Law Council
OF AUSTRALIA

Supplementary submission to the inquiry into extremist movements and radicalism in Australia

Parliamentary Joint Committee on Intelligence and Security

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

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- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council gratefully acknowledges the contribution of members of its National Criminal Law Committee to this supplementary submission.

Executive Summary

1. This supplementary submission provides the Law Council's responses to the following questions taken on notice at the public hearing of 30 April 2021:

    - **a possible 'watch-list' of individuals connected with ideologically motivated violent extremism, which is de-coupled from the criminal law**—Senator the Hon Kristina Keneally sought the Law Council's views on mechanisms outside of the criminal law to publicly denounce and warn the public about extremist views espoused by particular entities, or those who disseminate or facilitate the dissemination of such views on particular communications platforms. A public facing official 'watch list' was identified as one potential mechanism to give effect to that intent;
    - **the statutory listing ('proscription') of individuals**—Senator Keneally also sought the Law Council's views about the possible extension of the listing regime for terrorist organisations in Division 102 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to individuals, such as 'lone wolf' actors who are broadly inspired by an extremist ideology, but do not act in the name of an organised group which advocates or engages in violence to further a coherent ideology. It was noted that New Zealand's 'designated terrorist entity regime' in the *Terrorism Suppression Act 2002* (NZ) enables the listing of individuals. In August 2020, the Prime Minister of New Zealand exercised power under that Act to list the perpetrator of the 2019 Christchurch attacks, Mr Brenton Harrison Tarrant, after the High Court of New Zealand sentenced him to life imprisonment following his convictions for multiple murder, attempted murder and terrorism offences; and
    - **defining and regulating 'online hate speech' in the context of violent ideological extremism**—Dr Anne Aly MP sought the views of the Law Council about potential enhancements to the regulation of hate speech online, including a possible approach to defining the content constituting 'hate speech' in this context.

2. In addition, the Law Council provides some further remarks on two potential legislative amendments being considered by the Committee, namely:

    - a proposal advanced by the Australian Federal Police (**AFP**) to enact new offences targeting the mere possession of symbols and insignia, arising from a contention that there is a gap in the coverage of existing offences. (The Law Council's observations on this proposal also supplement its oral evidence in response to questions from Ms Celia Hammond MP. Those questions concerned the potential enactment of new offences for possessing symbols or insignia, which would apply to people who are reckless as to whether those materials are in some way connected with terrorism); and
    - possible offences which specifically target the possession and dissemination of 'manifestos' created by individuals who have engaged in terrorist acts, or who support, advocate or facilitate terrorist acts, or both.

3. In summary, the Law Council is doubtful that the potential or proposed new offences of the kind described above, or the statutory listing of individuals, are likely to be effective in responding to the threat of violent ideological extremism. There is also a significant risk that such measures may be counter-productive to the objective of preventing the spread of extremist ideology. The security and social impacts of a non-legislative listing mechanism would also need careful consideration.

4. However, if the Committee is inclined to pursue legislative measures, consideration might be given to the alternatives outlined at paragraph [83] of this submission, including implementation of an outstanding recommendation of the 2013 report of the *Council of Australian Government Review of Counter-Terrorism Legislation*.

Question on Notice (1): a public-facing 'watch list'

5. It would be legally possible for the Government to release publicly a list of entities, and potentially communication forums used by those entities, which present a high risk of exposing the community to extremist materials, for the purposes of denouncing those ideologies and warning the public of the risk.

6. Depending on applicable security considerations, such a list could be released in part, if considered necessary. For instance, extracts might be disclosed to specific sections of the community, as part of outreach and engagement by government, to assist with community-based intervention programs to deal with threats that most seriously affect those parts of the community.

Interaction with criminal laws relevant to terrorism

7. As some members of the Committee observed at the public hearing, such a mechanism would not, of its own force, trigger criminal law consequences for people who interacted with an entity that is on the 'watch-list'. Rather, for any criminal law response to be available under the terrorism-related provisions of the Criminal Code, one or more of the following consequences would need to occur separately:

    - it would be necessary for the entity appearing on the 'watch-list' to be separately listed as a 'terrorist organisation' within the meaning of paragraph (b) of the definition of that term in section 102.1 of the Criminal Code, thereby enlivening the terrorist organisation offences in Division 102 of the Criminal Code;

    - the Crown would need to establish, in the context of an individual prosecution for an offence against Division 102 of the Criminal Code, that the entity appearing on the 'watch-list' also fell within the meaning of paragraph (a) of the definition of a 'terrorist organisation' (being an organisation that is engaged in terrorism-related activity, even though the Executive Government has not made regulations to list it as a terrorist organisation);

    - depending on the factual circumstances, it may be possible to prosecute an individual who interacted with an entity on the 'watch-list' for terrorism offences against Division 101 or Division 103 of the Criminal Code, if that person's conduct was preparatory or ancillary to the commission of a terrorist act, or involved the financing of a terrorist act; or

    - an individual's interaction with an entity on the watch list may give authorities reason to investigate or monitor the person and, depending upon other circumstances and evidence, might form part of the factual matrix of an application for a control order under Division 104 of the Criminal Code.

Broader implications—security, social cohesion and administrative decision-making

8. Even if a 'watch-list' mechanism were established, which did not directly enliven any exposure to criminal liability and associated investigative or preventive powers, its broader implications would need careful consideration.

9. This includes assessing any security implications that may arise from disclosing publicly the fact that an entity or a communications forum is of security interest. For example, it would be important to assess the risk that the inclusion of a person or communications forum on a public-facing list could result in the relevant individuals taking further counter-intelligence measures to evade detection. This may include 'pivoting' to new forms of anonymising or encryption technology and migrating from the 'surface web' to the 'dark web'. There is also a risk that publicising the fact that a particular entity or forum is of security concern could attract attention and interest from

individuals who already display risk factors indicating their susceptibility to the influence of violent extremist ideology. This may frustrate, or even be counter-productive to, the intended purpose of warning and dissuading people from interacting with entities, or using communications platforms, that are on the 'watch-list'.

10. There is a further risk that the inclusion of a person or group on a purely administrative 'watch-list' could have adverse impacts on social cohesion within the community, in that it might aggravate the sense of grievance or social isolation or ostracism experienced by the relevant persons, and potentially also their family, friends and close associates. As an official, government-issued 'watch-list' is likely to carry substantial weight and influence with the public, the potential for listed entities and their families and associates to sustain reputational damage and experience discrimination, including in their lawful business or employment, would also need careful consideration.

11. It would also be important to carefully consider, from both a legal and a practical perspective, the use that may be made of such a 'watch-list' for the purposes of administrative decision-making by government about individuals on that list (and potentially others who interact with those individuals, including family, friends and business associates). This might include, for example, administrative decisions about the issuance or cancellation of visas, the issuance or revocation of security clearances or aviation or maritime security identification cards, the granting of parole, and the enlivenment of citizenship cessation laws. It might also influence the decision-making of law enforcement and border security officers about the exercise of intrusive powers, such as the selection of individuals for screening, search and questioning at major transport hubs (such as airports) or mass public gatherings.

12. The Law Council notes that these issues are not necessarily insurmountable obstacles to establishing a purely administrative mechanism in the nature of a 'watch-list' for the purpose of conveying an official expression of moral denunciation and warning the public of relevant risks presented by violent extremist ideologies. However, these issues would require due consideration, both at the point of determining whether to pursue this mechanism and in its design. Issues relevant to the design of such a mechanism include the manner in which the list may be used and disclosed, and safeguards to ensure procedural fairness in the process for including and removing entities.

Question on Notice (2): terrorist listing regimes for individuals

13. As Committee members observed, sections 20 and 22 of the *Terrorism Suppression Act 2002* (NZ) enable the listing of individuals and groups as 'designated terrorist entities'. It is also the case that the listing regime in Canada, in section 83.05 of the Canadian Criminal Code, applies to individuals and organisations.[1]

14. This is in contrast to the equivalent domestic listing regimes in Australia and the United Kingdom (**UK**), which are limited to groups—that is, 'terrorist organisations'.[2] However, the domestic terrorism-related listing regimes of New Zealand and Canada contain two major differences to corresponding provisions of Australian laws, in relation to the listing thresholds, and the specific criminal offences which are enlivened by the listing of an entity. These differences, and their policy implications, are outlined under the subheadings below.

15. For completeness, it should also be acknowledged that all jurisdictions in the Five Eyes alliance, including Australia, have separate legislative regimes which implement

[1] *Criminal Code* (RSC, 1985, c. C-46), section 83.01 (definition of 'entity').

[2] *Criminal Code Act 1995* (Cth), Division 102; *Terrorism Act 2000* (UK), Part II ('proscribed organisations').

what are commonly known as 'international sanctions'.[3] These sanctions take two main forms. The first is financial sanctions lists maintained by the United Nations Security Council (including terrorism-specific lists pursuant to various Security Council resolutions).[4] The second form of 'international sanction' is statutory 'autonomous sanctions' regimes, which operate in the absence of a United Nations resolution, but usually reflect multilateral action among like-minded groups of countries to apply financial and economic sanctions to a recalcitrant country or entities of a foreign country. Collectively, both forms of 'international sanctions' regimes can be used to target individuals who have engaged in, or facilitated or supported, terrorism-related activities. Contravention of relevant 'international sanctions' laws is generally an offence under the applicable laws of each Five Eyes jurisdiction.

Differences in domestic listing thresholds in Australia, New Zealand and Canada

16. As the Law Council's representatives noted at the public hearing, the statutory listing threshold in New Zealand is considerably higher than that of Australia. In New Zealand, an entity may only be listed if the Prime Minister believes, on reasonable grounds, that the entity has knowingly carried out, or has knowingly participated in the carrying out of, one or more terrorist acts. A 'terrorist act' for the purpose of the listing regime for terrorist entities is defined to cover not only the completion of a terrorist act, but also the making of credible threats to engage in such terrorist acts, as well as preparatory acts, attempts, and knowing facilitation.[5]

17. Similarly, the threshold for listing a person or an organisation as a 'designated terrorist entity' in Canada appears higher than the listing threshold for terrorist organisations in Australia. In Canada, the Governor-in-Council may list an entity if, on the recommendation of the relevant responsible Minister, they are satisfied there are reasonable grounds to believe that the entity has 'knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity'. Alternatively, an entity may be listed if it has 'knowingly acted on behalf of, at the direction of or in association with' an entity that has carried out, attempted, participated in, or facilitated a terrorist activity.[6]

18. A 'terrorist activity' is defined, for the purpose of the Canadian listing regime, in substantially similar terms to the Australian definition of a 'terrorist act' in section 100.1 of the Criminal Code. However, it also expressly covers threats, conspiracy, attempt and being an accessory after the fact. It further covers various enumerated offences in the Canadian Criminal Code which implement a number of sectoral international conventions directed to the suppression of terrorist bombings, terrorist financing, nuclear weapons, crimes against internationally protected persons and the taking of hostages, and aircraft or maritime hijacking (to which Australia is also a party and has separately criminalised outside the terrorism-specific provisions in Part 5.3 of the Criminal Code).[7]

19. In contrast, the Australian listing regime in Division 102 of the Criminal Code applies more broadly to organisations that the Minister for Home Affairs is satisfied have

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[3] **Australia:** *Charter of the United Nations Act 1945* (Cth), Part 4, and *Autonomous Sanctions Act 2011* (Cth); **UK:** *Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019* (UK) and *Sanctions and Anti-Money Laundering Act 2018* (UK); **New Zealand:** *Terrorism Suppression Act 2002* (NZ) (which combines domestic/autonomous and international/multilateral sanctions relevant to terrorism); **Canada**: *Criminal Code* (R.S.C., 1985, c. C-46) Part II.1 (combining domestic/autonomous and international/multilateral sanctions relevant to terrorism) ; and *United Nations Act* (R.S.C., 1985, c. U-2) (international/multilateral sanctions); and **US**: see generally, PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[4] See, for example, United Nations, *Security Council Resolution 1373*, (28 September 2001) with respect to terrorism financing.

[5] *Terrorism Suppression Act 2002* (NZ), section 25.

[6] *Criminal Code* (RSC, 1985, c. C-46), subsection 83.05(1).

[7] Ibid, section 83.01.

'advocated' the doing of a terrorist act, not only engaging in a terrorist act (or ancillary or preparatory activities).[8] The significantly greater breadth of the Australian listing regime is amplified by the fact that subsection 102.1(1A) of the Criminal Code defines 'advocates' (for the purpose of the listing regime) to significantly extend its ordinary meaning. Paragraph 102.1(1A)(c) deems 'advocacy' to include directly praising the doing of a terrorist act, where there is a substantial risk that such praise might have the effect of leading a person to engage in a terrorist act. Paragraphs 102.1(1A)(a) and (b) further expand the ordinary meaning of 'advocates' to cover the *indirect* provision of instruction on the doing of a terrorist act, and the *indirect* counselling, promoting, encouraging or urging of others to carry out a terrorist act.

Offences enlivened by the listing of an entity in Australia, New Zealand and Canada

20. The listing of an individual as a 'designated terrorist entity' pursuant to the *Terrorism Suppression Act 2002* (NZ) appears to enliven only two discrete terrorism offences in sections 9 and 10 that Act. These offences respectively cover dealings with property that belongs to, or is derived from the property of, a designated terrorist entity; and making property or financial or related services available to a designated terrorist entity.

21. In Canada, a number of offences apply to people who interact with a 'terrorist group' which is defined to include 'listed entities' (who, as noted above, can be both groups and individuals). These include offences for participating in, facilitating or instructing the activities of terrorist groups, or harbouring terrorist groups (but not membership alone). However, these offences only apply to people who knowingly participate in, or contribute to, such activities for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity.[9] This purpose-based requirement significantly limits the scope of the offence, and averts the need for exceptions or overreliance on executive discretion at the point of enforcement in relation to persons whose interactions have no connection with the terrorism-related activities of a listed entity. This element is likely to be material to satisfying the constitutional requirements of proportionality, in respect of laws which limit fundamental rights in the *Canadian Charter of Rights and Freedoms*, which include freedom of association, peaceful assembly and expression.

22. In contrast, the listing of a particular group as a 'terrorist organisation' under the Australian regime enlivens all of the offences in Division 102 of the Criminal Code. The seven types of terrorist organisation offences in Division 102 of the Criminal Code cover a very broad range of interactions that an individual may have with a terrorist organisation. This includes membership, direction, recruitment, providing or participating in training, providing funds or other material support, and association (the latter offence applying only to listed terrorist organisations).[10] Other than one offence in section 102.7 (concerning the provision of support to a terrorist organisation) there is generally no requirement to prove that the specific activity was done for the purpose of enabling the terrorist organisation to carry out or facilitate a terrorist act.

23. In the case of a person who engages in any of these activities in relation to a listed terrorist organisation, the prosecution is relieved of the requirement to prove that the particular listed organisation specified in a charge was, in fact, engaged in terrorism-related activity. Rather, the prosecution is required to prove that the defendant knew or was reckless in relation to the listed status of the organisation.

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[8] Ibid.

[9] *Criminal Code* (RSC, 1985, c. C-46), section 83.18.

[10] Criminal Code, sections 102.2-102.8.

Limited practical utility of a power to list individuals as 'terrorist entities' in Australia

24. From a practical perspective, the Law Council queries whether an ability to designate individuals as 'terrorist entities' would substantially change the already extensive coverage of the existing terrorism offences in Part 5.3 of the Criminal Code. For example:

    - in addition to offences in section 102.6 for getting funds to, from or for a terrorist organisation, there are also offences in Division 103 of the Criminal Code for financing a terrorist act by an individual.[11] Therefore, a person who gave money to a 'lone wolf' extremist to enable them to commit or facilitate a violent, ideologically motivated act, and was reckless as to whether the funds would be used for that purpose, may be liable to prosecution and conviction for the offence of financing a terrorist act. The extensions of criminal responsibility in Chapter 2 would also apply to people who attempted or conspired to do so, and people who incited or aided and abetted others to provide funds; and

    - in addition to the offences in section 102.7 for providing support to a terrorist organisation, the offences in Division 101 and Chapter 2 of the Criminal Code cover the actions of people who aid, abet, counsel or procure the commission of a terrorist act by one or more individuals, and people who incite one or more individuals to commit a terrorist act.[12] Therefore, a person who actively assisted a 'lone wolf' extremist to undertake a violent, ideologically motivated act (such as by providing or making available property) could be liable to prosecution and conviction for an offence under Division 101.

25. In both of the above scenarios, the prosecution would be required to establish that the person giving the funds either knew or was reckless in relation to the terrorism-related purpose to which the relevant funds or other assistance would be put.[13]

26. In the case of non-financial assistance which aids and abets the commission of a terrorist act (or one of the preparatory or ancillary offences in Division 101 of the Criminal Code, such as preparation or planning for a terrorist act), the prosecution would likewise be required to establish that the person intended that their conduct would aid or abet the commission of a terrorist act (or a preparatory or ancillary offence), or were reckless in relation to this outcome.[14] However, it is not necessary for the prosecution to establish that the defendant's actions were directed to a specific terrorist act, in that they do not need to prove that there was a particular location, date, time and target for an intended terrorist act to be carried out.[15]

27. Further, law enforcement agencies will be able to exercise extensive investigative powers, where there are reasonable grounds on which to suspect that a person has committed, an offence against Division 101 or 103 of the Criminal Code in the circumstances outlined above, in which an individual provides funds or other support to a 'lone wolf' actor who is motivated by violent extremist ideology. These powers include the following:

    - a lower arrest threshold for terrorism offences, requiring reasonable suspicion that the person has committed the relevant terrorism offence, rather than the

[11] Ibid, sections 103.1 and 103.2.

[12] Ibid, sections 101.1-101.6 and Part 2.4.

[13] Ibid, paragraphs 103.1(1)(b), 103.2(1)(b).

[14] Ibid, subsection 11.2(3) (elements of the complicity offence aka 'aiding and abetting') which would apply in connection with the principal offences in Division 101 of the Criminal Code.

[15] Ibid, subsection s101.2(3), 101.4(3), 101.5(3) and 101.6(2).

requirement of reasonable belief, which is the usual arrest threshold for all other Commonwealth offences;[16]

- specific post-arrest detention and investigative questioning powers for persons who are arrested on suspicion of terrorism offences, which enable a longer period of investigative questioning while a person is detained (up to 24 hours questioning time, inclusive of extensions) compared to the period for non-terrorism offences (up to 12 hours questioning time, inclusive of extensions);[17]

- delayed notification search warrants, which are available only in relation to terrorism offences, and enable the AFP to dispense with the usual requirement to notify the occupier of the relevant premises of their presence when the warrant is being executed, and give receipts for any items which are removed or seized during the search in accordance with the warrant;[18]

- warrantless search and seizure powers, for the purpose of preventing a thing that is located on private premises from being used in connection with a suspected terrorism offence, where there is an imminent risk to a person's life, health or safety, such that it is not practicable in the circumstances for the relevant police officer to obtain a search warrant;[19]

- terrorism-specific written notice-based production powers, which enable the AFP to require a person to produce documents or provide information relevant to a suspect's bank accounts and other financial transactions, telephone and utilities connections, and place of residence;[20] and

- the extensive suite of warrant and authorisation-based electronic surveillance powers available to the AFP in relation to Commonwealth offences, including telecommunications interception, access to retained and prospective metadata, the use of surveillance devices (listening, optical surveillance, data surveillance and tracking devices) and remote computer access powers.[21]

28. The AFP can also obtain orders under the *Proceeds of Crime Act 2002* (Cth) to freeze bank accounts, and restrain, confiscate or forfeit property that is the proceeds or an instrument of an offence.[22] This includes the terrorism offences outlined above, in circumstances in which an individual provides funds or support to a 'lone-wolf' actor.

Criminal law policy issues concerning a power to list individuals as 'terrorist entities'

29. In addition to a listing regime for individuals having limited practical utility, the Law Council would also hold significant policy concerns about a proposal to replicate the design of the offences in sections 9 and 10 of the *Terrorism Suppression Act 2002* (NZ) in relation to providing property or financial services to, or dealing with property of, an individual who is a 'designated terrorist entity'. These offences *prima facie* criminalise the provision of any property (including funds) and financial services (such as banking and credit or loan facilities) to the designated individual, irrespective of the purpose for which the property or service was provided.

30. It is one thing to criminalise the provision of any property or financial services to an organisation, which is a discrete legal entity, or an association of individuals, which exists to further a specific purpose or purposes. However, it is another matter entirely

[16] *Crimes Act 1914* (Cth) (**Crimes Act**), section 3WA (cf section 3W).
[17] Ibid, Part IC. See especially subsection 23DF(7) cf subsection 23DA(7).
[18] Ibid, Part IAAA.
[19] Ibid, section 3UEA.
[20] Ibid, section 3ZQN.
[21] *Telecommunications (Interception and Access) Act 1979* (Cth) and *Surveillance Devices Act 2004* (Cth).
[22] *Proceeds of Crime Act 2002* (Cth), Chapter 2.

to criminalise the provision of any property or financial services to an individual, whose life, health, welfare, safety, and economic and social participation may depend on such access, and the particular property or services may have no connection with the engagement of that person in terrorism-related activities.

31. In recognition of the vastly different impacts (and consequent human rights implications) of depriving groups and individuals of funds and property, the offences in sections 9 and 10 of the *Terrorism Suppression Act 2002* (NZ) include an exception for people who have a 'reasonable excuse' for providing or making available property or financial services to an individual who is a 'designated terrorist entity'.[23] The provisions containing these exceptions state expressly that a 'reasonable excuse' includes the provision of necessities, including food, clothing or medicine, as part of 'an act that does no more than satisfy essential human needs of (or a dependent of) an individual designated under this Act'.[24]

32. While the Law Council acknowledges this attempt to limit the scope of criminality, the framing of these legitimate purposes as exceptions to an offence means that a person who does no more than provide such necessities to a person who happens to be a 'designated terrorist entity' is nonetheless exposed to investigation and prosecution and possible conviction in respect of that assistance. Such a person would be required to discharge an evidential burden to point to evidence suggesting that they had a reasonable excuse for providing or making available property or financial services. They are liable to conviction if they fail to discharge that burden. It is possible that a person may be unable to discharge the evidential burden simply because they are unable to point to tangible evidence which clearly conveys the purpose for which they provided or made available the relevant the property or financial services. A bare statement of a person's subjective state of mind at the relevant time may not constitute adequate evidence for the purposes of discharging an evidential burden.

33. In this respect, the offence provisions enlivened by New Zealand's terrorism-related listing regime for individuals are structured in a similar way to Australia's 'declared area' offences in Division 119 of the Criminal Code (although the defence of 'reasonable excuse' in New Zealand is considerably broader than the more limited defences for Australia's 'declared areas' offences).[25] The Australian 'declared areas' offences criminalise a person's mere intentional presence in a 'declared area', even if the person was present for reasons wholly unconnected with terrorism or violence. These offences place the evidential onus on the defendant, via the creation of a limited exception, to identify evidence suggestion that they were present in the declared area solely for a prescribed, legitimate purpose.[26]

34. The Law Council has previously expressed serious concerns about the declared areas offences, noting that this approach to criminalisation reverses fundamental principles of criminal responsibility, and creates a high risk of arbitrariness and oppression in their investigation and enforcement.[27] These concerns would apply equally to any terrorism-related offences that would be enlivened by the conferral of a new statutory power on the executive government to effectively proscribe an individual as a 'terrorist entity'.

35. In particular, the effect of structuring offences in this way is that a person is exposed to substantial criminal penalty for activities that have no connection with terrorism or violent extremism. The person would be largely reliant on the beneficial exercise of discretion by law enforcement agencies to decide not to investigate or enforce an

[23] *Terrorism Suppression Act 2002* (NZ), subsections 9(1) and 10(1).

[24] Ibid, subsections 9(2) and 10(3).

[25] Criminal Code, section 119.2.

[26] Ibid, subsection 119.2(3).

[27] Law Council of Australia, *Submission to the PJCIS Review of the 'declared areas' provisions of the Criminal Code*, (August 2020), 13-14.

offence. As the Law Council has commented previously in relation to the 'declared areas' regime, placing sole or primary reliance on the beneficial exercise of a broad executive discretion falls far short of a legal safeguard that would limit precisely, and consistently in all cases, the scope of the offence, so that it only inculpates wrongdoing that is, in fact, demonstrably connected with terrorism and is therefore meritorious of criminal sanction.[28]

36. Importantly, even if an individual is ultimately acquitted at trial, or if an investigation is discontinued or charges are withdrawn, the person is nonetheless exposed to the ordeal of investigation or prosecution. Such exposure can, itself, be highly traumatic for the individual and their family. It can also cause serious to the person's reputation and standing in the community and that of their family and close associates. It can also be financially debilitating to the individual and their family, and may also tie up scare legal assistance funding. Such a 'broad brush' approach to criminalisation can also damage the relationship between parts of the community and law enforcement and security agencies, which may make those community members reluctant to engage with social cohesion initiatives, or report any future concerns to authorities. In some cases, prosecution of activity which, in reality, has no connection with terrorism may undermine the trust of members of a family or community in the Australian legal system, could be perceived as discriminatory or persecutory, and may lead to the type of disaffection which places some people at risk of becoming radicalised.

37. For the above reasons, the Law Council cautions that, on balance, a proposal to emulate the listing arrangements in New Zealand in relation to individuals would be a concerning and undesirable development in Australian criminal law. The extraordinary nature of this approach to criminalisation, and its potential to cause serious harm which undermines the desired policy objective, should not be underestimated. Although the Committee has recently recommended the extension of the 'declared areas' regime for a further period of three years,[29] the Law Council cautions strongly against 'normalising' the approach to the design of those offences. It should not be replicated in other parts of the criminal law.

38. It is especially important to be mindful of how significantly this approach to the design of offences departs from fundamental principles of criminal responsibility when considering its potential application to the terrorism offences in Part 5.3 of the Criminal Code. This reflects that terrorism offences:

- impose some of the most serious maximum penalties on the Commonwealth statute book, especially in respect of the Division 101 offences which target 'merely preparatory' conduct, which is traditionally not considered appropriate for criminalisation at all;[30]
- enliven intrusive and extraordinary investigative powers (in several cases with lower thresholds than for non-terrorism offences;
- have significant implications for bail, sentencing and parole laws; and
- generally result in convicted persons serving sentences of imprisonment in harsh custodial conditions, including significant periods of isolation.

Constitutional considerations in the Australian context

39. The Law Council further notes that there may be constitutional limitations on the legislative power of the Commonwealth to make laws authorising the listing of individuals as 'terrorist entities' which enlivens criminal offences. This includes

[28] Ibid, 13-14 and 19.

[29] PJCIS, *Report on the review of the 'declared areas' provisions*, (February 2021), recommendation 1.

[30] This is reflected in subsection 11.1(2) of the Criminal Code, which provides that the offence of attempt requires proof of conduct which is more than merely preparatory to the commission of the principal offence.

questions as to whether such laws are likely to be supported by one or more enumerated heads of legislative power (including the States' referral of powers to the Commonwealth with respect to the matter of a 'terrorist act'). It also includes questions as to whether such laws may contravene express or implied constitutional limitations on legislative powers, including those arising from the implied freedom of political communication, and the separation of judicial and non-judicial powers.

40. If the Committee is inclined to recommend the establishment of a listing regime with respect to individuals, the Law Council strongly encourages it to undertake a detailed assessment of issues concerning constitutionality. The Law Council cautions that laws authorising the effective proscription of individuals, on the basis of an executive determination they have engaged in a terrorist act, may raise additional and even more complex constitutional considerations than those raised by existing laws authorising the proscription of groups.

Question on Notice (3): defining 'online hate speech'

41. At the public hearing on 30 April 2021, Dr Aly sought the Law Council's view on whether there could be a legislative definition of 'hate speech' that might encompass the use of extremist symbols and insignia with the purpose of intimidating individuals or groups, particularly in the context of online communications.

42. The Law Council notes that such communications are potentially covered by a range of existing prohibitions and regulatory regimes under Commonwealth, State and Territory laws. Depending on the particular content and circumstances of an individual communication, this could include the prohibition under section 18C of the *Racial Discrimination Act 1975* (Cth), State and Territory racial vilification laws, or the offence in section 474.17 of the Criminal Code of using a carriage service to menace, harass or cause offence. In more extreme cases, such communications could potentially constitute one or more of the offences in Division 80 of the Criminal Code for advocating terrorism or genocide, or urging violence against groups or members of groups.

43. In terms of online content regulation, the proposed Online Safety Act, which is presently before Parliament in the Online Safety Bill 2021, would relevantly cover:

    - 'cyber abuse material targeted at an Australian adult' (specifically that which an ordinary reasonable person would conclude that is likely to have an effect of causing serious physical or mental harm to a particular Australian adult, and is menacing, harassing or offensive);[31] and

    - 'material that depicts abhorrent violent conduct' (being the engagement by a person in specified, extreme acts of violence including a committing terrorist act, murder or attempted murder, torture, rape and kidnap).[32]

44. It is not immediately apparent to the Law Council that there is a demonstrable gap in the coverage of these current or proposed laws that would necessarily require the establishment of a stand-alone definition of 'hate speech' for the purpose of ideological extremism.

45. As a general observation in considering whether a new concept of 'hate speech' is needed under Australian law, it would be important to determine whether any concerns about a potential gap in the coverage of existing laws is, in fact, a substantive legal gap, or instead reflects one or more practical limitations or barriers in the application or enforcement of applicable laws. The Law Council also emphasises the importance of

[31] Online Safety Bill, Clause 7.

[32] Ibid, Clauses 5 and 9.

technological neutrality in legal definitions, so that communications via online and other means are given equal regulatory treatment.

Observations on possible new offences under consideration

Possessing and disseminating certain symbols and insignia

46. The Law Council notes the evidence of the AFP to the inquiry, which expressed an opinion that there is a gap in the coverage of existing terrorism and security-related offences because there are no specific offences targeting mere possession or mere dissemination of symbols and insignia that have been identified as being connected with violent ideological extremism.[33] The AFP has commented that the existing offences in sections 101.4 and 101.5 of the Criminal Code for possessing a document or thing that is connected with preparation for, engagement in, or assistance or facilitation of, a terrorist act can be 'challenging to prove where there is no evidence of why the suspect possessed terrorist material'.[34]

47. The existing 'document' and 'thing' offences in sections 101.4 and 101.5 require proof that the person either knew of the connection between the document or thing and a terrorist act (punishable by a maximum penalty of 15 years' imprisonment),[35] or was reckless as to that connection (punishable by a maximum penalty of 10 years' imprisonment).[36] It is not necessary for the prosecution to prove that the document or thing was connected with a specific terrorist act, or that a terrorist act was ultimately carried out.[37] There are offence-specific exceptions for persons who possessed a document or thing without any intention to facilitate preparations for, or assistance or engagement in, a terrorist act.[38] The requirements for the prosecution to establish, beyond reasonable doubt, that that document or thing is connected with a terrorist act, and the person's criminal fault in relation to that connection, are important and deliberately imposed safeguards against the harsh and oppressive operation of these offences, noting their serious maximum penalties.

48. It appears that the AFP's proposal to criminalise mere possession or mere dissemination of symbols and insignia rests largely on two premises, namely:

    - an apparent view that the possession or dissemination of symbols and insignia is a reliable precursor to a person's engagement in violent extremism,[39] to the extent that the legislature should effectively 'deem' this to be the case, as a legal rule of general application, by enacting criminal offences for such possession or dissemination, without requiring proof of the person's 'ulterior intent' (that is, their actual motive) for possessing or disseminating the symbol or insignia; and

    - an evident desire to utilise criminal offences as the legal basis for enlivening investigative powers, which would be exercised principally for the purpose of intervening to disrupt potential terrorist acts at an even 'earlier stage of the attack planning continuum'.[40] This appears to conceptualise criminal offences as the 'trigger' for law enforcement to engage in disruptive activities, rather than necessarily achieving the ultimate, punitive and denunciatory objectives of

[33] PJCIS, *Committee Hansard*, 29 April 2021, 15 and 19-21.
[34] AFP, *Submission to the PJCIS Inquiry into Extremist Movements and Radicalism in Australia*, (February 2021), 9 at [44] (**AFP Submission**).
[35] Criminal Code, subsections 101.4(1) and 101.5(1).
[36] Ibid, subsections 101.4(2) and 101.5(2).
[37] Ibid, subsections 101.4(3) and 101.5(3).
[38] Ibid, subsections 101.4(5) and 101.5(5).
[39] AFP Submission, 8-9, at [43] and [45].
[40] Ibid, 9 at [48].

enforcing those offences, by obtaining sufficient evidence to support the charge and prosecution of those individuals after their activities have been disrupted.

49. The Law Council acknowledges and understands the desire to disrupt suspected terrorist plots and other potential threats to community safety at the earliest possible stage. However, it does not follow that enacting new criminal offences, which would significantly reduce existing thresholds of criminal responsibility, would be an effective, necessary or proportionate means of achieving that objective.

Lack of necessity of a 'mere possession' or 'mere dissemination' offence

50. On the issue of necessity, the Law Council notes that evidence of a person's possession or dissemination of an insignia or symbol of a terrorist organisation or violent extremist ideology is capable of forming part of a body of circumstantial evidence suggesting that the person may have committed, or is committing, one or more of the following offences:

    - membership of, participation in, or provision of support to, a terrorist organisation; or
    - preparing or planning to carry out a terrorist act, or assisting or facilitating others to do so; or
    - advocating a terrorist act, or violence against members of groups.

51. As the Law Council noted at the public hearing of 30 April 2021, it is implausible that a person's mere possession or dissemination of a symbol or insignia would be the sole piece of evidence in existence which gives rise to a reasonable suspicion that the person is involved in terrorism-related activities. Rather, it is more likely to serve as a 'signpost', which alerts law enforcement and security agencies to the possibility that the person may potentially be of interest and is meritorious of further observation.

52. It would also be open to law enforcement, under their current investigative powers, to obtain electronic surveillance or search warrants where there are reasonable grounds to suspect that a person has committed, may be committing, or may be about to or likely to commit an offence of the kind listed at paragraph [50] above. The exercise of these extensive investigative powers may conceivably yield sufficient evidence to meet the lower arrest threshold for terrorism offences, which requires reasonable suspicion (rather than belief) that the person has committed such an offence.

Lack of proportionality of a 'mere possession' or 'mere dissemination' offence

53. The Law Council is further concerned that the proposal to criminalise mere possession or mere dissemination of symbols and insignia, without requiring proof of a person's ulterior intent, is not proportionate to the objective of early intervention and disruption of terrorism-related activities. The criminal law is directed principally to the objective of denouncing, punishing, and deterring serious and harmful conduct. It is therefore an extremely blunt disruptive tool, because of the criminal justice process that it enlivens after police intervention to disrupt a potentially harmful activity. The perceived value of a proposed offence as a tool for enabling police to exercise powers of intervention must be balanced carefully against its subsequent impacts, both individual and systemic, of exposing individuals to arrest, charge, prosecution, conviction and sentence (and potentially post-sentence detention).

54. For this reason, the Law Council's primary submission to this inquiry has urged the Committee to undertake a comprehensive 'justice impact assessment' of any proposals to create new offences. It will be especially important to conduct such an assessment in scrutinising proposals for new criminal offences, where the justification advanced by the proponents rests principally on the perceived utility of offences as disruptive tools, without substantial acknowledgement of the primary purpose of

offences as punitive measures. Consideration should be given to impacts on legal assistance funding, judicial workload and case management; principles of open justice in criminal trials of persons accused of the new offences; the exercise of intrusive investigative and preventive powers; rehabilitation programs and facilities; and the conditions of detention of persons serving sentences of imprisonment or who are held on remand pending trial or sentence.

55. It will also be important to consider the following matters relevant to the design of the proposed offence, which do not appear to have been canvassed in the initial proposal advanced by the AFP:

    - the intended maximum penalty, which will be material not only to the sentencing of individuals, but also to broader matters including:

        - the availability of electronic surveillance powers for investigative purposes (and potentially the proposed warrant-based 'data disruption' powers under consideration by the Committee as part of its review of the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020); and

        - the exposure of convicted offenders to post-sentence detention orders under Division 105A of the Criminal Code (and potentially the proposed extended supervision orders, currently under consideration by the Committee in its review of the Security Legislation Amendment (High-Risk Terrorist Offenders) Bill 2020);

    - whether the offence should be classified as a 'terrorism offence' for the purpose of investigative and criminal procedure laws, such as arrest, post-arrest investigative questioning, bail and parole; and

    - whether the offence should be covered by the definition of 'politically motivated violence' in the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) as a component of the definition of 'security' (which enlivens that organisation's intrusive intelligence collection powers, such searching premises, accessing computers, intercepting telecommunications and compulsorily questioning persons). Presently a selection of offences against the security of the Commonwealth are covered by the definition of 'politically motivated violence' in the ASIO Act. This includes offences in Part 5.3 (terrorism) and Subdivision B of Division 80 (advocating terrorism and urging violence or genocide) of the Criminal Code.

Doubtful effectiveness of 'mere possession' and 'mere dissemination' offences

56. In its previous evidence to the inquiry, the Law Council cautioned that the creation of offences for 'mere possession' or 'mere dissemination' of extremist symbols or insignia could have significant unintended consequences. This could include fuelling extremism by heightening the sense of grievance and marginalisation felt by disaffected individuals and their associates, and isolating them from positive influences in their communities. It may also have broader social impacts on law-abiding members of the person's family and community, and weaken their willingness to engage with authorities out of fear their family or community member will be prosecuted and imprisoned.

57. The Law Council notes that, at the public hearing on 29 April 2021, representatives of the AFP were asked to respond to similar comments made by Victoria Police in its written submission to the inquiry. The Law Council understands the AFP's response to have placed weight on the exercise of discretion by its officers in deciding whether to

exercise investigative and enforcement powers in particular circumstances in which persons are suspected of possessing or disseminating relevant symbols or insignia.[41]

58. Rigorous internal operational decision-making practices and governance frameworks of the kind alluded to in the AFP's evidence are clearly important assurance measures. However, the Law Council cautions strongly against placing sole or primary reliance on the beneficial exercise of executive discretion at the point of investigative decision-making, as a means of essentially 'offsetting' the risks presented by overly broad criminal offences. (Namely, risks arising from the fact that these offences are capable of applying to people whose activities had no connection with terrorism-related activities, including that their enforcement may unintentionally inflame sections of the community.) Leaving such essential matters wholly to administrative discretion, on a case-by-case basis, exacerbates rather than relieves the Law Council's concerns about arbitrariness and overbreadth in the scope of the offence. A fundamental characteristic of a safeguard is that it imposes clear and legal limitations on the scope of individuals' exposure to criminal liability and associated investigative powers.

59. The Law Council also notes that 'mere possession' and 'mere dissemination' offences of the kind proposed by the AFP are likely to involve judgments about whether a particular symbol or insignia was connected with a terrorist organisation, or acts of terrorism or violence. Such judgments may be particularly complex in cases in which groups or individual proponents of violent extremism appropriate symbols or insignia that have legitimate uses. Error or misjudgement by law enforcement agencies may result in the arbitrary exposure of individuals to investigation and enforcement, and may undermine the practical effectiveness of the offences, social cohesion and public trust and confidence in law enforcement.

Distinguishing features of State and Territory 'outlaw motorcycle gang' laws

60. At the public hearing on 30 April 2021, Senator Keneally and Dr Aly observed that some State and Territory laws directed to 'outlaw motorcycle gangs' specifically prohibit people from wearing or displaying publicly the colours or insignia of such groups. They noted that Committee members are considering whether a similar approach could be adopted in relation to the wearing or displaying of symbols or insignia associated with violent extremist ideology.

61. In addition to the above comments on matters of necessity, proportionality and effectiveness, the Law Council notes that there are some important distinguishing features in State and Territory laws dealing with 'outlaw motorcycle gangs'. These laws establish a proscription process for such groups, which generally require evidence that a group is engaged in, or has as one of its purposes, engaging in serious criminal activity.[42]

62. The Law Council understands that statutory prohibitions on wearing or displaying publicly the 'colours' or insignia of a group that is specified as an 'outlaw motorcycle gang' generally apply at licenced public venues under liquor licencing laws.[43] They do not appear to amount to the criminalisation 'at large' of the wearing or displaying those insignia. Nor do they appear to criminalise 'at large' the wearing of any symbol or insignia that a law enforcement officer may suspect is in some way connected with

[41] PJCIS, *Committee Hansard*, 29 April 2021, 16.

[42] See, for example: *Criminal Organisations (Control) Act 2012* (NSW), *Criminal Organisation Act 2009* (Qld), *Criminal Organisations Control Act 2012* (WA), *Serious and Organised Crime (Control) Act 2008* (SA) and *Serious Crime Control Act 2009* (NT).

[43] See, for example: *Liquor Act 2007* (NSW), Part 8 (see also, Division 3 of Part 6: specific regulation of Kings Cross Precinct); and *Liquor Act 1992* (Qld), Part 6, Division 5. (For completeness, in those State jurisdictions which have control order regimes in the context of criminal groups, it is possible that control orders could be issued which prohibit individuals from possessing certain items. This could potentially include conditions prohibiting the possession of any item which bears the 'colours' or insignia of a proscribed group.)

serious crime; or with a group that is not proscribed under the regime, but is nonetheless suspected of engaging in serious and organised crime.

63. These differences may limit the utility of a similar prohibition in the context of symbols and insignia associated violent extremism (particularly noting evidence to the inquiry about the proliferation of extremist ideology online, including in closed fora on both the surface web and dark web).

Distinguishing features of section 13 of the Terrorism Act 2000 (UK)

64. Subsection 13(1) of the *Terrorism Act 2000* (UK) creates an offence for persons who publicly wear clothing or otherwise display the symbols of a proscribed terrorist organisation, 'in such a way or in such circumstances as to arouse reasonable suspicion that [they] are a member or supporter of the organisation'. This offence is punishable by a maximum of six months' imprisonment.[44] Police are also invested with a power to seize items bearing symbols or insignia, if they are reasonably believed to be evidence of an offence under subsection 13(1).[45]

65. Subsection 13(1A) creates an equivalent offence, punishable by the same maximum penalty, for persons who publish images of items of clothing or other articles in such a way, or in such circumstances, as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

66. As explained below, the Law Council would not support the enactment of corresponding offences under Australian federal criminal law, for reasons of both pragmatism and principle.

Practical issues

67. From a practical perspective, it is unclear what, if anything, these offences would contribute to the ultimate objective of preventing the propagation of extremist ideology, in addition to existing offences for actually being a member of a listed organisation, or actually providing material support to it.

68. The Law Council acknowledges that such offences might offer law enforcement agencies an immediate basis for directing a person to cease displaying or wearing the symbol or insignia under threat of criminal penalty, and may enable the seizure of the item. However, there is a serious question as to whether this would effectively deter a person who is predisposed toward an extremist ideology, but may not actually be a member or may not have actually provided material support, from simply acquiring and displaying a new item (which may be readily accessible). Criminalisation may simply lead to a perpetual cycle of re-offending.

69. If the offence were ultimately enforced, the conviction and sentencing of such a person may undermine the objective of preventing the spread of extremist ideology. The conviction and sentencing of a person who is not, in fact, a member of a terrorist organisation, and has not actually provided material support to such an organisation, may do little to deter that individual from being ideologically aligned with, or sympathetic to, the organisation. Investigation and enforcement action may serve to inflame that person's grievances, particularly if they were charged, convicted and sentenced to imprisonment. It may isolate them from positive influences and social connections, thereby strengthening or reinforcing any extremist views they may already hold.

70. These observations highlight the Law Council's previous remarks about the risks in enacting new criminal offences for the primary purpose of leveraging disruptive powers—such as the threat of arrest if a person does not cease displaying an item, or

[44] *Terrorism Act 2000* (UK), subsection 13(3).
[45] Ibid, subsection 13(4).

exercising powers of seizure—without paying sufficient regard to the essential character of criminal offences as punitive measures, which enliven the criminal justice process after the immediate act of disruption is complete.

71. Moreover, if a person who displayed the symbol or insignia of a terrorist organisation was, in fact, a member or had actually provided material support to the organisation, an offence for the mere display of the organisation's symbol or insignia would be redundant. Pursuing that offence against such a person could be a counter-productive diversion from the investigation and enforcement of the much more serious terrorist organisation offences in Division 102.

Principled issues

72. From a principled perspective, the design of the offences in subsections 13(1) and 13(1A) of the *Terrorism Act 2000* (UK) are a significant departure from the established principles of criminal responsibility in relation to proof of the defendant's fault. These offences do not require proof that the defendant intended to induce others into believing they were a member or supporter of the organisation, or that they were reckless in relation to the risk that reasonable people would perceive them to be a member or supporter of a terrorist organisation. Nor do these offences apply the standard criminal fault element of negligence, which under Australian law requires an assessment by the trier of fact that the defendant's conduct involved such a great falling short of the expected standard of care that a reasonable person would consider that their conduct is meritorious of criminal punishment.[46]

73. Rather, the UK offences apply a lower threshold of 'arousing reasonable suspicion' in the mind of a bystander that the person was a member or supporter of a terrorist organisation. This lower, bespoke element has the potential to make the enforcement of the offences complex and potentially arbitrary, because the distinction between criminal and non-criminal conduct will turn upon a wholly external factor—namely, the existence or otherwise of a 'reasonable suspicion' in the minds of others. It will not be dependent on the defendant's criminal fault in relation to the likely results of their conduct in wearing or displaying the symbol or insignia, in the sense of intending or being reckless as to whether others would reasonably believe them to be a member or supporter of a terrorist organisation.

74. It is also important to recognise that the offences in subsection 13(1) and 13(1A) of the *Terrorism Act 2000* (UK) apply only in relation to organisations that were proscribed under Part II of that Act at the time of the alleged offending, rather than any organisation which is alleged by the prosecution to have engaged in, facilitated, advocated or in some way supported terrorism. Importantly, the UK has considerably more robust independent review and appeal mechanisms in relation to proscribed organisations than those of Australia. This is an important consideration when assessing the scope, and therefore proportionality, of the offence for wearing or displaying symbols or insignia of a proscribed terrorist organisation.

75. In the UK, individuals may appeal to an independent De-Proscription Appeals Commission (and subsequently to a court) against decisions of the Home Secretary to refuse an application to de-proscribe an organisation, in addition to seeking review under the *Human Rights Act 1998* (UK).[47] There is also a statutory mechanism for people to appeal against convictions for terrorist organisation offences, in relation to a proscribed organisation whose proscription is revoked following a successful review application or appeal.[48]

[46] Criminal Code, section 5.5.

[47] *Terrorism Act 2000* (UK), sections 5, 6 and 9 and Schedule 3.

[48] Ibid, section 7.

Evidentiary treatment of symbols and insignia under Canadian anti-terrorism laws

76. For completeness, the Law Council also notes that subsection 83.18(4) of the Canadian Criminal Code purports to provide statutory guidance to the trier of fact in relation to evidence that may be relevant to the offence of participating in, or contributing to, the activities of a terrorist group for the purpose of enhancing its ability to carry out or facilitate a terrorist act.

77. This provision states that, for the purpose of determining whether an accused person participates in or contributes to any activity of a terrorist group, the court may consider a non-exhaustive and non-determinative list of factors. One enumerated factor, listed in paragraph 83.18(4)(a), is whether the accused person 'uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group'.

78. This provision appears to be declaratory of general rules of evidence in relation to relevance. That is, if evidence is relevant to a fact in issue in proceedings, then it is admissible unless a separate exclusionary rule applies. However, from a practical perspective, it may serve as a 'signpost' or 'prompt' for investigators, prosecutors and courts in the process of identifying and assessing relevant circumstantial evidence.

79. While it would be open to the Australian Parliament to enact a similar guiding provision in Division 102 of the Criminal Code, such a provision would not be legally necessary, as it would not substantively add to the existing rules of evidence as they are capable of applying to a prosecution of a terrorist organisation offence.

80. Further, the Law Council generally does not support the enactment of evidentiary provisions which apply to criminal proceedings for specific criminal offences and are merely declaratory of the general rules of evidence. This is because such provisions carry a legal risk of unintended consequences, by impliedly altering the application of general rules of evidence to a prosecution for a specific offence or class of offences.

81. Rather, where it is considered necessary to provide specific practical guidance about the application of general evidentiary rules to particular circumstances, including the prosecution of particular offences, it is generally preferable that this is first attempted via non-statutory means. This may include the incorporation of appropriate content in judicial bench books, which can be utilised by trial courts. Guidance could similarly be included in law enforcement agencies' policies and procedures for commencing and conducting investigations and prosecutions.

Alternatives to the enactment of specific possession and dissemination offences

82. For the reasons discussed above, the Law Council remains of the view that neither the private possession, nor the public wearing or displaying, of a particular symbol or insignia should be a discrete offence in its own right. These actions are more appropriately treated as a 'signpost' for law enforcement to further investigate a person's potential membership of, or provision of support to, an organisation of concern, or their potential engagement in other activities of concern.

83. However, the Law Council would not object to further consideration being given to three potential measures, which may go some way towards addressing concerns about the public display of symbols or insignia, and the use of those symbols and insignia as part of a wider course of action to urge violence in furtherance of an extremist ideology:

    - stronger and nationally consistent regulation of the sale and commercial distribution of symbols or insignia, and consideration of non-criminal prohibitions on displaying insignia under Commonwealth, State and Territory laws. (For example, as Law Council representatives noted at the public hearing on 30 April, State and Territory motor vehicle registration laws may prevent the registration of personalised licence plates of an offensive nature);

- implementation of outstanding recommendations of the report of the *Council of Australian Governments Review of Counter-Terrorism Legislation* (**COAG Review**) from March 2013, which called for amendments to the offences in sections 101.4 and 101.5 of the Criminal Code for a possessing a document or thing connected with a terrorist act (or preparatory or ancillary activities). The COAG Review recommended that these offences should include an express provision stating that a 'thing' or a 'document' is, by its very nature, capable of being connected with the preparation for, the engagement of a person in, or assistance in a terrorist act.[49] This would codify the interpretation adopted by the High Court in relation to the 'document' offence in section 101.5 in *R v Khazaal* (2012) 246 CLR 601, and apply it equally to the 'thing' offence in section 101.4. Whether a particular document or thing is, by its very nature, connected with a terrorist act will be a question of fact to be determined in individual prosecutions (and is likely to be a live issue in the case of items that have multiple uses, some of which are lawful and benign); and

- considering whether the offences in sections 80.2A and 802B of the Criminal Code for advocating violence against groups or members of groups might be amended to include a further 'tier' of offence for people who intentionally advocate violence against groups or members of groups, and are *reckless* as to whether that advocacy will result in other persons engaging in violence against those group members. Currently, these offences require proof that a person *intends* that force or violence will occur. In contrast, the offences in sections 80.2C and 80.2D for advocating terrorism or genocide apply to people who intentionally advocate such activities and are *reckless* as to whether another person will engage in acts of terrorism or genocide (as applicable).

  The Committee may wish to consider whether there is a demonstrable gap in the availability of the urging violence offences in sections 80.2A and 80.2B. For example, it may wish to consider whether law enforcement agencies have identified instances in which persons of interest have been urging violence against groups, in circumstances in which they are aware of a substantial risk that violence will occur, and nonetheless and unreasonably in the circumstances decided to urge other people to use violence.

Offences for accessing and disseminating terrorist 'manifestos'

84. The Law Council notes that the Committee is considering whether further legal mechanisms could be implemented to prohibit online access to the personal ideological 'manifestos' of persons involved in violent extremism, including the writings of individuals who have perpetrated terrorist acts. Such mechanisms would be in addition to existing online content regulation regimes, and offences in relation to the failure of an online content host to remove 'abhorrent violent material'.[50]

85. The Law Council submits that the creation of new criminal offences, or the lowering of thresholds for existing offences, is unlikely to be an effective means of achieving this objective for all of the reasons discussed above, and in the Law Council's main submission. Online content regulation, including takedown laws and cooperative partnerships with communications providers, may prove a more effective 'large-scale' solution for the prompt removal of such content, as compared to the enforcement of 'mere viewing or access'-type offences against individual 'end users'.

Coverage of existing security offences

86. The Law Council also notes that the offences in Chapter 5 of the Criminal Code appear comprehensive in their coverage of the activities of individual internet users

[49] COAG Review of Counter-Terrorism Legislation, *Final Report* (March 2013), 14 at [55]-[57], 18 at [74]-[75] and recommendations 9 and 10.

[50] Criminal Code, Division 474, Subdivision H.

who possess such 'manifestos' and disseminate them online for terrorism-related purposes. This includes offences for collecting or making documents or things connected with terrorist acts in sections 101.4 and 101.5 of the Criminal Code (where the person knows of, or is reckless as to whether the document or thing is connected with a terrorist act). It also includes the offences in Division 80 of the Criminal Code for advocating terrorism, violence against groups or individual group members, and genocide. All of these offences are legally capable of being constituted by conduct that is carried out in the online environment.

87. Importantly, in the case of the offence for collecting or making a document connected with a terrorist act in section 101.5 of the Criminal Code, the High Court has held that the content of the document itself is capable of establishing the requisite connection with a terrorist act. This could include, for example, writings that contain instructions on the commission of terrorist acts or exhortations to commit terrorist acts.[51] The High Court has also held that the requisite connection between a document and a terrorist act for the purpose of the offence in section 101.5 is to be construed broadly, having regard to the preventive purpose of the offences as reflected in the specific criminalisation of merely preparatory conduct, which would not have met the legal threshold for the offence of attempting to commit a terrorist act.[52]

Dangers in a potential offence for 'mere viewing' or 'mere access'

88. The Law Council encourages the Committee to take a particularly cautious approach to considering any proposals to enact offences in respect of persons who merely view or access documents or online content that is connected with terrorist acts, such as documents in the nature of extremist 'manifestos'.

89. Offences for the mere viewing or accessing of content, without requiring proof that a person deliberately viewed or accessed that content for nefarious purposes, are highly extraordinary measures, normally reserved for material that has a very low likelihood of being accessed unwittingly, and involves the infliction of significant harm upon vulnerable persons. For example, 'mere viewing and access'-type offences currently exist in Divisions 273 and 474 of the Criminal Code in relation to child abuse material. Those offences are subject to specific defences in relation to conduct in accessing or viewing the material which is 'public benefit'.[53]

90. In contrast to child abuse materials (such as images or recordings of child sexual abuse or exploitation) the Law Council notes that there may plausibly be a much broader range of circumstances in which a person may unwittingly come across the 'manifestos' of individuals engaged with extremist ideology, not fully understanding the nature of that material. In this regard, the Law Council notes evidence of security agencies to the inquiry which identified the extensive and sophisticated use of propaganda via social media and other online communications platforms by groups and individuals of security concern.[54]

91. The Law Council further notes that, in contrast to viewing or accessing child abuse material, there may conceivably be a much wider range of legitimate reasons that individual web users may access such 'manifestos', including for the purposes of academic research, legitimate journalism, the development and delivery of preventive or rehabilitative services to 'at-risk' persons, and the parental monitoring of children's online activities. These considerations tend against the criminalisation of mere access

[51] *R v Khazaal* (2012) 246 CLR 601 at [34] (French CJ). In this case, the requisite connection was established by the content of a document compiled by the defendant entitled *Provisions on the Rules of Jihad: Short Judicial Rulings and Organizational Instructions for Fighters and Mujahideen Against Infidels*, which purported to provide a religious justification for engagement in terrorist act, contained instructions in methods for carrying out attacks, and identified potential targets.

[52] Ibid, [33] (French CJ).

[53] Criminal Code, sections 273.9 and 474.24.

[54] See, for example, ASIO, *Submission to the PJCIS Inquiry into Extremist Movements and Radicalism in Australia*, (February 2021), 2 at [4] and 4-5 at [20]-[22].

or mere viewing, and then requiring a defendant to discharge the evidential burden in respect of a limited 'public benefit' defence, in the same manner as the existing offences in relation to accessing or viewing child abuse material.

92. In further contrast to offences directed to accessing or viewing child abuse material, enacting a similar offence in relation to terrorism-related material may also run the risk of inadvertently capturing persons who access or view so-called 'manifestos' which are directed to legitimate matters of political dissent or struggle. This might include, for example, writings which call for the overthrow of oppressive governmental regimes in foreign countries; or the efforts of particular groups or regions in foreign countries to achieve independence as sovereign nations. In circumstances involving international armed conflicts, it is theoretically possible that some actions of this nature may be permissible under international humanitarian law. These considerations tend further against enacting a 'mere access' or 'mere viewing' offence for materials in the nature of 'manifestos'.