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FACULTY OF LAW

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

INQUIRY INTO THE ANTI-TERRORISM LAWS REFORM BILL 2009

Thank you for the invitation to make a submission to the Committee's inquiry into the Anti-Terrorism Laws Reform Bill 2009 ('the Bill').

The Bill makes a wide range of amendments to the following Acts, and we deal with the amendments to each of these in turn:

- Section 80 and Divisions 101 and 102, *Criminal Code Act 1995* (Cth) ('*Criminal Code*');
- *Crimes Act 1914* (Cth) ('*Crimes Act*');
- *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'); and
- *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) ('*NSI Act*').

We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

Yours sincerely,

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A Amendments to Section 80 of the *Criminal Code* – Schedule 1 to the Bill

We do not support item 1 of the Bill. Item 1 repeals section 80.2 of the *Criminal Code*, which contains the 'sedition offences'. We note that the Australian Law Reform Commission ('ALRC'), in its 2006 report, did not recommend the repeal of this section. Instead, it recommended a number of amendments, including clarification that the offender must *intend* for another person or group to use force or violence.[1]

In the Commonwealth Government's December 2008 response to the Commonwealth Government to the Clarke Inquiry into the Case of Dr Mohamed Haneef and other inquiries (including the ALRC inquiry), it indicated that it would be making a number of amendments to section 80.2 along the lines of the ALRC's recommendations.[2] A Discussion Paper containing draft legislation implementing the Government's response was released for public consultation and comment this week. We will make for detailed submissions on the amendments to section 80 in our submission in response to the Discussion Paper.

B Amendments to Division 101 of the *Criminal Code* – Schedule 1 to the Bill

- **Definition of a 'Terrorist Act'**

Items 3 and 4 of Schedule 1 to the Bill repeal certain provisions of the *Criminal Code* relating to the definition of a terrorist act. Specifically:

- Item 3 repeals the definition of a 'terrorist act' in subsection 100.1(1) of the *Criminal Code*, and inserts an alternate definition based upon the definition used by the United Nations Security Council;[3] and

- Item 4 repeals subsections 100.1(2) and (3) of the *Criminal Code*, and inserts new subsections 100.1(3A) and (3B).

Item 3

Item 3 seeks to redefine a 'terrorist act' in two ways. First, references to 'threat of action' and 'threat' are removed from the definition. Secondly, the requirement that a terrorist act be made with the intention of 'advancing a political, religious or ideological cause' (paragraph (b) of the current subsection 100.1(1)) is deleted.

We 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.[4]

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1 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, 22-24 (Recommendations 8-11).

2 Australian Government, Attorney-General's Department, *Australian Government response to ALRC Review of sedition laws in Australia* (December 2008).

3 Commonwealth of Australia, Senate, Explanatory Memorandum, *Anti-Terrorism Laws Reform Bill 2009*, 3.

4 Security Legislation Review Committee ('SLRC'), *Report of the Security Legislation Review Committee* (June 2006), 53.

Recommendation 1

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.

The justification for deleting the requirement that a 'terrorist act' be done with the intention of 'advancing a political, religious or ideological cause' is largely human rights-based. For example, in one Canadian case, the judge held that the requirement for proof of a political or religious motive with respect to crimes of terrorism constituted an unjustified violation of the freedoms of expression, religion and association.[5] The removal of the 'motive' requirement has also been justified from a pragmatic perspective. For example, Roach has argued that 'a focus on the accused's religion and politics can prolong and distract trials', by subjecting the trial itself to accusations of politicisation.[6]

We, however, oppose the removal of this so called 'motive' requirement. 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'. As Saul has pointed out:

> Where the political or religious motives of suspects are not known for lack of evidence, violent attacks can always still be prosecuted as ordinary crime, which precludes impunity while ensuring that terrorism is a label reserved for those crimes that are conceptually and morally distinguishable because they involve political or religious coercion of the public or government.[7]

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5 *R v Khawaja* [2006] OJ 4245, [73] per Rutherford J.

6 Kent Roach, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive' in Andrew Lynch, Edwina MacDonald & George Williams (eds) *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007), 43.

7 Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?' in Andrew Lynch, Edwina MacDonald & George Williams (eds) *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007), 34.

Furthermore, the retention of the element of 'advancing a political, religious or ideological cause' is consistent with the recommendations of the SLRC.[8]

Recommendation 2

We believe that paragraph (b) in section 100.1(1) of the *Criminal Code* should be retained.

Item 4

The Bill both narrows and expands the categories of action that fall within the definition of a 'terrorist act'.

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.[9]

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'.[10]

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[11] and New Zealand.[12] 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).[13] Failing the 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.

Recommendation 3

We support item 4 of the Bill.

Item 4 also proposes a new type of action which should be included within the definition of terrorist act in subsection 100.1(2), namely, action which 'involves taking a person hostage'. To 'take a person hostage' is defined in the new subsection 100.1(3B) as being 'to seize or detain that person; and to threaten to kill, to injure, or to continue to detain that person'.

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8 SLRC, above n 2, 57.

9 *Terrorism Act 2000* (UK) Ch 11 s 1(2).

10 Kent Roach, 'The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001' (2004) *Studi Senesi* 487, 494. See also 493-497.

11 *Criminal Code* RSC 1985 c 46 s 83.01.

12 *Terrorism Suppression Act 2002* (NZ) s 5(3).

13 *Criminal Code* RSC 1985 c 46 s 83.01(b)(ii)(D).

Recommendation 4

We support the inclusion of hostage-taking as an act constituting a 'terrorist act'.

Item 4 to the Bill amends subsection 100.1(3).

Currently, item 100.1(3) provides that there is an exception for 'advocacy, dissent, protest or individual action'. However, this exception does not apply if the actor intends to cause serious physical harm or a person's death, endanger a person's life or create a serious risk to the health or safety of the public or a section of the public.

Item 4 would add hostage-taking to this list. Therefore, a person who intends to take another person hostage, even if acting in protest or dissent, would nevertheless be engaging in a terrorist act. This is, of course, only if the other elements of the definition of a 'terrorist act' in subsection 100.1(1) are satisfied. We agree that it is appropriate to include hostage-taking on this list. Such an act is of a sufficient degree of severity that a person should not excused merely on the ground that he or she was engaging in advocacy, dissent, protest or industrial action.

However, item 4 would also *delete* creating a serious risk to the health or safety of the public or a section of the public from subsection 100.1(3)(b). The reason for this 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.

Recommendation 5

We support item 4 only to the extent that it would include an intention to take a person hostage in subsection 100.1(3)(b).

We recommend that an intention to create a serious risk to the health or safety of the public or a section of the public be retained in subsection 100.1(3)(b).

Finally, the Bill inserts a new subsection (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*.

This amendment is based on Recommendation 12 of the 2006 Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security ('PJCIS').[14] The PJCIS was of the view that the distinction between counter-terrorism law and the law of armed conflict should be preserved. As the law of armed conflict already contains

[14] Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-Terrorism Legislation* (December 2006) [5.42]-[5.48].

prohibitions against various terrorist offences,[15] the effect of this proposed amendment to the *Criminal Code* is to prevent the possibility that a person is charged with an offence under both the counter-terrorism laws *and* the law of armed conflict.

Recommendation 6

We support the inclusion of new subsection 100.1(3A).

- **Offence of Possessing a Thing Connected with a Terrorist Act**

Item 5 of Schedule 1 to the Bill 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.

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.

First, the language of section 101.4 is vague and overly broad. There is no definition of 'thing' in the *Criminal Code*, nor is the level of 'connection' between the 'thing' and the terrorist act specified. Sections 101.2 (providing or receiving training connected with terrorist acts) and 101.5 (collecting or making documents connected with terrorist acts) are similarly vague on the degree of 'connection' required. Furthermore, there is no definition of 'training' or 'collection' in the *Criminal Code*. This means that the scope of these offences is also indeterminate, and arguably goes beyond what is proportionate to respond to the threat of terrorism.

Second, subsection 101.4(5) provides that it is not an offence if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a similar act. Unusually, the defendant bears an evidential burden in relation to this matter. The same evidential burden applies to persons charged under section 101.5(5) (collecting or making documents connected with terrorist acts). In our opinion, it undermines the presumption of innocence for a defendant to be required to disprove an element of the offence, or even to be required to put forward evidence that tends to disprove that element. The fact that a person actually intended to use the thing or document in relation to a terrorist act is central to the person's culpability. Without this circumstance, a person would be guilty of an offence for possessing a document the person knows is connected (in potentially the loosest sense) with preparation for a terrorist act even if that person had no involvement in the proposed terrorist act. This would include, for example, an academic who downloads a document about a possible terrorist act for research purposes.

15 *Ibid* [5.45].

These two problems are compounded by the absence (in relation to all of the preparatory offences in Division 101 of the *Criminal Code*) of any obligation on the prosecution to establish that the preparatory activity or thing was connected to a particular terrorist act.

Recommendation 7

A review of all of the preparatory offences in Division 101 of the *Criminal Code* should be conducted, with an eye to determining whether these offences are effectively targeted to the threat of terrorism.

C Amendments to Division 102 of the *Criminal Code* – Schedule 1 to the Bill

Division 102 of the *Criminal Code* sets out a procedure for the proscription of terrorist organisations. An organisation may be declared or proscribed as a terrorist organisation in one of two ways:

(a) During the course of a prosecution of an individual for one of the derivative terrorist organisation offences in Subdivision B of Division 102, a court may make a declaration that the relevant organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)' (subsection 102.1(1)); or

(b) The Commonwealth Attorney-General may make a regulation listing an organisation as a terrorist organisation if he or she is satisfied on reasonable grounds that the organisation satisfies the definition in (a) above or the organisation advocates the doing of a terrorist act (subsection 102.1(2)).

Some critics have suggested that proscription is not a proportionate response to the threat of terrorism, and therefore Division 102 should be repealed in its entirety, or alternatively that the power to proscribe an organisation should be transferred exclusively to the courts. In our opinion, the complex policy issues involved in making proscription decisions, the confidential information and intelligence upon which such decisions are often based and the accountability of the executive branch of government to the Parliament and the people means that such decisions should be left in the hands of the Commonwealth Attorney-General.[16]

We do, however, have a number of concerns regarding the breadth of the definition of a 'terrorist organisation', the absence of adequate checks and balances on the discretion of the Attorney-General in proscribing organisations and, finally, the indeterminacy of the terrorist organisation offences in Division 102 of the *Criminal Code*.

- **Definition of a 'Terrorist Organisation'**

There is no definition of 'fostering' in Division 102 of the *Criminal Code*. The breadth of this term is, however, evident from the comments of Bongiorno J during the 2008 trial of Abdul

16 For a more detailed discussion of our position on this point, see Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1.

Nacer Benbrika and 11 co-accused in the Victorian Supreme Court. Justice Bongiorno instructed the jury that '[f]ostering can be synonymous with encouraging or something of that nature'.[17] For example, giving public encouragement to the anti-apartheid struggle of Nelson Mandela in South Africa (which is within the definition of a 'terrorist act' in section 100.1) may be regarded as fostering the doing of a terrorist act.

There has been no case in which the Crown has relied solely upon the 'fostering' of a terrorist act as the basis for a claim that an organisation is a 'terrorist organisation'. This is presumably because of the indeterminate scope of that term. For example, in the 2008 Benbrika trial in the Victorian Supreme Court, the prosecution submitted that the 12 men were part of an organisation which was 'directly or indirectly engaged in preparing or fostering the doing of a terrorist act'.[18] It is unlikely that deletion of the term 'fostering' from the definition of a 'terrorist organisation' would have any adverse impact on the ability of the Commonwealth to prosecute individuals for terrorist organisation offences.

Recommendation 8

We support the proposal in item 7 of Schedule 2 to the Bill to delete the term 'fostering' from the definition of a 'terrorist organisation' in subsection 102.1(1).

We have two additional concerns regarding the definition of a 'terrorist organisation' that are not reflected in the Bill.

First, we support the SLRC's recommendation to remove paragraph (c) from the definition of 'advocates' in subsection 102.1(1A).[19] Paragraph (c) means that an organisation can be proscribed when the organisation 'directly praises' terrorism even if the praise does not result in a terrorist act, it was not intended that a terrorist act would occur and the organisation has no substantive involvement in terrorism. There need only be a risk that such praise might lead a person to engage in a terrorist act, regardless of that person's age or mental capacity.

It remains unclear what would constitute 'advocacy' or 'praise'. Must the statements be made publicly or are private statements also included? Is it sufficient if a single member of the organisation praises terrorism or is only the words of the leader of the organisation that count? If the former, it is possible that the organisation could be proscribed as a 'terrorist organisation' on the basis of statements that only a minority of its members support. This presents an extraordinary situation given that once an organisation is prescribed all persons involved in even the most minimal way with that organisation are exposed to criminal liability under the various terrorist organisation offences (which carry terms of imprisonment ranging from three to 25 years).

Recommendation 9

Paragraph (c) should be deleted from the definition of 'advocacy' in subsection 102.1(1A) of the *Criminal Code*.

17 *R v Benbrika* [2009] VSC 142 (8 April 2009).
18 *R v Benbrika* [2009] VSC 21 (3 February 2009).
19 SLRC, above n 2, 73

Second, we believe that further criteria should be specified in Division 102 of the *Criminal Code* to guide the discretion of the Commonwealth Attorney-General in deciding which organisations to prescribe. The definition of a 'terrorist organisation' potentially encompasses many organisations. The fact that only 19 organisation are (or have been) proscribed indicates that the Attorney-General is exercising a degree of selectivity in deciding which organisations to prescribe. The failure to set out more detailed criteria in Division 102 gives rise to the potential for arbitrary and politicised decision-making, reduces the transparency of the decision-making process and undermines public confidence in that process.[20]

Recommendation 10

We support the criteria proposed by Patrick Emerton in Submission No. 18 to the Parliamentary Joint Committee on Intelligence and Security, *Review of the Listing of the Kurdistan Workers' Party (PKK)* (2006), 6-7. These criteria should be entrenched in Division 102 of the *Criminal Code*.

- **Notification of Proscription (Procedural Fairness)**

Division 102 of the *Criminal Code* does not mandate any public notification, either before or after the making of a regulation listing an organisation as a terrorist organisation. It is only by convention that, on the day after a regulation is lodged on the Federal Register of Legislative Instruments, the Attorney-General issues a press release, including a Statement of Reasons, announcing the listing of the organisation. Indeed, in some cases, even this minimal level of public notification has not occurred. For example, a regulation re-listing the Kurdistan Workers' Party was made on 12 February 2008.[21] The Attorney-General's Department did not issue a media release giving public notice of the re-listing and did not provide a Statement of Reasons.[22]

In our opinion, item 8 of Schedule 1 to the Bill makes a substantial improvement to Division 102 of the *Criminal Code* by requiring that, after a regulation is made, the listed organisation and its members are notified (if it is practical to do so) and a general notification published via the specified media. To ensure that individuals are deterred from participating in the activities of a terrorist organisation (which is the primary purpose of proscription), it is imperative that the community is clearly notified of the proscription of a particular organisation.

Item 8 also mandates notification of the relevant organisation and its members (if it is practical to do so) prior to a regulation being made.

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20 Lynch, McGarrity & Williams, above n 16, 28-31.

21 Federation of Community Legal Centres (Vic) Inc, Submission No 7, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the re-listing of the Kurdistan Workers Party (PKK) as a terrorist organisation under the* Criminal Code Act 1995 (2008), 4.

22 *Ibid*.

The Attorney-General's Department has stated that 'providing notice prior to listing could adversely impact operational effectiveness and prejudice national security'.[23] In our opinion, these arguments are unpersuasive. 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.[24]

Recommendation 11

We support the proposal in item 8 of Schedule 1 to the Bill to establish a mandatory notification process both before and after a regulation is made.

- **Advisory Listing Committee**

Item 9 of Schedule 1 to the Bill creates a Listing Advisory Committee with the functions of advising the Attorney-General on any proposed listing and considering any objections to the proposed listing and making recommendations to the Attorney-General. This is in accordance with the recommendation of the SLRC that an independent body of retired judges and persons 'with experience in security legislation, investigation and policing' be established to advise the Attorney-General prior to a regulation being made.[25] We support the creation of a Listing Advisory Committee.

We believe that it is particularly advantageous that the Listing Advisory Committee will be empowered to engage in public consultations and publicise its role. This would:

(a) assist the prescribed organisation and affected persons to understand the reasons for proscription;
(b) give the community a sense of assurance about controversial proscription decisions;
(c) educate the community about proscription and therefore improve the deterrence function of proscription;
(d) ensure that the Listing Advisory Committee has all the information necessary to make recommendations to the Attorney-General; and

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23 Attorney-General's Department, Submission No 10, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the* Criminal Code Act 1995 (2007), 13.

24 For a more detailed analysis of the Commonwealth Attorney-General's arguments, see Nicola McGarrity, 'Review of the Proscription of Terrorist Organisations: What Role for Procedural Fairness?' (2008) 16 *Australian Journal of Administrative Law* 45.

25 SLRC, above n 2, 91.

(e) 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.

Recommendation 12

We support the proposal in item 9 of Schedule 1 to the Bill to create a Listing Advisory Committee to review and make recommendations to the Commonwealth Attorney-General regarding proposed regulations to proscribe organisations as 'terrorist organisations'.

- **Appeal to the Administrative Appeals Tribunal**

As discussed above, we believe that the power to proscribe organisations should remain in the hands of the Commonwealth Attorney-General rather than the courts. Item 9 of Schedule 1 to the Bill would confer a power on the Administrative Appeals Tribunal ('AAT') to review the decision to list an organisation. We assume that the Bill is referring to a power of merits review.

We do not support item 9. 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. As Lord Nicholls of Birkenhead stated in *A v Secretary of State for the Home Department*:

> All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.[26]

For this reason, 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.

We do, however, support the availability of judicial review by the courts on the grounds set out in sections 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This is especially important if the new procedural requirements proposed by the Bill (including prior notification of an organisation and its members) are implemented.

Recommendation 13

We do not support item 9 of Schedule 1 to the Bill.

- **Offence of Training with a Terrorist Organisation**

[26] [2005] 2 AC 68 [79]. See also *Australian Communist Part v Commonwealth* (1951) 83 CLR 1, 272; *Alister v R* (1984) 154 CLR 404, 455 (Brennan J), 435 (Wilson and Dawson JJ).

The particularly problematic aspect of the offence of training with a terrorist organisation is contained in subsection 102.5(2). This subsection provides that a person commits an offence if:

(a) he or she intentionally provides training to, or intentionally receives training from, an organisation; and
(b) the organisation has been listed by regulation as a terrorist organisation.

This is a strict liability provision. That is, the fact that the relevant organisation has been listed by regulation negates any requirement for the prosecution to establish that the defendant either knew or was reckless as to whether the organisation was in fact a terrorist organisation. All that is required (by subsection 102.5(4)) is that the person was reckless as to whether the organisation had been listed as a terrorist organisation, and the defendant bears an evidential burden in relation to this element. As noted by the SLRC, the defendant therefore does not have 'any opportunity to resist the factual conclusion that it is a terrorist organisation'.[27] The SLRC could not see any reason for subsection 102.5(2) to be a strict liability provision (especially given that the other offences in Division 102 contain a requirement of knowledge and/or recklessness).

Recommendation 14

We support the redrafting of section 102.5 as set out in item 10 of Schedule 1 to the Bill, that is, making it an element of either offence in the section that the defendant knows or is reckless as to whether the relevant organisation is a 'terrorist organisation'.

However, we note that item 10 of Schedule 1 does not address another problem with section 102.5 identified by the SLRC. The SLRC noted that the section 'catches quite innocent training or teaching of persons who may, unknown to the teacher, be members of a terrorist organisation'.[28] That is, it is not sufficiently targeted to the culpable conduct, namely, the provision to a terrorist organisation of support that is connected with engagement in or preparation for a terrorist act. Section 102.5 would capture, for example, the provision of training in the use of office equipment to a terrorist organisation.

Recommendation 15

We support the recommendation of the SLRC that section 102.5 should be redrafted to make it an element of both offences 'either than 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'.[29]

- **Offence of Providing Support to a Terrorist Organisation**

27 SLRC, above n 2, 114.
28 *Ibid* 117-118.
29 *Ibid* 118.

We accept that it is appropriate, as section 102.7 of the *Criminal Code* provides, to criminalise the provision of certain types of support to a terrorist organisation.

The problem, as identified by the SLRC, is that 'support' is not defined in the *Criminal Code*. It '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'.[30] Additionally, the use of this section to charge Dr Mohamed Haneef in 2007 after he provided a SIM card to a relative demonstrated the virtually unlimited range of the concept of 'support'.

We believe that the Bill's addition to two further requirements to section 102.7 appropriately limits the scope of this offence. First, items 11 and 13 of Schedule 1 to the Bill require the 'support' to be 'material'. 'Material' is defined in item 15 as not including 'the mere publication of views that appear to be favourable to an organisation or its objectives'. Second, items 12 and 14 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.

Recommendation 16

We support items 11-15 of Schedule 1 to the Bill.

- **Offence of Associating with a Terrorist Organisation**

Under section 102.8 of the *Criminal Code*, it is an offence punishable by up to three years' imprisonment to knowingly associate, on two or more occasions, with a member of a listed terrorist organisation or a person who directs/promotes activities of a listed terrorist organisation, with the intention of providing support and that support would assist the organisation to expand or continue to exist.

The SLRC recommended that this offence be repealed.[31] The PJCIS endorsed this recommendation.[32]

We agree. There are two reasons why we object to the existence of an 'association' offence.

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.[33] 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.[34]

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

30 *Ibid* 121.
31 *Ibid* 13 (Recommendation 15).
32 PJCIS, above n 14, 81 (Recommendation 19).
33 SLRC, above n 2, 4-5.
34 *Ibid* 129; PJCIS, above n 14, 80.

manner by the counter-terrorism laws.[35] This is one of the greatest challenges facing the Commonwealth in achieving an effective counter-terrorism strategy. Terrorism is far more 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.

Recommendation 17

We support the proposal in item 16 of Schedule 1 to the Bill to repeal section 102.8 of the *Criminal Code*.

D Amendments to the *Crimes Act* – Schedule 2 to the Bill

- **Presumption against Bail**

Prior to 1 July 2004, there was a presumption in favour of bail for persons charged with terrorism offences. In response to the granting of bail to Belal Khazaal, who was charged with two terrorism offences under Division 101 of the *Criminal Code*, section 15AA was introduced into the *Crimes Act* by the *Anti-Terrorism Act 2004* (Cth). This section prevents a bail authority from granting bail to a person charged with a terrorism offence (with the exception of the 'association' offence in section 102.8) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

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, however, 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).

Section 15AA has been criticised by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

35 SLRC, above n 2, 14.

> [T]he classification of an act as a terrorist offence in domestic law should not result in automatic denial of bail, nor the reversal of onus. Each case must be assessed on its merits, with the burden upon the State for establishing reasons for detention.[36]

We would therefore support revision of section 15AA reflecting the fact that there is a spectrum of terrorism offences. The fact that a person is charged with a terrorism offence should not automatically mean that there is a presumption against bail except where exceptional circumstances can be demonstrated. The other offences captured by section 15AA give an indication as to where the line could be drawn in relation to terrorism offences. Section 15AA also captures, for example, offences against a law of the Commonwealth where a physical element of the offence is that the defendant engaged in conduct that caused the death of a person and the fault element is that the defendant engaged in that conduct intentionally.

Recommendation 18

We do not support item 1 of Schedule 2 to the Bill.

We believe that there are some terrorism offences for which there should be a presumption against bail unless exceptional circumstances are demonstrated. A review should be conducted to determine where the line should be drawn between such offences and other terrorism offences for which there should be a presumption in favour of bail.

- **'Dead Time' Provisions**

Upon arrest for a terrorism offence,[37] a person may be detained without charge for the purpose of investigating whether he or she committed the offence and/or whether he or she committed another terrorism offence that an investigating official reasonably suspects he or she committed.[38] The period of detention for adults is generally limited to a 'reasonable' period of not more than four hours,[39] with the sole exception being where a magistrate or justice of the peace grants an application under section 23DA for the period of detention to be extended. The total of any periods of extension cannot be more than 20 hours.[40] That is, there is a maximum detention period of 24 hours. It is notable that the maximum detention period for other serious offences is 12 hours.[41]

However, section 23CA(8) provides for 'dead time' that must be disregarded in ascertaining compliance with the time limit for the detention period. This 'dead time' means that a person may be detained for days or even weeks, with the maximum of 24 hours of questioning spread over that period. Many of the justifications for staggering of the questioning period through the use of 'dead time' are clearly defensible – allowing for breaks for meals or sleep, the translation of documents relevant to police inquiries and the need to communicate with agencies across

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36 Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Human Rights Council, United Nations General Assembly, *Australia: Study on Human Rights Compliance While Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006).

37 *Crimes Act 1914* (Cth), s 23CA(1).

38 *Crimes Act 1914* (Cth), s 23CA(2).

39 *Crimes Act 1914* (Cth), s 23CA(4).

40 *Crimes Act 1914* (Cth), s 23DA(7).

41 *Crimes Act 1914* (Cth), s 23D.

different time zones. These justifications apply to the investigation of both terrorism and non-terrorism offences.[42]

By contrast, subsection 23CA(8)(m) of the *Crimes Act* is unique to the investigation of terrorism offences. This subsection includes as 'dead time':

> [A]ny reasonable time that:
> (i) is a time during which the questioning of the person is reasonably suspended or delayed; and
> (ii) is within a period specified under section 23CB.

Section 23CB provides that time may be specified as 'dead time' if a magistrate or justice of the peace is satisfied that it is appropriate to do so, that the offence is a terrorism offence, detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence, the investigation is being conducted properly and without delay and the accused has been given an opportunity to make representations.

It was subsection 23CA(8)(m) in combination with section 23CB that enabled the detention of Dr Mohamed Haneef for 12 days without charge in July 2007. This paragraph is unique to the investigation of terrorist offences.

Item 4 of Schedule 2 to the Bill proposes to repeal subsection 23CA(8)(m). Whilst we agree with the drafters of the Bill that amendments to the *Crimes Act* are necessary to protect the right to liberty of terrorism suspects, we believe that it would be more appropriate to keep subsection 23CA(8)(m) intact and instead impose a cap on the total amount of time that a suspect may be detained without charge. An appropriate period of time would be 48 hours.

Recommendation 19

We do not support item 4 of Schedule 2 to the Bill. Instead, we recommend that a cap of 48 hours be imposed on the total amount of time that a suspect may be detained without charge.

We do, however, support the proposals in items 2 and 7 of Schedule 2 to the Bill that:

(a) Section 23BA ('Persons to be informed of rights') be introduced into the *Crimes Act*; and,
(b) Section 23DA be amended such that any application by an investigating official for an extension of the investigation period must be heard by a judge (rather than a magistrate or justice of the peace).

E Amendments to the *ASIO Act* – Schedule 3 to the Bill

We believe that the questioning and detention scheme under the *ASIO Act* needs to be substantially reworked. First, we do not believe that it is justifiable for ASIO to possess a power to detain persons, including non-suspects, for up to 168 hours (or seven days). Detention is the most invasive restriction on individual liberty and security of person. As such it must be seen

[42] *Crimes Act 1914* (Cth), s 23C(7).

as a means of last resort to be used after all feasible alternatives have been exhausted. If the stated purposes of the detention provisions are to prevent a subject alerting others that the terrorist offence is being investigated, to prevent absconding, or to prevent the damage or destruction of evidence (subsection 34F(3)), then it is arguable that those purposes can be achieved by less invasive means. For example, electronic monitoring, home detention, telephone reporting, home surveillance, prohibitions on visitors or contact with others, and banning the use of computers and telephones.

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.

Our concerns regarding the questioning and detention powers of ASIO are discussed in detail in the submission of Williams and Saul to the Parliamentary Joint Committee on ASIO, ASIS and DSD in 2005.[43] However, in brief:

- There should be a cap of 24 hours on questioning of a person under a questioning or questioning and detention warrant. There should not be an extension of time where the person requires an interpreter;
- Members of the AAT should not be appointed as prescribed authorities. They are dependent upon the favour of the executive if they wish to seek reappointment to the AAT;
- In relation to the issue of legal representation, we believe: (1) the legislation should recognise a right to advice prior to questioning; (2) the legislation should expressly preserve lawyer / client confidentiality; (3) ASIO should not be able to exclude legal advisors from the proceedings on the basis that they are 'unduly disrupting' the proceedings; and (4) the legislation should expressly provide for the availability of legal aid.
- The offence of disclosing 'operational information' should be repealed.

F Repeal of the *NSI Act* – Schedule 4 to the Bill

Item 1 of Schedule 4 to the Bill proposes to repeal the *NSI Act* in its entirety. We do not support this proposal. This is because we acknowledge that there is a need for legislation dealing with the disclosure during judicial proceedings of information that might prejudice Australia's national security.

Nevertheless, we believe that there are fundamental problems – both practical and conceptual – with the *NSI Act*. To date, there has been no inquiry into the *NSI Act*. Therefore, we recommend that an independent person (possibly the proposed National Security Legislation Monitor) be appointed to conduct a review of the terms and operation of the *NSI Act*, and make recommendations to the Commonwealth Parliament for amendment or even repeal.

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[43] George Williams and Ben Saul, Submission No. 55, Parliamentary Joint Committee on Intelligence and Security, *Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers* (2005).

Practitioners and judicial officers have commented on the challenge that the *NSI Act* poses to the efficient running of a criminal trial. For example: lawyers and court staff are required to go through an extremely intrusive procedure to apply for a security clearance; failure of a practitioner to notify the Commonwealth Attorney-General of information which relates to or may affect national security may result in custodial sentence; and, the suspension of the trial whilst the Commonwealth Attorney-General considers whether to grant a certificate and during the making of any appeals results in considerable delay and disturbance to the trial process.[44]

The unworkable nature of aspects of the *NSI Act* is further evidenced by the frequent use of section 22 orders in terrorism trials, especially in the Victorian Supreme Court. Under section 22, the prosecutor and defendant 'may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security'. The court may make an order in the terms of the arrangement if it believes that it is appropriate to do so.[45] The use of section 22 orders tends to suggest that there is a need for more stream-lined procedures dealing with national security information in judicial proceedings.

The person reviewing the *NSI Act* should be required to consider whether it strikes an appropriate balance between promoting and upholding the right of a defendant to a fair trial and maintaining national security by protecting sensitive information during criminal proceedings. Of particular concern in this regard is section 31(8) of the *NSI Act*. Section 31(7) specifies a number of matters that the court must take into account in deciding what order to make in relation to the disclosure of information. These include: (a) whether there would be a risk of prejudice to national security if the information was disclosed; and (b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence. Section 31(8) limits the discretion of the court by requiring it to give greatest weight to (a).

Recommendation 20

We do not support item 1 of Schedule 4 to the Bill.

Instead, we recommend that an independent review of the terms and operation of the *NSI Act* be conducted as a matter of priority.

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44 Anthony Whealy, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials' (2007) 8 *The Judicial Review* 353, 363. See also Phillip Boulten, 'Preserving National Security in the Courtroom: A New Battleground' in Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (2007) 96-105.

45 See, for example, *R v Khazaal* [2006] NSWSC 1353 (13 December 2006) [85]. One reason why it may be 'appropriate' to make an order in the terms of the arrangement is to 'avoid the need for the Court to undertake the more cumbersome procedures necessary where agreement has not been reached in relation to the disclosure and protection of national security information'.