way; sections 20(2) and 21(2) of COTUNA discussed in para 12.23; see also p113 of the report.

(h) Under this heading in para 12.23 the SLRC re-stated its view that offences or elements of offences carrying potentially heavy sentences, in this case five years imprisonment, should not be of strict liability. This is discussed beginning at p113 of the report. An offence of strict liability is one where no fault element need be proved by the prosecution; see section 6.1(1)(a) of the Criminal Code. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence; section 5.1(1) of the Criminal Code.

(i) Para 12.27 of the report concerns problems raised by the Australian Bankers' Association with the Department of Foreign Affairs and Trade and as yet not resolved.

As to the *Border Security Legislation Amendment Act (BSLA Act)* the following points are made:

(a) This legislation amended border security law principally by amendment of the *Customs Act* and other customs legislation, the *Migration Act* and the *Fisheries Management Act*.

(b) Key issues related to privacy of collected information and increased powers in relation to search and seizure.

(c) Eight recommendations related to border security were made by Customs for amendment to various sections of the *Customs Act*, para 13.16. The SLRC recommended that the government give consideration to implementation of the eight recommendations; recommendation 19.

(d) Recommendation 7 by Customs related to Customs' access to Passenger Name Records (PNR); para 13.17. This in turn relates to European Union (EU) privacy directives that require member States to comply with privacy laws. One of the requirements is that the personal data of EU citizens will be handled in accordance with those privacy directives. Customs outlined its current processes for access to PNRs and the audit activities in relation to PNRs carried out by the Office of the Privacy Commissioner (OPC); see para 13.20 and second SLRC finding p15, first and second bullets. The SLRC concluded that effort should be made to obtain an "adequacy" finding from the EC for the Australian PNR system and that consideration be given by

government as to how best to achieve such an adequacy finding; para 13.24.
See SLRC recommendation 19.

As to the Criminal Code Amendment (Suppression of Terrorist Bombings) Act (STB Act) the following points are made:

- (a) The Act was directed to offences relating to international activities using explosive or other lethal devices in prescribed places.
- (b) None of the submissions received by the SLRC contained any adverse comment about this Act.

The Security Legislation Amendment (Terrorism) Act (SLAT Act) amendments.

As to treason (section 80.1 of the Code p 211) the following points are made:

- (a) Section 80.1(1)(f) introduced by the SLAT Act makes it an offence called Treason if a person engages in conduct that assists by any means whatever, with intent to assist, another country or an organisation that is engaged in armed hostilities against the ADF.
- (b) The SLRC recommended that it should be an element of the offence that the person knows that the country or organisation is engaged in armed hostilities against the ADF; (para 11.19); see SLRC recommendation 18.

I should mention for the assistance of this Committee that in its review of sedition laws, the Australian Law Reform Commission has also proposed changes to the treason provisions. In particular, the ALRC proposes that assistance to an enemy should be conduct which must "materially" assist an enemy, making it clear that mere rhetoric or expressions of dissent are not sufficient.

Terrorism and terrorist organisations

As to Part 5.3 Divisions 100 and 101 of the Code, a significant part of the SLRC report concerns Division 101 Terrorism and particularly the meaning of the definition in section 100.1(1) of "terrorist act" as a "threat of action", and whether paras (b) or (c) should be excluded and the limitation in subsection (2)(a) of serious harm to physical harm. The SLRC also considered the retention of section 100.1(3) and concluded it should be retained.

As to Division 102 Terrorist Organisations, a significant part of the report reviewed both Subdivision A, Definitions and Subdivision B Offences.

Subdivision A (as to which see Chapters 6 – 9 of the report) includes in section 102.1(2) and following Terrorist Organisation Regulations which enable the making of a regulation specifying an organisation on particular grounds to be a terrorist organisation (a listed terrorist organisation) and hence by definition under section 102.1(1) a terrorist organisation. This process has come to be referred to as proscription and such organisations as proscribed terrorist organisations. The operation of section 102.1 of the Code,

which governs the listing of terrorist organisations, will not be under examination by the PJC in the present inquiry. This topic will be the subject of a separate review in early 2007 pursuant to the PJC's obligation under subsection 102.1A(2) of the Code.

Subdivision B Offences (as to which see Chapter 10 of the report) listed in seven sections 102.2 – 102.8, are offences derivative from the existence of a terrorist organisation. The offences are not offences by the terrorist organisation but by persons in some way connected or associated with a terrorist organisation. The following points should be made.

(a) Sections

- 102.2 – directing the activities of a terrorist organisation,
- 102.4 – recruiting for a terrorist organisation,
- 102.6 – getting funds to, from or for a terrorist organisation, and
- 102.7 – providing support for a terrorist organisation.

Each divides into two offences, one based on knowledge that the organisation is a terrorist organisation and the other on recklessness as to that fact. In each case the recklessness offence carries a lesser maximum penalty.

“Recklessness” is defined in section 5.4 of the Code with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him or her, it is unjustifiable to take the risk and, with respect to a result, if he or she

is aware of a substantial risk that the result will occur and having regard to the circumstances known to him or her, it is unjustifiable to take the risk. See para 10.5 of the report. This differs from the use of the expression "recklessness" ordinarily in criminal law where it is roughly interchangeable with "negligent" or perhaps "seriously negligent". See generally para 10.8 of the report. In the Code it is an alternative to knowledge or to intention. In criminal law it is referred to as reckless indifference.

(b) Section 102.3 – membership of a terrorist organisation provides in subsection (2) that it is a defence if the person charged proves that all reasonable steps were taken to cease to be a member after the person knew the organisation was a terrorist organisation. For reasons given commencing at p106 of the report, the SLRC concluded that in section 102.3(2) an evidential burden should replace a legal burden of proof (see p106-9 of the report).

A legal burden of proof means that the defendant bears the ultimate onus of *proving that such reasonable steps were taken*. See section 13.1(3) of the Criminal Code and the SLRC report at p106. The effect of imposing that onus on the defendant effectively overrides the presumption of innocence; para 10.20.; See *Sheldrake v DPP* [2005] 1 AC 264 and recommendation 11.

Evidential burden in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist; section 13.3(6) of the Criminal Code. Imposing an

evidential burden is not judicially regarded as having the effect of overriding the presumption of innocence; see *Sheldrake*.

(c) Section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation has been amended expressly to rely on recklessness as to whether the organisation is a terrorist organisation. A condition of subsection (1) is that the organisation is a terrorist organisation (b). A condition of subsection (2) is that the organisation is a proscribed terrorist organisation (b). In para 10.26 of the report it is pointed out that recklessness can under the Code be established by proving intention, knowledge or recklessness. Subsection (3) provides that subject to subsection (4) strict liability applies to para (2)(b) and subsection (4) provides that subsection (2) does not apply unless the person is reckless as to the circumstances mentioned in para (2)(b). The defendant bears the evidential burden in relation to the matter in subsection (4). Subsections (2), (3) and (4) add an offence which in part at least duplicates subsection (1) and introduces complexities such as the evidential burden in relation to the matter described in subsection (4).

(d) The SLRC recommended that the section called for urgent redrafting, that as an element of the offence training should be connected with a terrorist act or such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act and that the scope of the offence should be extended to cover participation in training; see p118.

(e) In section 102.6(3) – getting funds to, from or for a terrorist organisation – for like reason to that given in respect of section 102.3 the SLRC thought that the burden on the defendant in respect of the receipt of funds for legal representation should be an evidential rather than the legal burden and the defence enlarged; see para 10.48. Also compare section 102.6(3) with 102.8(4). Note at pp228 and 231-233.

(f) As to section 102.7 – providing support to or for a terrorist organisation – the SLRC recommended that it be amended to ensure that the word “support” could not be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective; see para 10.51. “Support” in this context seems to mean to uphold a person, cause or policy by aid or countenance (that is to say appearance of favour, encouragement or moral support), to back efforts or aims; Macquarie Dictionary. Thus it may restrict political speech on matters of public concern. Currently consider discussions about proscribed organisations such as the military wings of Hamas, and Hizballah. The potential infringement of any constitutional doctrine of implied freedom of political communication is recognised in section 102.8(6); see para 10.66 and the reference to *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

(g) As to section 102.8 – associating with terrorist organisations – “associate” is defined in section 102.1(1) (p221) in a way that would include a casual meeting by the offender in the street or a casual telephone

communication with a person who is a member of or promotes or directs a proscribed terrorist organisation. The offender must know that the organisation is a terrorist organisation according to subsection (1)(a)(ii) and subsection (2)(c).

(h) Subsection (3) provides that strict liability applies to paras (1)(b) and (2)(g), that is to say, that the organisation is a proscribed terrorist organization. Subsection (5) provides that the section does not apply unless the person is reckless as to the circumstances mentioned in para (1)(b) and (2)(g). It is not clear how this fits in with the requirement that the person know that the organisation is a terrorist organisation; see subsections (1)(a)(ii) and (2)(c) and see para 10.65 of the report.

(i) Subsection (4) provides that the section does not apply in the case of certain enumerated associations including those with close family members and associations only for the purpose of providing legal advice or legal representation. An evidential burden is imposed upon the defendant in stark contrast to the legal burden to apply in section 102.6(3). See p228.

These are but some of the problems noted by the SLRC in its report; pp123-133. More serious is the denial of a fundamental human right of freedom of opinion, expression, association and assembly. The SLRC recommended the repeal of section 102.8 and suggested, if it thought to be appropriate, inserting a lesser offence of providing support to a terrorist organisation with the intention that the support assist the organisation to expand or to continue to

exist; para 10.68, p129) which did not rely expressly on association and thereby flout a fundamental human right.

General matters considered

Others matters examined by the SLRC were the application of section 15.4 of the Criminal Code "extended geographical jurisdiction category D", (p147 of the report) to offences, the insertion into Commonwealth legislation of a hoax offence (p189 of the report) where the evidence does not support a finding that the intentions described by the definition of a terrorist act were made out, proposed amendments concerned with the taking of evidence overseas (p191 of the report), the anonymity (p 193 of the report) of ASIO officers called to give evidence, the right of the DPP to appeal a grant of bail on the grounds of exceptional circumstances in terrorist cases (p198 of the report) and various mechanisms for continuing review of the legislation and the appointment of a Public Interest Monitor (pp201-207 of the report). The SLRC recommended that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years. Recommendation 1.

Further the SLRC recommended that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim and Arab communities, and to understand and address the concerns and fears of members of those communities so that practical and immediate programmes can be developed to allay them. Recommendation 2.

The SLRC recommendations, the subject of this review, are 1, 2, 6-9 and 11-20. See also the matters set out on pages 15 and 16 of the report.

