



Submission

Administrative Law & Human Rights Section

Security Legislation Review

To: Parliamentary Joint Committee on Intelligence and Security

A submission from the Administrative Law & Human Rights Section of the Law Institute of Victoria

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1 Introduction

Section 29(1)(ba) of the *Intelligence Services Act 2001* (Cth) requires the Parliamentary Joint Committee on Intelligence and Security (Committee) to review the operation, effectiveness and implications of the:

- (a) *Security Legislation Amendment (Terrorism) Act 2002* (Cth);
- (b) *Border Security Legislation Amendment Act 2002* (Cth);
- (c) *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth); and
- (d) *Suppression of the Financing of Terrorism Act 2002* (Cth) (Security Legislation),

and report its comments and recommendations to each House of the Parliament and to the responsible Minister, as soon as practicable after the third anniversary of the laws coming into force.

The package of legislation was the subject of a public inquiry by the Security Legislation Review Committee (SLRC) led by The Hon. Simon Sheller AO QC. The SLRC report was tabled in Parliament by the Federal Attorney-General on 15 June 2006.¹

Section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) requires the Committee to take account of the SLRC report in the conduct of its own review. The Committee has therefore decided to conduct a modified review of the laws in question with a focus on the SLRC recommendations.

The LIV has been invited by the Committee to provide comments on the SLRC recommendations. While the LIV is pleased to provide comments to the PJCIS, it has concerns about the review process when such limited time is allowed for the public to meaningfully express its views. The date on the letter sent to LIV President Catherine Gale inviting comments is dated 16 June 2006, however, the letter was received on 26 June 2006. Given that the deadline for comments is 7 July 2006, this has provided the LIV with little time to respond in detail to the request for comments.

We refer the Committee to the LIV's submission made to the SLRC in January 2006, which provides comments on the Security Legislation.² The LIV also participated in a public hearing held in Melbourne by the SLRC on Tuesday 7 February 2006.³ Our representatives at that meeting were Mr Andrew Hudson (Chair, International Law Section and LIV Council member) and Mr Andrew Closey (Criminal Law Section solicitor).

The LIV has reviewed and considered the SLRC recommendations in its report of June 2006⁴ and provides the following comments for the Committee's consideration. The LIV would also the opportunity to provide more detailed comments to the Committee either in a further written submission or as part of a public hearing, particularly in light of the limited period allowed for public comments.

2 Executive summary

The LIV commends the SLRC for conducting a comprehensive review of the Security Legislation and notes the nature of the recommendations supports the retention of separate security legislation but with more adequate safeguards for the rights of accused persons and organisations subject to the legislation.

The LIV supports increased safeguards in the Security Legislation to ensure that due process is accorded to all such persons or organisations. The LIV does not support a separate legal system for those accused of terrorist acts or terrorist related crimes.

In this regard, the LIV reiterates its firm view that the criminal law is adequate to deal with terrorism offences including, murder, conspiracy or an attempt to commit a terrorist crime and inciting or threatening violence. Accordingly, the LIV does not support the first recommendation in the SLRC report that supports separate security legislation to deal with terrorism crimes rather than relying on existing criminal law.

The basis for the SLRC recommendations, as stated in its report, is the need to strike an appropriate balance between ‘the need to protect the community from terrorist activity’ and the ‘maintenance of fundamental human rights and freedoms’.

The SLRC’s overall conclusion that some parts of the Security Legislation “have a disproportionate effect on human rights” correlates with the LIV’s recommendation in its submission to the Inquiry that there be “inclusion of measures to protect the individual rights of citizens under the Security Legislation, such as ensuring that all decisions made under the legislation are judicially reviewable and that a person who suffers a wrong under the legislation can seek a remedy”.

In its Executive Summary, the SLRC identified five key areas of concern:

- (a) process for proscribing an organisation as a terrorist organisation;
- (b) offence of associating with terrorist organisations;
- (c) offence of advocating the doing of a terrorist act;
- (d) application of strict liability to elements of a criminal offence; and
- (e) greater efforts be made by state and federal governments to explain the Security Legislation to the public, including Muslim and Arab communities.

The LIV shares the concerns of the SLRC and supports the above proposed reforms and initiatives.

Ultimately, the LIV recognises the key to amending the Security Legislation is the support of the Federal Attorney-General. To date, the Attorney-General has been critical of the SLRC recommendations and has stated that “changing the government’s powers to ban terrorist organisations would jeopardise national security”.⁵ It is disappointing that in dismissing the SLRC’s recommendations and the considered views of many respected legal practitioners and academics, the Attorney-General also rejects any suggestion that the Security Legislation should provide more adequate legal safeguards for individuals or organisations subject to the legislation. Accordingly, while making this submission, the LIV is cognisant of the limited effect it will have on current Federal government legislation and policy.

3 Recommendations

The SLRC is satisfied of the need for separate criminal legislation to deal with terrorism as defined by the expression 'terrorist act' and does not recommend general repeal of the security legislation.

The LIV does not support this recommendation.

The LIV's general position on security and counter terrorism legislation is consistent with that of the Law Council of Australia (LCA). As stated in the LIV's submission to the SLRC, "the LIV emphasises the effectiveness of the criminal law to deal with security and terrorism offences, as it stood prior to the significant expansion of powers under counter terrorism, security and telecommunications interception laws since 2001".¹

As submitted below, the difference with existing criminal liability and terrorist offences relates to proof of a specific intent/motivation, that is, terrorist offences require a political, ideological or religious intent whereas criminal liability does not.

Recommendation 1 - Further review

The SLRC recommends that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years.

If an independent reviewer, as discussed in this report, has been appointed, the review to be commissioned by the Council of Australian Governments (COAG) in late 2010, could be expanded in its scope to include all of Part 5.3 of the Criminal Code. The SLRC also draws attention to other models of review and urges the government to consider the models discussed in the report.

The LIV supports this recommendation. As stated in the LIV's submission to the SLRC, it supports a further review of the Security Legislation in three years.

However, the LIV emphasises the limited time allowed for public comment. The LIV suggests that if meaningful comments of complex legislation are to be provided, more time should be permitted (e.g. no less than one month).

Recommendation 2 - Community education

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

The LIV supports this recommendation.

(a) _____

¹ See Annual Reports prepared by the Attorney-General's Department for the years 2001-2002, 2003-2004 and 2004-2005 for new security, counter terrorism and telecommunications interception legislation and legislative amendments introduced since 2001 <<http://www.ag.gov.au/agd/www/Agdhome.nsf/Page/RWP63A965098EA78C27CA256B72007C6C26?OpenDocument>> (accessed 16 January 2006).

Recommendation 3 - Reform of the process of proscription

The SLRC recommends that the process of proscription be reformed to meet the requirements of administrative law. The process should be made more transparent and should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

The LIV supports with this recommendation.

Recommendation 4 - Process of proscription

The SLRC recommends that either:

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

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

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

or

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

The LIV supports recommendation (ii) to ensure that the process of proscription is fair, transparent and accords the affected organisation with due process. The current process of proscription provides the Federal Attorney-General with excessive executive power without adequate legal safeguards. This recommendation is particularly welcomed in light of the severe penalties that apply to individuals members of or those involved in a proscribed terrorist organisation.

Recommendation 5 - Publicity of proscription of a terrorist organisation

The SLRC recommends that once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution.

The LIV supports this recommendation.

Recommendation 6 - Definition of terrorist act – ‘harm that is physical’

The SLRC recommends that the words ‘harm that is physical’ be deleted from paragraphs 2(a) and 3(b)(i) in the definition of ‘terrorist act’ so that the definition of harm in the

Dictionary to the Criminal Code applies, and the paragraphs extend to cover serious harm to a person's mental health.

The LIV supports this recommendation.

Recommendation 7 - Definition of a terrorist act: 'threat of action'

The SLRC recommends that the reference to 'threat of action' and other references to 'threat' be removed from the definition of 'terrorist act' in section 100.1(1).

The LIV deals with this in its comments on recommendation 8 below.

Recommendation 8 - Offence of 'threat of action' or 'threat to commit a terrorist act'

The SLRC recommends that an offence of 'threat of action' or 'threat to commit a terrorist act' be included in Division 101.

The description should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur.

The LIV supports the SLRC's recommendation that the reference to "threat of action" and other references to "threat" be removed from the definition of "terrorist act" in s100.1(1), but does not support the recommendation that a separate substantive terrorist offence based on a "threat of action" should be inserted in the Criminal Code.

The definition of a "terrorist act" in s100.1 of the Criminal Code includes an act or a threat of action that is motivated by a political, religious or ideological reason. Removing these specific references would remove the current criminalisation of religion and belief. Instead criminal prosecution for "terrorist acts" would proceed on the basis of the act or threat of action alone based on the definition provided in s100.1 *vis* an act with the intention of coercing or influencing by intimidation the government or intimidating a section of the public.

The LIV's understanding of the SLRC's recommendation is that the definition of a "terrorist act" should exclude the words "threat of action" and other references to "threat" in favour of including a separate offence of "threat of action" or "threat to commit a terrorist act" in s101.

As currently drafted, the scope of the substantive terrorist offence in s100.1 can extend beyond actual conduct to "threats made with the intention" of committing a "terrorist act". A threat of action in relation to a terrorist act can therefore include preparatory acts (i.e. acts that are considered a "threat of action") to advance a political, religious or ideological cause. That is, an "action" or "conduct" not as yet committed (i.e. by including in the definition of a terrorist act "action" as well as a "threat of action") the substantive terrorist offence encompasses conduct that is not at the level of an "act" conduct or action.

It is therefore the case that preparatory conduct in relation to a 'terrorist act' (amount to a threat) is sufficient for a terrorist offence under s101.1 "A person commits an offence if the person engages in a terrorist act".

If a "threat of action" was removed from the definition of a terrorist act in s101, there would be greater clarity for the substantive terrorist offence in the Criminal Code.

The LIV submits, however, that there should not be an offence of a “threat of action” given the overlap with existing criminal laws.

The inclusion of preparatory acts in terrorist offences by including “threats of action” or “threats to commit” terrorist acts imports liability based on conduct that has not yet occurred.

The existing criminal law already has a regime of inchoate criminal responsibility, intended to prevent the commission of a criminal offence by intervention prior to the actual commission of a criminal offence.

Within criminal responsibility, inchoate liability is one step below the completion of a substantive offence and divided into three categories of conspiracy, incitement and attempt. For the purposes of comparison, these three categories, as defined in the Criminal Code, are extracted in table-form below:

Section	Section Heading	Offence	Penalty
s11.1	Attempt	(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed. (2) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.	Same as substantive offence
s11.4	Incitement	(1) A person who urges the commission of an offence is guilty of the offence of incitement. (2) For the person to be guilty, the person must intend that the offence incited be committed.	Varying penalties depending on penalty for substantive offence
s11.5	Conspiracy	(1) A person who conspires with another person to commit an offence ... is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.	Same as substantive offence.

Including a threat of terrorist action as a substantive criminal offence within the Criminal Code is unnecessary given the overlap with the existing law.

On this point, the LIV recognises the need for terrorism laws to be proactive, rather than reactive. Given the existing regime of inchoate liability, however, reliance on the existing criminal law would enable intervention before commission of a completed terrorist offence.

Recommendation 9 - Definition of ‘advocates’

The SLRC recommends that paragraph (c) of section 102.1(1A) be omitted from the definition of ‘advocates’.

Section 102.1(1A) provides that an organisation advocates the doing of a terrorist act if 'the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person ... to engage in a terrorist act.'

If paragraph (c) is not omitted from the definition, the SLRC recommends that 'risk' should be amended to read 'substantial risk'.

The LIV supports these alternate recommendations, in particular, the proposal that paragraph (c) be omitted from the definition of "advocates".

Recommendation 10 - Definition of 'terrorist organisation'

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

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

The LIV supports this recommendation.

Recommendation 11 - Section 102.3(2): burden of proof

The SLRC recommends that the burden of proof on the defendant under section 102.3(2) be reduced from a legal burden to an evidential burden.

Section 102.3(2) requires the defendant to prove that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

The LIV notes that the recommendation proposes a reduced burden being placed on the defendant, but that ultimately this still presents practical difficulties for the defendant where a lack of evidence exists.

Recommendation 12 – Section 102.5: training a terrorist organisation or receiving training from a terrorist organisation

The SLRC recommends that section 102.5, 'Training a terrorist organisation or receiving training from a terrorist organisation', be redrafted as a matter of urgency.

The redraft should make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.

The SLRC recommends that the scope of the offence should be extended to cover participation in training.

The SLRC recommends that neither the offence nor any element of it should be of strict liability.

The LIV supports the recommendation that the scope of the offence should be extended to cover participation in training and that neither the offence nor any

element of it should be of strict liability. The LIV suggests that there should be a right to defend the elements of the offence.

Recommendation 13 - Section 102.6: getting funds to, from or for a terrorist organisation

The SLRC recommends that, at most, a defendant legal representative should bear an evidentiary burden, and that subsections (1) and (2) should not apply to the person's receipt of funds from the organisation if the person received the funds solely for the purpose of the provision of:

- (a) legal representation in proceedings under Part 5.3, or*
- (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.*

The LIV supports this recommendation on the basis that an accused person should be able to obtain funding solely for the purpose of funding their legal defence if accused of a terrorist-related offence.

Recommendation 14 - Section 102.7: providing support to a terrorist organisation

The SLRC recommends that section 102.7, 'Providing support to a terrorist organisation', be amended to ensure that the word 'support' cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective.

One means of achieving this could be to insert defences of the type contained in section 80.3 of the Criminal Code in relation to treason and sedition.

The LIV supports this recommendation. However, we refer the Committee to the current Australian Law Reform Commission review of sedition laws under the Criminal Code.

Recommendation 15 - Section 102.8: associating with terrorist organisations

The SLRC recommends that in its present form section 102.8 of the Criminal Code, 'Associating with terrorist organisations', be repealed.

The SLRC recommends that, if section 102.8 is retained, section 102.8(5) be repealed.

The LIV supports this recommendation.

Recommendation 16 - Section 103.1: financing terrorism

The SLRC recommends that section 103.1, 'Financing terrorism', should be amended by inserting 'intentionally' after 'the person' in paragraph (a) and removing the note.

The LIV supports this recommendation on the basis that it should be made clear that the financing is intentional.

Recommendation 17 - Section 103.2: financing a terrorist

The SLRC recommends that consideration be given to re-drafting paragraph (b) of section 103.2(1) to make it clear that it is required that the intended recipient of the funds is a terrorist.

As above, the LIV supports this recommendation on the basis that it should be made clear that the financing is intentional.

Recommendation 18 - Section 80.1(1)(f): conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force

The SLRC recommends that section 80.1(1)(f), 'Conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force', be amended to require, as an ingredient of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the Australian Defence Force.

The LIV supports this recommendation.

Recommendation 19 - Customs' recommendations on border security

The SLRC recommends that the government give consideration to implementation of Customs' eight recommendations on border security.

The LIV generally supports this recommendation, however, it recommends some alterations to the recommendations proposed by Customs and endorsed by the SLRC.

The LIV endorses the amendment to the recommendation proposed by Customs, as set out in paragraph 13.18, as this will place a limit on any retention of personal information regarding international travellers.

In relation of Custom's recommendations 1 and 2 , the LIV recommends that the Committee take into account recommendation 1 of the Senate Legal and Constitutional Legislation Committee in its report into the *Customs Legislation Amendment (Border Compliance and other measures) Bill 2006* (May 2006). The recommendation of the Senate Committee has an impact on current proposals by Customs to limit access to Customs-controlled areas for parties who otherwise hold visitor identification cards.

Recommendation 20 - Hoax offence

The SLRC recommends that a hoax offence be added to Part 5.3 in the terms of Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism to apply to a credible and serious threat to commit a terrorist act, where the evidence does not support a finding that there was such intention as described in the definition of 'terrorist act'.

The LIV does not support the inclusion of hoax offence based on intention. It further notes the difficulty in proving the *mens rea* requirement for a hoax. If an act is sufficient to constitute a hoax it is most likely to fall within the scope of the terrorist offence under s101.1

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- 1 www.ag.gov.au/slrc
- 2 Refer https://www.liv.asn.au/members/sections/submissions/20060118_2/index.html (accessed 3 July 2006).
- 3 Security Legislation Review Committee, Transcript of public hearing (Melbourne, 7 February 2006) [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(153683DB7E984D23214BD871B2AC75E8\)~Transcript+Melbourne+7+February+2006+Davies-Carnell-McMi.PDF/\\$file/Transcript+Melbourne+7+February+2006+Davies-Carnell-McMi.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(153683DB7E984D23214BD871B2AC75E8)~Transcript+Melbourne+7+February+2006+Davies-Carnell-McMi.PDF/$file/Transcript+Melbourne+7+February+2006+Davies-Carnell-McMi.PDF) (accessed 3 July 2006).
- 4 Refer <http://www.ag.gov.au/slrc> (accessed 3 July 2006).
- 5 'Changing terror laws dangerous: Ruddock', *The Sydney Morning Herald* (16 June 2006).< <http://www.smh.com.au/news/National/Changing-terror-laws-dangerous-Ruddock/2006/06/16/1149964705200.html>> (accessed 4 July 2006).