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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

To the Committee Secretary

**Review of Security and Counter Terrorism Legislation**

I refer to your letter of 20 June 2006 inviting me to make a submission commenting on the recommendations of the Sheller Inquiry or raising any other matter concerning the 2002 package of Commonwealth security and counter terrorism legislation. I appreciate the opportunity to participate in the review, and make the following submissions to the Committee.

***General Concerns***

1. I commend the acknowledgment by the Sheller Inquiry that the 'guiding principle' in any critical assessment of security and counter terrorism legislation is that such legislation must be a **reasonably proportionate** means of achieving the intended object of protecting the security of Australians and Australian interests. Legislation must be well framed and kept within the boundaries imposed by human rights law. The language

must be specific and unambiguous, to provide a level of certainty to the obligations such legislation places on members of the community.

2. Similarly, I commend the position taken by the Council of Australian Governments (COAG) in September 2005 following a special meeting on counter-terrorism, which is quoted by the Sheller Inquiry (see p. 34):

> … any strengthened counter-terrorism laws must be **necessary**, **effective** against terrorism and contain **appropriate safeguards** against abuse … and be exercised in a way that is **evidence-based**, **intelligence-led** and **proportionate** [emphases added].

3. However, both COAG and the Sheller Inquiry make a number of assumptions which I would caution the Committee against accepting in the absence of supporting evidence that has been adequately tested.

4. The *first* assumption is that there is a 'clear case' for Australia's counter terrorism and security laws to be strengthened. The Australian community has been offered very little evidence of the actual level of threat that terrorism currently poses to Australians and Australian interests, beyond the vague assessments and usual refrains of the security agencies and politicians respectively. As yet, the Australian government has consistently failed to provide any reasoned justification for claiming that existing laws are not adequate to deal with the terrorist threat. I accept that there are obviously severe limits on what evidence can be provided to the community. However, if not supported by some *independent assessment* based on *actual evidence* that our laws are inadequate, the claim that there is a 'clear case' should not be accepted.

5. The *second* assumption I would caution against is the automatic concession that in addition to the general criminal law, separate security legislation is necessary. While separate security legislation may be required in certain limited circumstances, it must be remembered that counter terrorism and security measures do not operate in a vacuum; the general criminal law remains an important tool in our response to terrorist crime. We should therefore exercise care in the face of unqualified statements that such a

'clear need' exists, and where appropriate, resist the temptation to respond by enacting new and separate criminal offences.

6. A *third* and related assumption is that the terrorist character of such acts must *necessarily* be an element of any criminal law offence. While the public perception of terrorism as something other than 'ordinary crime' might provide support for making this distinction in the legislation by emphasising the 'terrorist' nature of such offences, is this really helpful? Virtually all terrorist acts involve what might be called ordinary crimes (such as murder, causing grievous bodily harm, malicious damage, arson etc), so why not just ignore the inherent political nature of the terrorist crime? The underlying criminal acts still remain, and in fact they become more easily identifiable for the purposes of investigation or prosecution. If specific terrorist offences bear *no resemblance whatsoever* to any underlying criminal act, what conduct are they really criminalising? Can such conduct be considered inherently criminal?

7. The *fourth* assumption is that counter terrorism legislation must *necessarily* provide for preventative measures that go beyond the operation of general criminal laws. I find it troubling that the Commonwealth Director of Public Prosecutions (DPP) submitted that laws of conspiracy, attempt, incitement and aiding and abetting are problematic to prosecute in the context of some of the factual circumstances encountered, because they can only be proved if they attach to a specific primary offence. Given that a causal link can be found between almost anything if one is willing to go back far enough, the concept of a 'connection' to terrorist crime must be limited in some way. The criminal law relies on concepts of causation and complicity to provide these limitations, so if particular conduct by a terrorist suspect does not amount to complicity, conspiracy or attempt under the general criminal law, is it really conduct that ought to be punished? What is the basis for any perceived need to go beyond the preventative measures that already exist?

8. Finally, according to the Sheller Inquiry, the Commonwealth DPP submitted that the nature of terrorism is such that the individuals involved in terrorist activities may not know the specific details of the terrorist act contemplated. This can hardly be cited as evidence that counter terrorism legislation in somehow inadequate, and that criminal responsibility must be extended to cover individuals whose alleged connection to a terrorist or terrorist organisation is so remote that their conduct cannot be even indirectly linked to any specific criminal activity! Nothing about the nature of terrorism can justify such an incredible expansion of criminal responsibility.

### *Definition of 'Support' and 'Resources'*

9. I share the Sheller Inquiry's concerns about the vague language contained in s 102.7, which sets out the offence of providing support to a terrorist organisation. However, I would go further than the Inquiry (see Recommendation 14) by recommending that the terms 'support' and also 'resources' be defined in clear terms in the Criminal Code. As providing 'support' or 'resources' represents the actus reus for the offences in s 102.7, they should be defined with certainty. By way of comparison, the equivalent of this section in Title 18 of the United States Code, §2339A, 'Providing material support to terrorists', defines 'material support or resources':

> As used in this section—
>
> (1) the term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;
>
> (2) the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and
>
> (3) the term 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge.

10. Section §2339A requires that such 'material support or resources' be provided in circumstances where the person knows or intends that they are to be used in preparation for, or in carrying out, certain specified offences in the Code (among other things).

11. The inclusion of a definition of the terms 'support' and 'resources' within the code would provide certainty, and would ensure that, for example, the provision of 'moral support' which does not amount to an incitement to violence is excluded. **I would therefore recommend that rather than limiting the application of s 102.7 by inserting defences (as suggested by the Inquiry in para. 10.55), that a clear definition of 'support' and 'resources' be inserted so as to confine the offence to a limited range of activities.**

***Training or Receiving Training from a Terrorist Organisation***

12. I agree with the Sheller Inquiry's finding that s 102.5 is poorly drafted. I support their recommendation that this section be redrafted as a matter of urgency. As explained in the Inquiry's Report (see paras 10.24–10.38), the attempt to introduce strict liability with respect to one element of the offence, while seeking to maintain both intention and recklessness with respect to two other elements of the offence, only creates confusion. Moreover, it does not appear to achieve anything. In the interests of certainty, I support Recommendation 12 of the Sheller Inquiry, that the section be redrafted to remove the application of strict liability to any element of the offence.

13. I also agree with the Inquiry's conclusion that the scope of the offence needs to be defined more carefully, on the basis that it could catch quite innocent training or teaching of persons who may, unknown to the teacher, be members of a terrorist organisation (see paras 10.39–10.40). The Inquiry recommends (see Recommendation 12) that the section be amended to make it an element of the offence that either:

    (i) the training is connected with a terrorist act; or

(ii) 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.

14. I would go further than the Sheller Inquiry, by requiring that 'training' be specifically defined in the Criminal Code. As 'training' or 'receiving training' represents the actus reus for the offence, it should be defined with certainty. By way of comparison, the equivalent of this section in Title 18 of the United States Code, §2339D, 'Receiving military-type training from a foreign terrorist organisation', defines 'military-type training':

> As used in this section—
>
> (1) the term 'military-type training' includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction …
>
> (3) the term 'critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety including both regional and national infrastructure. Critical infrastructure may be publicly or privately owned; examples of critical infrastructure include gas and oil production, storage, or delivery systems, water supply systems, telecommunications networks, electrical power generation or delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), and transportation systems and services (including highways, mass transit, airlines, and airports); …

15. Rather than inserting another vague element requiring connection to a terrorist act or something similar, I see no reason why the word 'training' cannot be defined specifically as is done in 18 U.S.C. §2339D. This would provide certainty, and would also ensure that only training in activities that are inherently dangerous could be covered. Any argument that individuals should be criminally liable for providing or receiving training that is not captured under the definition of 'military-type training' above simply cannot be justified on the basis of proportionality.

16. **I submit to the Committee that object of protecting the security of Australians and Australian interests would be better achieved by enactment of a more specific offence, such as that provided in 18 U.S.C. §2339D, which is directed at specific types of training that should be condemned as criminal where provided to, or received from, a terrorist organisation.**

***Associating with Terrorist Organisations***

17. I agree with the finding of the Sheller Inquiry, that s 102.8 which provides for an offence described as 'associating with terrorist organisations' transgresses a fundamental human right to freedom of association, and interferes with ordinary family, religious and legal communication. The definition of 'association' is so broad that it cannot possibly be considered necessary or proportionate to the threat posed by terrorism. Expressing the 'fundamental unacceptability of the organisation itself' (see para 10.67) can hardly justify the imposition of a criminal conviction in violation of an individual's freedom of association. Furthermore, any legitimate objective this section aims to achieve can be achieved by way of other offences in Part 5.3.

18. **There being no justifiable need for the creation of this new offence, I therefore support the Sheller Inquiry's Recommendation 15, that s 102.8 be repealed, and support its conclusion that the interference with human rights is disproportionate to anything that could be achieved by way of protection of the community if that section were enforced.**

***Legal Burden versus Evidential Burden***

19. In some places the legislation imposes a 'legal burden of proof' upon the defendant. For example, the offence of membership of a terrorist organisation (s 102.3) places a legal burden of proof on the defendant in the following manner:

> (2) Subsection (1) does not apply if the person proves 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.
>
> Note: A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).

20. The term 'legal burden' is defined in s 13.1 of the Criminal Code as meaning 'in relation to a matter, … the burden or proving the existence of the matter'. Where the legal burden of proof is on the defendant, it must be discharged 'on the balance of probabilities (s 13.5). The defendant therefore carries the ultimate onus of proving the defence in order to exonerate him/herself.

21. A legal burden is significantly heavier than an 'evidential burden', which is the burden of proof that ordinarily applies when a defendant seeks to rely on a defence. The term 'evidential burden' is defined in s 13.3 to mean 'in relation to a matter, … the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'. If the defendant can adduce or point to such evidence, it is then for the prosecutor to disprove, beyond reasonable doubt, the elements of the defence.

22. So the difference between the two burdens for this offence would be the difference between:

    (i) proving *on the balance of probabilities* that the person took all reasonable steps to cease being a member; and

    (ii) pointing to evidence that *suggests a reasonable possibility* that the person took all reasonable steps to cease being a member with the legal onus remaining on the prosecutor.

23. As the Sheller Inquiry concluded, this difference could potentially be challenged as incompatible with the presumption of innocence, as occurred in the United Kingdom before the House of Lords in *Sheldrake v DPP, Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264. A similar provision which imposed a legal burden upon the defendant to prove a

defence was held to be not a proportionate and justifiable legislative response to the threat of terrorism. The burden was therefore read down by the House of Lords to be an evidential burden.

24. **I therefore submit to the Committee that placing a legal burden on the defendant in s 102.3 is inconsistent with both the presumption of innocence and with general principles of fairness. I support the Sheller Inquiry's recommendation (see Recommendation 11) that the Criminal Code be amended to remove the note and to provide expressly that the burden of proof on the defendant under s 102.3(2) is an evidential burden.**

25. Another example is the defence to section 102.6, which sets out the offence of getting funds to, from or for a terrorist organisation. Subsection (3) states:

> Subsections (1) and (2) do not apply to the person's receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of:
>
> (a) legal representation for a person in proceedings relating to this Division (ie division 102); or
>
> (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.
>
> Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4).

26. As the Report of the Sheller Inquiry accurately explains (at para. 10.45), this means that if a legal advisor receives funds solely for the purpose of the provision of legal representation, the legal advisor bears the burden of establishing on the balance of probabilities that the purpose of the provision of legal representation falls within (3)(a) or (b). I agree with the Inquiry's conclusion that the need to prove the specific purpose of the provision of legal representation creates serious problems for an accused person's legal representative.

27. The Inquiry correctly states (at para 10.46) that communications passing between a client and his or her legal advisor, and made for the purpose of obtaining or giving legal advice, are in general privileged from disclosure.

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. In addition, requiring a legal representative to disclose the nature of legal representation provided gives rise to a real risk that s 102.6 will be used in an improper manner.

28. Even if Recommendation 13 of the Sheller Inquiry (that the legal burden be changed to an evidential burden) is adopted, the concerns raised with respect to s 102.6 will only be partly addressed. **I submit to the Committee that it would be more appropriate to recommend that in addition to the Sheller Inquiry's recommendation, the defence in subs (3) be amended to remove the requirement that the provision of legal representation be for one of two specific purposes. Instead, the defence should be amended to read:**

> **Subsections (1) and (2) do not apply to the person's receipt of funds from the organisation if the person proves that he or she received the funds solely for the purpose of the provision of legal representation or assistance.**
>
> **Note: A defendant bears an evidentiary burden in relation to the matter in subsection (3) (see section 13.3).**

29. The result would be that a legal representative of the accused would not be required to disclose the nature of the legal assistance provided; all that would be required is that the defendant point to evidence that the funds were paid in consideration for legal assistance, which could be demonstrated by way of trust account entries that legal representatives are obliged to maintain.

30. **Finally, I submit to the Committee that no further regulation of receipt of funds by a legal representative could be considered proportionate, given the strict regulation of professional conduct under the *Legal Profession Act 2004*, the relevant Professional Conduct and Practice Rules and the common law by the Legal Services Commissioner, the**

**Supreme Courts of the States and numerous professional associations.** Professional responsibilities placed on legal practitioners are sufficient to address any improper conduct by lawyers who receive funds from a terrorist organisation where the receipt of such funds is not solely for the purposes of legal representation or advice. For example, any receipt of proceeds of crime or receipt of funds for an illegal purpose would already attract significant professional and criminal sanctions under this scheme.

***DPP v Thomas***

31. The Report of the Sheller Inquiry refers to Justice Cummins' ruling in *DPP v Thomas* [2006] VSC 243 on 7 April 2006 (see paras 17.5–17.11) in the context of a discussion on 'admissibility of evidence obtained overseas' (an issue raised in submissions during the Inquiry). While not directly relevant to this Committee's Review, I take this opportunity to address some inaccuracies in the Report.

32. Section 23 of the *Crimes Act 1914* (Cwth) states that Part 1C of the Act 'imposes obligations on investigating officials in relation to (i) people arrested for Commonwealth offences; and (ii) certain other people who are being investigated for Commonwealth offences. Under s 23G, an investigating official must, before starting to question a relevant person, inform that person that s/he may communicate, or attempt to communicate, with a legal practitioner.

33. Section 23G is made subject to s 23L, which provides exceptions to the obligations on investigating officials. This section is designed to ensure that an individual is only deprived of the right to legal representation in circumstances where some countervailing public interest (eg public safety, preservation of evidence, etc) justifies both the fact and the extent of the derogation. Furthermore, s 23L provides that the exceptions will only apply to investigating officials' obligations with respect to legal representation 'in exceptional circumstances'. In this way, the *Crimes Act* recognises the

fundamental nature of an individual's right to legal representation during questioning, which the Australian government has agreed to protect under various human rights treaties.

34. Referring to the case of *DPP v Thomas*, the Report of the Sheller Inquiry states: '*His Honour found that Part 1C [of the Crimes Act 1914] did not operate in Pakistan but admitted the record into evidence in the exercise of his discretion'*. On the contrary, the written ruling states clearly that the provisions of Part 1C applied to the interview in question. Cummins J. records that the officers, rather than inform the accused of his right to legal representation, informed Mr Thomas that 'this right will not be available to you today'. His Honour ruled the interview admissible, despite the failure of Australian Federal Police officers to comply with Part 1C.

35. The Sheller Inquiry rightly notes that this ruling is currently the subject of an appeal which will be heard by the Victorian Court of Appeal on 24 July 2006. Whether or not it is appropriate for a court to exercise its *discretion* to admit evidence obtained in violation of Part 1C, any attempt to introduce a *statutory* amendment which would sanction the violation of fundamental rights by Australian Federal Police in order to address perceived 'difficulties' which might arise with respect to admissibility of evidence is, in my submission, indefensible.

### *Conclusion*

36. Some of the concerns I have expressed about the security and counter terrorism legislation are exacerbated if the charges proceed to a full trial. The ambiguity surrounding the breadth of conduct which might be caught by the offences allows prosecutor to present a case theory with less precision than the clearly defined elements of 'ordinary' crimes will allow. This invites the court to admit a much wider range of evidence. Prosecutors are therefore permitted to present the fact-finder with a complete picture of a terrorist organisation's activities, and to connect the dots to form what would

otherwise be a fragmented and incomplete narrative of the defendant's conduct with respect to that organisation.

37. This is then combined with the difficulty the fact-finder faces when making findings based only on evidence admitted in court, unaffected by any general knowledge which may have been absorbed through the media about particular terrorist organisations or alleged terrorists. In practice, therefore, these offences can be used to expand the scope of criminal behaviour to an unacceptable extent, converting innocent acts, conversations and associations into criminal offences.

Should the Committee have any queries, please do not hesitate to contact me.

Yours sincerely,

**LEX LASRY QC**