CHAPTER 3
ISSUES

1.1 This private senator's bill is before the committee at the same time as the Attorney-General and his department are concluding a public consultation process over changes to Australia's national security legislative framework. The exposure draft of the Attorney's bill discloses that several of the issues and amendments being foreshadowed in this Bill, or very similar ones, are already being considered by the Government. However, the Bill currently before the Committee proposes some amendments that are not included in the Attorney's Exposure Draft. In light of the continuing calibration of the Government's exposure draft, and its likely introduction to the Parliament in coming months, this report briefly summarises the views put by submitters with a view to making a contribution to the final form of the reforms being considered by the Government. For the reasons discussed above, the committee has not made a specific recommendation on the substantive issues or overall merit of the Bill but is of the view that this report along with Hansard transcripts of hearings and submissions should form part of this current discussion.

1.2 The majority of submitters were positive about the changes signalled in the Bill.[1] A number of submissions received by the committee dealt with the provisions of the Bill in turn, while others considered the merit of the proposed amendments more generally. At the outset, however, the committee notes the ambivalence to the current set of laws expressed by a number of submitters, as evidenced by the following contribution from the Law Council of Australia (the Law Council):

> When these provisions were initially introduced, it was certainly the Law Council's submission that the existing body of criminal law was sufficient, although the Law Council was open to the possibility that there was a need for specific offences or specific law enforcement powers to deal with these emergencies in unusual circumstances. The Law Council's position was, and it has not changed, that a cogent case was never made for why that existing body of laws was inadequate.[2]

1.3 Other submitters expressing a similar view in this regard included the Australian Muslim Civil Rights Advocacy Network (AMCRAN), the Human Rights Law Resource Centre, and the International Commission of Jurists (Australia) (ICJA).[3]

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1 See, for example, Islamic Information and Support Centre of Australia, *submission 16*, pp 2–4; Liberty Victoria, *submission 23*, p. 1; Australian Islamic Mission, *submission 10*; Mr Ghayass Sari, *submission 9*; ICJA, *submission 26*, pp 1–2; Mr Mohamad Tabbaa, *submission 12*; Ms Christie Elemam, *submission 4*; Human Rights Law Resource Centre, *submission 21*.

2 Ms Helen Donovan, Committee Hansard, 22 September 2009, p. 15.

3 AMCRAN, *submission 15*, p. 5; Human Rights Law Resource Centre, *submission 21*, p. 4; ICJA, *submission 26*, p. 4.

Schedule 1 – Amendments to the *Criminal Code Act 1995*

Sedition

1.4 The current offence of sedition would be repealed by the Bill.[4] The ICJA[5] and the Law Council expressed a common view that the sedition laws currently in place serve no useful purpose, are broadly drafted and rely on unqualified and undefined terms, resulting in an imprecise and uncertain scope of application. For these reasons they supported the proposed repeal. The availability of the current 'good faith' defence offers, in the Law Council's opinion, little respite:

> The availability of a 'good faith defence' to the sedition charges does not allay these concerns. The fact that a court may ultimately find, after charges have been laid and a prosecution commenced, that the particular conduct falls within the limited 'good faith' exception, does not diminish the fear of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the sedition offences.[6]

1.5 Similarly, the Law Council took little solace in the fact that current sedition laws have fallen into disuse, submitting that:

> They have not been used to date. They have not been used for many years. But the Law Council thinks there is a danger in having these types of offences remain on the statute book even if they are not used. That is partly because…the law enforcement agencies sometimes as a result have a misunderstanding about the extent of their powers or about what sort of activity may be subject to criminal investigation and criminal prosecution. We have to remember—and this relates not only to the sedition offences but also to a number of the other offences which are covered by the discussion paper and by this bill—that, even though they might not be invoked and nobody may ever be charged or prosecuted for those offences, they provide a hook for the use of law enforcement powers and they allow police to obtain telephone interception warrants, for example, along with warrants to use a number of other intrusive powers. So, having them remain on the statute book is in itself a risk, notwithstanding that they may not be invoked in prosecution.[7]

1.6 The ICJA submitted that, if not repealed:

> …the sedition offences will continue to pose a significant threat to freedom of speech and expression, the right to which is set out in Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights. Australia is a party to both of these

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4 Sedition occurs when a person urges another person to overthrow by force or violence either the Constitution, the Government of the Commonwealth, a State or a Territory, or the lawful authority of the Government of the Commonwealth.

5 ICJA, *submission 26*, p. 4.

6 Law Council of Australia, *submission 14*, p. 4.

7 Ms Helen Donovan, *Committee Hansard*, 22 September 2009, p. 11.

> international instruments. The ICJA is also concerned that as presently worded the offences set out in section 80.2 can be recklessly committed even though there may be a lack of intention requisite for such an offence. This anomaly is problematic.[8]

1.7 The Australian Press Council informed the Committee that current anti-terrorism laws had caused Australia to move from a position in the top 12 in the world listing of countries with a free press in 2002, to 35th, and submitted in respect of sedition laws that:

> By and large the real problem with this sort of legislation is not that it involves censorship, but that it involves self-censorship…there is a potential there in the sedition laws and in the support for a proscribed organisation laws of the media being unable to report matters of public interest and concern because they themselves might be accused of either sedition or support for a proscribed organisation.[9]

1.8 Notably, the Gilbert and Tobin Centre of Public Law (the Gilbert and Tobin Centre) were a notable exception to the trend and opposed the amendment, but did not elaborate on their reasons for taking this position.[10]

Definition of 'Terrorist Act'

1.9 The Bill would significantly narrow the definition of a 'terrorist act' under the Act, removing the making of a threat of action from the definition. It would also remove references to the damage of property and interference, disruption or destruction of information, telecommunication, financial, transport, or essential public utility systems or the delivery of essential government services as action that can be considered a terrorist act. Reaction to the proposed amendment was mixed.

1.10 The Law Council supported the amendment, arguing that it was:

> …of the view that the Australian definition of terrorist act in section 100.1 of the Criminal Code is broader than [the] internationally accepted definition [and]…includes threats of action, as well as completed acts. This not only inappropriately broadens the definition but, because of the interaction between s100.1(1) and s100.1(2), also renders the definition, in part, unintelligible.[11]

1.11 The Federation of Community Legal Centres for the most part supported the proposed reform, criticising the current arrangements as follows:

> In section 102 of our act we have a very broad category of offences in relation to organisations. It is an offence to have various sorts of involvements with any organisation, whether or not it has ever been proscribed by the government, which is engaged in preparing, planning,

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8 ICJA, *submission 26*, p. 4.

9 Mr Jack Herman, *Committee Hansard*, 22 September 2009, p. 18.

10 Gilbert and Tobin Centre for Public Law, *submission 1*, p. 1.

11 Law Council of Australia, *submission 14*, p. 7.

> assisting or fostering directly or indirectly the doing of a terrorist act. So we have a very broad statutory notion of 'an organisation', which hangs on a very broad statutory notion of 'terrorist act'. Our notion of a 'terrorist act' does not distinguish between civilian violence and military violence; it does not distinguish between internal conflicts and international conflicts; it does not distinguish between actions that take place in the context of an ongoing armed conflict and acts that take place in a purely civilian context—for example, a suicide bombing in a cafe in Tel Aviv. We do not draw a distinction between that and violence in a military conflict situation. There are a number of distinctions and different international instruments. Various other jurisdictions often tend to be sensitive to one or more those distinctions in the way frame their laws in this area. I think the Australian position is peculiar in that it is sensitive to none of the relevant distinctions. It is about the failure of sensitivity to any of the relevant distinctions. And hanging on that very broad notion of 'terrorist act' is a whole range of broader offences, including our very broad 'organisation' offences, that operate very expansively compared to other comparable countries.[12]

1.12 The ICJA viewed the amendment with mixed feelings, supporting the removal of 'threat' and 'threat of action', but submitting that:

> …the removal of the phrase 'intention of advancing a political, religious or ideological cause' from the definition, may reduce the possibility of a particular political, religious or ideological group being particularly targeted by the police, media and the public, however terrorism will always have a political and ideological character. The ICJA suggests that perhaps merely the removal of 'religious' would be a more positive amendment.[13]

1.13 However, the Gilbert and Tobin Centre did not support the amendment, submitting that they:

> …believe that it is appropriate for threats to commit a terrorist act to be criminalised. Therefore, we do not support item 3 since it removes the 'threat of action' and 'threat to commit a terrorist act' from the definition of a 'terrorist act', but does not, as recommended by the Security Legislation Review Committee ('SLRC') in 2006, create a separate offence of making a threat to engage in a terrorist act.
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> We support the recommendations of the SLRC that: (1) 'threat of action' and 'threat to commit a terrorist act' be deleted from the definition of a 'terrorist act' in subsection 100.1(1) of the Criminal Code; and (2) a separate offence of 'threat of action' or 'threat to commit a terrorist act' be included in Division 101.[14]

1.14 In addition to removing reference to the threat of an act, Item 3 would remove the current requirement that, to be a terrorist act, an act must advance a political,

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12 Dr Patrick Emerton, *Committee Hansard*, 22 September 2009, p. 5.

13 ICJA, *submission 26*, p. 5.

14 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 2.

religious or ideological cause. The Gilbert and Tobin Centre would also retain the 'motive' requirement, which Item 3 would remove.

> The effect of doing so would effectively render would-be terrorist acts as 'normal' violations of the criminal law, no different in character to traditional offences such as murder, assault and arson. It is the intention of 'advancing a political, religious or ideological cause' (combined with the other intentional element of the definition of a 'terrorist act' – that the action is done with the intention of coercing a government or intimidating the public) that distinguishes terrorist acts from other forms of criminal conduct. Australia's counter-terrorism laws (which give expansive powers to intelligence gathering and policing agencies to prevent and respond to terrorist acts, create broad preparatory offences and impose serious penalties for committing those offences) were justified by reference to the extraordinary nature of the threat posed by terrorism. The gravity of the potential harm and the intention of offenders meant that it was appropriate to enact laws that derogated from fundamental human rights and ordinary principles of criminal justice. We would therefore oppose any attempt to broaden the definition of a 'terrorist act' which might potentially extend it to less serious forms of criminal conduct which do not meet the description of 'political violence'.[15]

1.15 Item 4 largely replicates the provisions of existing subsection 3, which go to the intention behind the act or threat and provide that an act or threat is not a terrorist act if it was not intended to cause harm or endanger life. However, the Bill would remove from the definition the creation of an offence by virtue of there being a serious risk to the health and safety of the public. The Gilbert and Tobin Centre took the opportunity to compare Australia's definition with those of other western nations, and commented that:

> Action would only constitute a 'terrorist act' if it causes a certain level of personal harm. That is, it would not be sufficient (as it is currently under subsection 100.1(2)) for the act to cause serious damage to property and seriously interfere with, disrupt or destroy information, telecommunications, financial, transport, or essential public utility systems or the delivery of essential government services. In including damage to property and infrastructure in the definition of a 'terrorist act', Australia has followed the UK example. We accept the argument put forward by Professor Kent Roach that there are 'real questions whether it is necessary to define all politically motivated serious damage to property or serious disruptions to electronic systems as terrorism'. We would prefer item 4 of the Bill to the current subsection 100.1(2). This would delete damage to property and infrastructure as part of the definition of a 'terrorist act', bringing Australia more into line with the approach in Canada and New Zealand. The definition of a terrorist act in Canada, for example, only includes property damage where it is likely to result in the death or serious bodily harm to a person, endanger a person's life or cause a serious risk to the health or safety of the public (or a segment of the public). Failing the

15 Gilbert and Tobin Centre of Public Law, *submission 1*, pp 2–3.

> simple removal of the property and infrastructure aspects of subsection 100.1(2), we would favour the introduction of a similar qualification in respect of those provisions.[16]

1.16 However, the Gilbert and Tobin Centre did not support the removal of the offence of a serious risk to the health and safety of the public from subsection 100.1(3)(b) of the Act.

> The reason for [the proposed removal] is not clear from the Explanatory Memorandum to the Bill. We do not support item 4. This is because we believe, as with hostage-taking, that such an act is of sufficient severity that a person should not be excused merely on the ground that he or she was engaging in advocacy, dissent, protest or industrial action.[17]

1.17 The ICJA also did not support the amendment, on the grounds that the only action that would fall outside the definition of 'terrorist act' would be 'advocacy, protest, dissent or industrial action', and considered that such a narrow definition of what fell *outside* the definition could infringe Australia's obligations to the International Convention on Civil and Political Rights (ICCPR).[18]

New offence – taking of hostages

1.18 The Bill would create a new offence of taking a person hostage, unless the action was advocacy, protest, dissent or industrial action and was not intended to involve the taking of a hostage or cause harm of a type contained in proposed paragraph 100.1(3)(b). While not widely commented on, the proposal attracted specific support from the Gilbert and Tobin Centre.[19]

Exclusion of armed conflict

1.19 The Bill inserts a new subsection100.1(3A) to provide that action will not be a terrorist act if it takes place in the context of, and is associated with, an armed conflict. The armed conflict need not be an international armed conflict. 'Armed conflict' is defined in the new section 100.1(3B) as having the same meaning that it has in Division 268 of the Criminal Code. The amendment garnered general support.[20]

Possession of a thing connected with a terrorist act

1.20 Item 5 repeals section 101.4 of the Criminal Code. Section 101.4 prohibits the possession of a thing connected with preparation for, the engagement of a person in, or assistance in a terrorist act, where the person knows or is reckless as to the existence of that connection.

1.21 The Law Council criticise the existing provisions, and argue that:

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16 Gilbert and Tobin Centre of Public Law, *submission 1*, pp 3–4.

17 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 5.

18 ICJA, *submission 26*, p. 5.

19 See, for example, Gilbert and Tobin Centre of Public Law, *submission 1*, p. 4.

20 See, for example, Gilbert and Tobin Centre of Public Law, *submission 1*, p. 4; Australian Muslim Civil Rights Advocacy Network, *submission 15*, p. 11.

> These types of offences, which expose a person to sanction for actions undertaken before he or she has formed any definite plan to commit a criminal act, represent a departure from the ordinary principles of criminal law…Some may argue that it is necessary to have widely drafted terrorism offences on the statute books so that law enforcement agencies have the room and flexibility to take a proactive and preventative approach. It is often assumed that no harm will ensue because ultimately the authorities are unlikely to resort to the terrorism provisions without evidence of a threat of the most serious nature. However, the Law Council believes that poorly defined, overly broad offence provisions can never be justified on the basis that, despite their potentially wide application, they are only intended to be utilised by the authorities in the most limited and serious of circumstances. An unacceptable element of arbitrariness and unpredictability arises when the determination of whether or not a person is charged with a terrorist offence under Part 5.3 of the Criminal Code is left to the broad discretion of prosecutorial authorities.[21]

1.22 The Gilbert and Tobin Centre make the point that:

> The Explanatory Memorandum to the Bill does not give any reasons why this section and not any of the other preparatory offences in Division 101 of the Criminal Code should be repealed. In our opinion, section 101.4 is not unique. Many of the other offences in Division 101 have the same problems as section 101.4.[22]

1.23 The Gilbert and Tobin Centre went on to criticise the vagueness and lack of clear guidance given in the subsection to decision makers, and recommend a review of all of the preparatory offences in Division 101 of the Criminal Code, with an eye to determining whether these offences are effectively targeted to the threat of terrorism.[23]

Terrorist organisation regulation and proscription

1.24 As detailed in the previous chapter, the Bill would replace arrangements going to the proscription of an organisation by the Minister. As summarised by the Explanatory Memorandum, the amendments would:

- provide notification, if it is practicable, to a person, or organization affected, when the proscription of an organization is proposed;
- provide the means, and right, for persons and organizations, to be heard in opposition, when proscription is considered;
- provide for the establishment of an advisory committee, to be appointed to advise the Attorney-General on cases that have been submitted for proscription of an organization;

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21 Law Council of Australia, *submission 14*, p. 8.

22 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 6.

23 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 6.

- require the committee to consist of people who are independent of the process of proscribing terrorist organizations, such as those with expertise in security analysis, public affairs, public administration and legal practice;
- require the role of the committee be publicised; and
- allow the committee to consult publicly and to receive submissions from members of the public to assist in their role.

1.25 The Law Council provided a lengthy argument against the current proscription arrangements, on the basis of a lack of transparency, a denial of natural justice to proscribed organisations, and the perception that mere advocacy of terrorism is grounds for listing. They observe that:

> …having now observed the listing provisions in operation for several years, the Law Council questions whether the provisions actually serve any intrinsic law enforcement purpose. Any attempt to understand the law enforcement rationale behind how and when organisations are identified for proscription is frustrated by the opaque and ad hoc manner in which the proscription power has been exercised.[24]

1.26 AMCRAN took the view that:

> proscription is an inherently anti-democratic and draconian measure and we oppose the proscription regime in its entirety. However, we support the amendments in principle as they provide greater safeguards to the proscription process (including an independent advisory committee, notification to the organisation being listed, a means to be heard before being proscribed, consultation).[25]

Discretion to proscribe

1.27 The Law Council opposes the provisions that the Bill seeks to amend, and has done for some time. In supporting the amendments to the extent that they enhance transparency and natural justice, the Council:

> …opposed the enactment of the listing provisions when they were introduced...The basis of that opposition was the view that the Executive should not be empowered to declare that an organisation is a proscribed organisation without:
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> - prior judicial review and authorisation of the exercise of the power; and
> - the opportunity for affected citizens to be heard.
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> The Law Council maintains its objections to the listing provisions on that basis.[26]

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24 Law Council of Australia, *submission 14*, p. 10.

25 AMCRAN, *submission 15*, p. 14.

26 Law Council of Australia, *submission 14*, p. 10.

1.28 The Gilbert and Tobin Centre were concerned at the lack of guidance afforded the Attorney-General in the exercise of their discretion to proscribe, a concern also expressed by the ICJA.[27]

'Fostering'

1.29 The Gilbert and Tobin Centre had concerns on a number of fronts. These included the breadth of the term 'fostering', which is used in connection with terrorist acts in the current legislation, but which is undefined.

1.30 The Centre agreed that the term should be deleted from the Code, an outcome achieved by Item 7 of this Schedule.[28] Nonetheless, the Bill would still provide for an organisation which 'assists' with a terrorist act to remain within the definition. This came under criticism from the ICJA, on the basis that the term was undefined and hence has the same drawbacks as does 'fostering'.[29]

Notification process

1.31 The Gilbert and Tobin Centre supported the proposal to establish a notification process for proscribed organisations both before and after their proscription, and were unpersuaded by the Attorney-General's Department's previous argument to the Parliamentary Joint Committee on Intelligence and Security that 'providing notice prior to listing could adversely impact operational effectiveness and prejudice national security'.[30] The Centre's counter-argument was as follows:

> First, the proscription of an organisation can never be so urgently required that there is insufficient time for prior notification and consultation to occur. This is because proscription does not have any immediate effect. It merely facilitates the prosecution of individuals for terrorist organisation offences under Subdivision B of Division 102. In addition, quite apart from proscription by the executive, an organisation may in any event be found to be a terrorist organisation by a court under subsection 102.1(1). Second, the Statement of Reasons conventionally issued by the Attorney-General's Department after a regulation is made is based on publicly available details about an organisation. It is therefore difficult to see how disclosing this information to the relevant organisation or its members prior to a regulation being made would prejudice national security.[31]

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27 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 7; ICJA, *submission 26*, pp 7–8.

28 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 8. The Centre makes other noteworthy criticisms of the definition of 'terrorist organisation', particularly in respect of the terms 'advocacy' and 'praise'. The observations are set out on page 8 of the Centre's submission.

29 ICJA, *submission 26*, p. 5.

30 Gilbert and Tobin Centre of Public Law, *submission 1*; Attorney-General's Department, *submission 10*, Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 2007, p. 13.

31 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 10.

Advisory listing committee

1.32 This amendment attracted general support. In its support, proponents considered that it would:

- assist the proscribed organisation and affected persons to understand the reasons for proscription;
- give the community a sense of assurance about controversial proscription decisions;
- educate the community about proscription and therefore improve the deterrence function of proscription;
- ensure that the Listing Advisory Committee has all the information necessary to make recommendations to the Attorney-General; and
- contribute to the strength of accountability mechanisms by providing the community with a template against which to judge the ultimate decision made by the Attorney-General.[32]

Appeal to the Administrative Appeals Tribunal

1.33 This item was supported by, among others, the Federation of Community Legal Centres of Victoria and AMCRAN. [33]

1.34 This item elicited concern from the ICJA, who took the view that:

> …while it is commendable that the government is seeking to heighten its accountability, the power to proscribe organisations should remain in the hands of the Governor-General rather than tribunals and courts as it is a most serious task. Merits review would likely not achieve a result better than advice from the Listing Advisory Committee.[34]

1.35 The Gilbert and Tobin Centre took a similar line, and explicitly did not support the item, submitting that:

> Merits review by the AAT is inconsistent with our opinion that proscription decisions are more appropriately made by the executive branch of government. Furthermore, merits review is unlikely to be effective given the traditional deference of the courts to the executive branch of government on matters of national security…building a safeguard onto the front of the proscription process, namely, creating an Advisory Listing Committee, is likely to be more effective than ex post facto merits review.[35]

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32 See, for example, Gilbert and Tobin Centre of Public Law, *submission 1*, pp 10–11.

33 Federation of Community Legal Centres of Victoria, *submission 19*, p. 12; AMCRAN, *submission 15*, p. 16.

34 ICJA, *submission 26*, p. 7.

35 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 11.

Training with a terrorist organisation

1.36 Currently, the offence of training with a terrorist organisation is a strict liability offence; a prosecutor need not prove that a person knew or was reckless about whether the organisation was a terrorist organisation to successfully convict, the burden of proof being on the defendant to prove otherwise. The amended provision would require knowledge of, or at least recklessness as to whether, an organisation is a terrorist organisation before an offence is committed.

1.37 The Gilbert and Tobin Centre views the current provision as 'particularly problematic', and support the proposed amendment. However, they call for better targeting of the provision to more narrowly focus on conduct that prepares a person for terrorist acts. They point to the recommendations of the Security Legislation Review Committee, and point out that training in the use of office equipment would technically fall under the existing provisions. They suggest that an element of the offence be 'either that the training be 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'[36] The Islamic Council of Victoria raised similar concerns, as did AMCRAN.[37]

1.38 The Law Council would repeal the section, rather than amend it as the Bill proposes.[38]

Providing support to a terrorist organisation

1.39 The Bill would require that 'support' provided to a terrorist organisation be 'material' before it can be successfully prosecuted. 'Material' is defined as not including 'the mere publication of views that appear to be favourable to an organisation or its objectives. The Bill would further require that the person either intends or is reckless as to whether the material support will be used by the organisation to engage in a terrorist act. The proposed amendment received general support.[39]

1.40 A number of submitters saw problems with the current provisions insofar as 'support' is not defined in the Criminal Code, and as was noted by the SLRC in 2006, could be regarded as support that directly or indirectly helps a terrorist organisation engage in a terrorist act, and may even extend to the publication of views that appear to be favourable to a proscribed organisation and its stated purpose.[40] To this end, the

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36 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 12, referring to the Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, June 2006, pp 114–118. The Islamic Council of Victoria took a similar view, *submission 6*, p. 2.

37 Islamic Council of Victoria, *submission 6*, p. 2; AMCRAN, *submission 15*, p. 17.

38 Law Council of Australia, *submission 14*, p. 14.

39 See, for example, Human Rights Law Resource Centre, *submission 21*, p. 5; Federation of Community Legal Centres of Victoria, *submission 19*, p. 12.

40 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 13, referring to the Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, June 2006, p. 121.

Gilbert and Tobin Centre consider that the Bill appropriately limits the scope of the offence, and they support the proposed amendment.[41]

1.41 The Law Council cited the inquiry by the Hon John Clarke QC into the Haneef case and argued for the repeal of the provisions creating the offence of providing support for a terror organisation, but went on to say:

> However, if the section is to remain, the Law Council supports an amendment to the section designed to clarify that the assistance provided must be 'material' assistance and, at the very least, more than the mere publication of views that appear to be favourable to an organisation or its objectives…the Law Council is of the view that the section should require knowledge rather than recklessness as to whether the organisation was a terrorist organisation.[42]

1.42 The ICJA supported the amendment but noted that:

> …a person can be guilty of the offence if they are reckless as to whether the organisation is a terrorist organisation, or whether the material support or resources provided will be used in such an activity. The ICJA therefore submits that the person should have actual knowledge in order to be able to provide 'material support' and the section should be amended accordingly.[43]

Associating with a terrorist organisation

1.43 Under section 102.8 of the Criminal Code, it is an offence to knowingly associate, on two or more occasions, with a member of a listed terrorist organisation or a person who directs and/or promotes activities of a listed terrorist organisation, with the intention of providing support and that support would assist the organisation to expand or continue to exist. The Bill would repeal the provision.

1.44 The Gilbert and Tobin Centre supported the repeal of the provision on two grounds. These were as follows:

> First, this offence interferes with fundamental human rights – the freedoms of speech and association – and this interference is disproportionate to the protection of the community from the threat of terrorism. This is because section 102.8 does not properly target the culpable conduct. It is the provision of support to the terrorist organisation that should be criminalised (as per section 102.7 of the Criminal Code), rather than the person's association with a member of the organisation.
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> Second, this offence has been identified as a major contributor to the unhelpful perception amongst Australian Muslim communities that they are being targeted in a discriminatory manner by the counter-terrorism laws. This is one of the greatest challenges facing the Commonwealth in achieving an effective counter-terrorism strategy. Terrorism is far more

41 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 13.

42 Law Council of Australia, *submission 14*, p. 15.

43 ICJA, *submission 26*, p. 8.

> likely to emerge from a divided society in which some feel marginalised and disempowered on the basis of their race or religious beliefs. Any factors that may isolate and exclude Muslim communities must be seriously addressed.[44]

1.45 The Law Council concurred, and again drew this committee's attention to the conclusions of the Security Legislation Review Committee, which reported that:

> The breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions, has led the SLRC to conclude that considerable difficulties surround its practical application. Some of these difficulties include the offences' potential capture of a wide-range of legitimate activities, such as some social and religious festivals and gatherings and the provision of legal advice and legal representation. Further, the section is likely to result in significant prosecutorial complications.[45]

1.46 For its part, the Law Council argued that:

> The Law Council submits that the association offence casts the net of criminal liability too widely by criminalising a person's associations, as opposed to their individual conduct…The Law Council is of the view that this is unnecessary because existing principles of accessorial liability already provide for an expansion of criminal responsibility to cover attempts, aiding and abetting, common purpose, incitement and conspiracy. These established principles draw a more appropriate line between direct and intentional engagement in criminal activity and peripheral association.[46]

Schedule 2 – Amendments to the Crimes Act 1914

Presumption against bail

1.47 Item 1 of this Schedule would repeal current section 15AA of the Crimes Act, which provides for a strong presumption against bail for certain offences, so much so that in relation to most terrorism offences a bail authority must be satisfied that exceptional circumstances exist to justify bail being granted.

1.48 The proposal to repeal the section received support from the Law Council, which argued that there was no evidence to demonstrate why a reversal of the onus of proof in relation to bail was necessary to aid the investigation or prosecution of terror offences, and that:

> No evidence has been put forward, for example, to suggest that persons charged with terrorism offences are more likely to abscond while on bail, re-offend, threaten or intimidate witnesses or otherwise interfere with the investigation. Prior to the introduction of s15AA, the existing bail

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44 Gilbert and Tobin Centre of Public Law, *submission 1*, pp 13–14.

45 Security Legislative Review Committee, *Report of the Security Legislation Review Committee* 2006 at paragraph 10.75.

46 Law Council of Australia, *submission 14*, p. 15.

> provisions already provided the court with the discretion to refuse bail on a range of grounds, and to take into account the seriousness of the offence in considering whether those grounds were made out. No reason was given as to why these existing provisions were inadequate to guard against any perceived risk to the community in terrorism cases.[47]

1.49 The Gilbert and Tobin Centre argued that the proposed amendment goes too far, and that some offences justify the presumption against bail, but that the current arrangements are also unbalanced. Gilbert and Tobin submitted that:

> The law in relation to bail is based on the principle that a person should not be deprived of his or her liberty without conviction for a criminal offence. There are, of course, exceptions such as where the prosecution provides evidence that the person might flee the country or destroy evidence or cause further danger to the community. An obligation on the defendant to prove exceptional circumstances before bail will be granted undermines the presumption of innocence, and therefore is generally only imposed with respect to offences of the highest degree of seriousness.
>
> Section 15AA…treats almost all terrorism offences as satisfying this seriousness threshold. Whilst this may be correct in relation to some terrorism offences – for example, the offence in section 101.1 of the Criminal Code of engaging in a terrorist act (which carries a maximum life term of imprisonment) – it is patently incorrect in relation to others – for example, the membership offence in section 102.2 of the Criminal Code (which carries a maximum term of imprisonment of only ten years).[48]

1.50 On the whole, however, the proposed amendment was supported.[49]

Time limits on detention without charge

1.51 Current section 23CA and 23CB provide for periods of time that are not to be counted when calculating the period of time a person has been held without charge for the purpose of complying with time limits on detention without charge. The provisions therefore have the effect of extending the time in which a person can be held. This measure attracted widespread support.[50] One of the periods of so-called 'dead time' is provided for under paragraph 23CA(8)(m) which allows questioning to be 'reasonably suspended or delayed' for a period specified by magistrate or justice of the peace, and for that period not to be counted toward the period the person has been held. The Bill would repeal paragraph 23CA(8)(m), require a person to be informed of their rights, and require any application for an extension of detention to be heard by a judge instead of a magistrate or justice of the peace.

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47 Law Council of Australia, *submission 14*, p. 17.

48 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 14.

49 See, for example, the Islamic Council of Victoria, *submission 6*, p. 2; AMCRAN, *submission 15*, p. 22; ICJA, *submission 26*, p. 11.

50 See, for example, Islamic Information and Support Centre of Australia, *submission 16*, p. 3; AMCRAN, *submission 15*, p. 23; Federation of Community Legal Centres, *submission 19*, p. 14.

1.52 The Law Council submitted that, while the current investigation period is nominally capped at 24 hours, this does not operate as a safeguard against prolonged detention without charge because allowance for reasonable 'dead time' means that the 24 hours of questioning may be spread out over a period of weeks. The Council also argued that there is no clear limit in sub-paragraph 23CA(8)(m) and section 23CB on how many times police can approach a judicial officer to specify certain time periods as dead time, and that the threshold test that police need to satisfy in order to obtain an extension of the detention period is low. The conduct of ongoing routine investigative activities is enough to justify prolonged detention.[51]

1.53 Furthermore, the Council submitted that the time taken to make and dispose of a dead time application automatically further extends the dead time. Therefore, if the judicial officer hearing a dead time application under section 23CB fails to make a decision on the spot, and instead adjourns the matter, even for a period of days, then this time itself counts as dead time.[52]

1.54 This creates the real risk that detained suspects or their legal representatives may be deterred from raising points of law or challenging evidence on the basis that it may delay the presiding judicial officer's pronouncement on the application.

1.55 To this end, the Law Council agreed with the Gilbert and Tobin Centre that a finite limit should be placed on how long a person can be held without charge. Gilbert and Tobin submitted that 48 hours would be a reasonable period.[53] As such, neither the Law Council nor Gilbert and Tobin supported the repeal of paragraph 23CA(8)(m), but did endorse proposed section 23DA, which would require applications to be heard by a judge.[54] In addition, the Law Council recommended the amendment of sections:

- 23CB to ensure police only have one opportunity to apply to a judicial officer to declare a specified period as reasonable dead time for the purposes of calculating the investigation period;
- 23CB to preclude a judicial officer from adjourning an application made under section 23CB for more than a specified number of hours, or alternatively, amend sub-paragraph 23CA(8)(h) to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must be included in the calculation of the investigation period;
- 23CB and 23DA to require that if a suspect is not legally represented when an application is made under section 23CB or section 23DA, the police should be required to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that the suspect

51 Law Council of Australia, *submission 14*, p. 20.

52 Law Council of Australia, *submission 14*, p. 20.

53 Law Council of Australia, *submission 14*, p. 21.

54 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 16. The Law Council also supported this amendment, but expressed a preference for applications to go to a Supreme Court Judge.

understands the nature of the application and has been given his or her opportunity to be heard on the application;

- Amend section 23CB to require that applications must be made to a Supreme Court Judge, or at least a judicial officer, rather than permitting such applications to be determined by a justice of the peace or bail justice.[55]

Schedule 3 –Amendments to the Australian Security and Intelligence Organisation Act 1979

Reduction in maximum length of detention

1.56 As described in the previous chapter, amendments to the ASIO Act would reduce the maximum period a person can be held for questioning under the Act from 7 days to 1 day. This measure attracted widespread support.[56] The Gilbert and Tobin Centre submitted that:

> It is not acceptable in a liberal democracy for a State police force to detain people in secret for several days, nor should it be acceptable for intelligence agencies like ASIO. No other comparable jurisdiction has enacted laws permitting the detention of citizens not suspected of any crime. ASIO's detention power is unnecessary and unjustifiable and should be repealed. While the fact that this power has not been used in the seven years of its existence points to the restraint and responsibility of the members of ASIO, it may also be said to provide clear evidence that it is unnecessary.[57]

1.57 At the committee's public hearing, Ms Emily Howie from the Human Rights Law Resource Centre submitted in respect of the current ASIO detention provisions that her organisation:

> [S]upport[s] the amendments in the bill before the committee, particularly because currently a person can be detained without charge under an ASIO warrant for up to 168 hours and a separate warrant can be issued at the end of that time if new material justifies it. This year the United Nations Human Rights Committee has stated that these provisions affect people's rights to liberty and security of the person and that, to the extent that they can affect people's ability to communicate with counsel of their own choosing, they also impinge upon the right to a fair trial. The ASIO detention provisions have also being considered by the UN Committee Against Torture, which has said that, to the extent that these provisions infringe people's rights to take proceedings to court to determine the lawfulness of their detention, they are in breach of article 2 of the Convention Against Torture.[58]

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55 Law Council of Australia, *submission 14*, p. 22.

56 See, for example, Human Rights Law Resource Centre, *submission 21*, p. 5; Federation of Community Legal Centres of Victoria, *submission 19*, p. 18; AMCRAN, *submission 15*, p. 25.

57 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 17.

58 Ms Emily Howie, *Committee Hansard*, 22 September 2009, pp 25–26.

1.58 Dr Patrick Emerton, representing the Federation of Community Legal Centres of Victoria, considered the current ASIO provisions to be inappropriate, and that:

> [T]he vesting of coercive investigatory powers in a body that is not a police force is at odds with some of the fundamentals of our constitutional tradition. It has consequences that then play out on the ground in an adverse way in respect of community members. They get policed by ASIO, but ASIO is not a body that conducts itself with the norms of a police force. They do not have the same rights in relation to ASIO officers that they have in relation to police officers and there are not the same constraints of publicity and accountability on ASIO that operate on police officers both as a matter of law and the long tradition of the constabulary. For those reasons we remain opposed to the vesting in ASIO of coercive powers of the sort that that part of the ASIO Act gives them.[59]

1.59 The Law Council supported the direction taken in the proposed amendments, but would prefer to see the repeal of the whole of the relevant Division of the Act, and an alternative approach taken which:

- limits questioning to four hours with a four hour extension;
- requires judicial approval for any further extension; and
- entitles the subject to legal representation.[60]

1.60 A number of other submitters also called for ASIO's questioning and detention powers to be repealed in their entirety.[61]

Other provisions

1.61 Other amendments would repeal provisions which allow a detainee to be questioned even in the absence of their lawyer, and in the absence of their parent, guardian or other representative if that person is deemed to be overly disruptive. The offence of disclosing operational information within 2 years of learning the information as a result of the issue of a warrant would also be repealed.

1.62 The Gilbert and Tobin Centre argued for the explicit recognition of a right to take advice prior to being questioned, for the preservation of lawyer/client confidentiality, against the ability of ASIO to remove a representative for being overly disruptive, and against the offence of disclosing operational information.[62]

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59 Dr Patrick Emerton, *Committee Hansard*, 22 September 2009, p. 8.

60 Law Council of Australia, *submission 14*, p. 24.

61 See, for example, Australian Islamic Mission, *submission 10*, p. 1; Ms Christie Elemam, *submission 4*, p. 1.

62 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 17, endorsing a previous submission to an inquiry of the Parliamentary Joint Committee on Intelligence and Security on this subject.

Schedule 4 – repeal of the National Security Information (Criminal and Civil Proceedings) Act 2004

1.63 The *National Security Information (Criminal and Civil Proceedings) Act 2004* deals with the disclosure during judicial proceedings of information that it is deemed might prejudice national security. This Bill would repeal it.

1.64 The Gilbert and Tobin Centre do not support the repeal of the Act, but call instead for a review of its terms by an independent reviewer. The review is warranted by criticism of the Act by judicial officers and practitioners, which the Centre claim is inefficient and (in part) unworkable because of its requirement for security clearance of practitioners and judicial staff, and other requirements.[63]

1.65 The Law Council would not repeal the Act either, instead calling for amendments to repeal the security clearance process contained in section 39, or in the alternative, amend the section so as to give the Court a greater role in both determining whether a notice should be issued and reviewing a decision to refuse a legal representative a security clearance. The Council sets out a possible method of achieving this outcome in its submission.[64]

1.66 On the other hand, the Federation of Community Legal Centres of Victoria supports the proposed repeal, submitting that:

> The Act allows the Attorney General to closely monitor and regulate court processes in both criminal and civil proceedings. We see this as a clear breach of the doctrine of the separation of powers which is a corner stone of our legal system. The act gives extensive power to the government to control who participates in legal proceedings. The regime of security clearances is inconsistent with the principle of a judiciary which is independent from government. We submit that the power to determine how proceedings will be run should rest with the court. The regimes constructed in the Act for closed hearings, Ministerial certificates and security clearances are not the only method of dealing with classified and security sensitive information. The courts should be allowed to make a broad range of orders to protect such information.[65]

Conclusion

1.67 As stated at the beginning of this chapter the committee makes no formal recommendation about the passage of this Bill but has used this inquiry process as a mechanism to further the public discussion on ways to improve laws relating to terrorist activity in Australia. To this end, the committee will forward to the Attorney-General copies of this report, along with Hansard transcripts and submissions to the inquiry so that they might assist him in progressing the consultation currently underway on the national security legislation framework. In particular, the committee will draw the Attorney's attention to the issues, arguments and proposals made in this

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63 Gilbert and Tobin Centre of Public Law, *submission 1*, p. 18.

64 Law Council of Australia, *submission 14*, p. 27.

65 Federation of Community Legal Centres of Victoria, *submission 19*, p. 23.

Bill, and about which considerable comment was made by submitters, in respect of the ASIO Act and the proscription regime.

Senator Trish Crossin
Chair