22 January 2021

Law Council
OF AUSTRALIA

Office of the President

Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Members

Inquiry into extremist movements and radicalism in Australia

1. Thank you for inviting the Law Council of Australia to participate in the above inquiry. This submission provides some high-level remarks relevant to the potential legislative measures identified in the Committee's third term of reference, namely:

   (a) changes that could be made to the Commonwealth's terrorist organisation listing laws to ensure they are fit for purpose, address current and emerging terrorist threats, reflect international best practice, and provide a barrier to those who may seek to promote an extremist ideology in Australia;

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   (d) further steps that the Commonwealth could take to disrupt and deter hate speech and establish thresholds to regulate the use of symbols and insignia associated with terrorism and extremism, including online, giving consideration to the experience of other countries.

2. The Law Council acknowledges the current public advice from security agencies that the national terrorism threat level remains at PROBABLE; and that while Sunni Islamic extremism remains the primary terrorism threat facing Australia, right wing extremist groups and individuals also present an increasing and evolving threat, accounting for approximately one third of the counter-terrorism investigations undertaken by the Australian Security Intelligence Organisation (**ASIO**) in 2019-20.[1]

3. Given this context, it is desirable that there is ongoing reflection on the operation of Australia's laws, policies and practices as the domestic and global security environment evolves. As has occurred with this inquiry, it is important that the Parliament plays a pro-active and participatory role in undertaking such reviews and evaluations. It is desirable that Parliamentary and public engagement and involvement occurs well before the 'reactive' task of scrutinising proposed legislation, which has been developed internally by the Government, on the basis of a unilateral assessment of the necessity of legislative action, in the specific form proposed.

4. The Law Council welcomes opportunities for early Parliamentary and public stakeholder engagement on the threshold question of whether legislative intervention is necessary, before being presented with a Bill reflecting a concluded view of the executive government. It is hoped that this approach is utilised more broadly in future.

[1] ASIO, *Annual report, 2019-20,* (September 2020), 17-19.

Guiding principles for assessing the necessity of legislative intervention

5. The Law Council is concerned that the focus of the Committee's third term of reference on specific legislative amendments may reflect a predisposition towards legislative intervention before the necessity of such a course of action has been established.

6. It is important to distinguish the threshold of legal necessity from mere administrative or operational convenience. It is also important to carefully interrogate any claims that there is a defect in applicable legislation, to ascertain whether the perceived 'defect' is, in fact, an issue of practice, policy or culture. Similarly, it is important that deliberate legal safeguards to protect human rights are not perceived incorrectly as unnecessary 'barriers'. This includes the established principles of criminal law and procedure in respect of the design, investigation and enforcement of offences.

7. The recently released report of the *Comprehensive Review of the Legal Framework of the National Intelligence Community*, undertaken by former Director General of Security and Defence Secretary, Dennis Richardson AO (**Richardson Review**), also emphasised the importance of the Government and Parliament applying rigorous scrutiny to claims by security and law enforcement agencies that existing legislation contains deficiencies that require amendment. The Richardson Review found that:

> *agencies had a tendency to suggest that legislative provisions presented barriers to their effective operation. Barriers agencies experienced were presented as unintended, rather than a consequence of deliberate design. On closer examination, it was often apparent that these barriers, to the extent that they in fact were barriers, were not due to legislation, but rather to culture, policy or practice. In other cases, a perception of the existence of barriers stemmed from an immature understanding of the principles governing the intelligence agencies.*
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> *This lack of understanding led some agencies to suggest that legitimate safeguards should be removed … The ends do not always justify the means and the referenced legal requirements are important features designed, among other things, to protect individuals' rights … Likewise, what was argued to be an administrative burden was often a deliberately imposed safeguard. Alternatively, what was said to be an administrative burden was more properly characterised as a reasonable incident of the performance of functions in a liberal democracy. The term 'administrative burden' tends to be thrown around too loosely by agencies. Government should be wary of, and properly test, such claims.*
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> *Our laws are not constraints or barriers to operational effectiveness as they are sometimes perceived. Rather, they are guardians of valuable principles … Too often during the Review, proposals to 'clarify' or 'streamline' legislation amounted to no more than a bid to extend powers or functions. Government should be sceptical of calls for legislative clarity—very often such claims do not withstand even modest inquiry.*[2]

8. The Law Council submits that this is a sound guiding principle for the Committee's present inquiry. It has particular importance to any proposals of the following kind, for the purpose of responding to, or preventing, violent extremism of any persuasion:

   - proposals to directly or indirectly expand the scope of criminal liability in relation to terrorism or security offence—for example, by expanding the criteria or

[2] Richardson Review, *Unclassified Report, Volume 1*, (December 2019), 34-35.

otherwise lowering the thresholds for listing a terrorist organisation under Division 102 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**);

- proposals to depart from established principles of criminal responsibility and due process in the design, investigation and enforcement of offences; or
- proposals to confer any further intrusive or coercive powers on security agencies, for investigative, disruptive or preventative purposes.

Limitations in the utility of criminal law as a social policy instrument

9. In particular, as explained below, proposals to effectively lower existing thresholds for the listing of terrorist organisations under Division 102 of the Criminal Code will have significant consequences for the criminal law. This includes terrorism offences in Part 5.3 of the Criminal Code, as well as 'quasi-criminal' orders, such as control orders[3] and post-sentence orders,[4] which have close connections with criminal offences and expose people to significant criminal liability for contravening their conditions.

10. While the criminal law has a legitimate function to denounce and deter wrongdoing, and to protect the community from dangerous offenders, its significant limitations as an instrument of social policy must be acknowledged. Criminalisation should not be conceived as a primary tool through which to prevent radicalisation and extremism from propagating, or to facilitate behavioural change by disaffected individuals.

11. The imposition of serious criminal sanctions, and other major restrictions on a person's activities within the community, can readily have the opposite effect. Prolonged incarceration risks placing an individual in a learning environment for further crime, and isolating them from positive influences and support systems within the community. The Law Council has also previously cautioned that restrictions imposed by control orders, including requirements to wear visible tracking devices, such as ankle bracelets, can hinder a person's re-integration and rehabilitation by exposing them to stigmatisation that may adversely affect their employment prospects, community participation and mental health.[5]

Criminal law implications of listing as a terrorist organisation

12. The listing of an entity as a terrorist organisation enlivens the offences in Division 102 of the Criminal Code.[6] Those offences cover all range of interactions with a terrorist organisation, including association, membership, participation in training, recruitment, direction, and the provision of funds and material support.[7] These offences are variously punishable by maximum penalties that generally range from 10 to 25 years' imprisonment.

13. It is important to recognise the extraordinary nature of 'status offences', which target the nature of the organisation with which the defendant engaged, rather than requiring proof of a defendant's specific intention to further the terrorism-related objectives of the organisation.[8] This is compounded by the fact that, when a person is prosecuted for a terrorist organisation offence in relation to their engagement with a **listed** terrorist organisation, the prosecution is relieved of the requirement to prove that the organisation was, in fact, engaged in terrorism-related activities. Rather, all that must

[3] Criminal Code, Division 104.
[4] Ibid, Division 105A and Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020.
[5] See, for example: D Neal SC, Law Council of Australia, *Committee Hansard*, PJCIS, 13 November 2020, Canberra, 4 and 5-6 (questioner: the Hon M Dreyfus QC MP).
[6] Criminal Code, subsection 100.2.1(1) (paragraph (b) of the definition of a 'terrorist organisation').
[7] Ibid, sections 102.2-102.8.
[8] See, for example: Law Council of Australia, *Submission to the COAG Review of Counter-Terrorism Legislation*, (September 2012), 28-29. See further: Bernadette McSherry, *Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws*, [2004] UNSWLawJl 26.

be established is the fact of the listing at the time of the alleged offence, and the defendant's knowledge or recklessness in relation to that circumstance at that time.

Implications for any review of the statutory listing threshold

14. The Law Council acknowledges that the Committee's terms of reference do not extend to directly reviewing the approach to criminalisation adopted in Division 102 of the Criminal Code. However, the extraordinary nature and grave consequences of that approach are critical considerations in any assessment of the thresholds, criteria and process for the listing of terrorist organisations.

15. Similarly, any review of the statutory listing threshold should also take account of the fact that a person's suspected interactions with a listed terrorist organisation can expose them to intrusive investigatory powers,[9] and extensive limitations on their movements and activities under control orders (which operate on the lower, civil standard of proof).[10] A person who holds dual citizenship is also liable to the cessation of their Australian citizenship.[11] An Australian citizen or resident who is overseas may also be temporarily excluded from re-entering Australia.[12]

16. The fact that the ordinary requirements of proof in relation to terrorist organisation offences, and associated investigatory and preventive powers, are relaxed for listed organisations makes it important that there is a high threshold for the listing of terrorist organisations, as well as a rigorous and fair listing process (in both substance and perception). These implications also underscore the need for caution in considering any amendments to Division 102 of the Criminal Code that would result in the current threshold being lowered, or existing safeguards being weakened or removed.

Current listing threshold

17. Currently, the listing threshold requires the Minister for Home Affairs to be satisfied, on reasonable grounds, that the organisation either:

    (a) is directly or indirectly engaged in, preparing, planning assisting in or fostering the doing of a terrorist act; or

    (b) advocates the doing of a terrorist act.[13]

18. Subsection 102.1(1A) of the Criminal Code significantly extends the ordinary meaning of the word 'advocates' for the purposes of the terrorist organisation listing regime. In addition to covering acts which directly or indirectly counsel, promote, encourage or urge the doing of a terrorist act, the term 'advocates' is defined to cover:

    - the provision of instruction, direct or indirect, on the doing of a terrorist act; and
    - directly praising a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of age or any mental impairment) to engage in a terrorist act.

19. While the Law Council continues to hold the concerns it has raised previously about overbreadth in the coverage of advocacy (among other issues in the listing regime)[14] the current listing threshold and criteria are the outcome of careful deliberation by

[9] For example: *Crimes Act 1914* (Cth), Part IC (post-arrest questioning) as well as surveillance powers under the *Telecommunications (Interception and Access) Act 1979* (Cth) and *Surveillance Devices Act 2004* (Cth).
[10] Criminal Code, Division 104.
[11] *Australian Citizenship Act 2007* (Cth), subsections 34(2) and sections 36B and 36C.
[12] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth), subsection 10(2).
[13] Criminal Code, subsection 102.1(2).
[14] See, for example: Law Council of Australia, *Submission to the COAG Review of Counter-Terrorism Legislation*, (September 2012), 28-35; and Law Council of Australia, *Submission to the PJCIS inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth)*, (October 2014), 7.

multiple Parliamentary committees and independent reviews.[15] There is a heavy onus on the proponents of any proposals to lower the threshold or expand the listing criteria to demonstrate the necessity and proportionality of those proposals, as well as their human rights compatibility and constitutionality.

Approach to examining potential barriers to listing organisations of security concern

20. As a starting point, the Law Council encourages the Committee to seek detailed information, in classified form as necessary, about the perceived barriers to the listing of any organisations about which Committee members may hold security concerns. Any such barriers should be interrogated carefully to determine whether they arise from the statutory thresholds, or the exercise of discretion in applying non-legislative considerations. This includes the non-statutory criteria that ASIO routinely examines in accordance with the *Protocol for Listing Terrorist Organisations Under the Criminal Code*, which states:

> *There are a large number of organisations that could be considered for possible listing. To guide and prioritise the selection of organisations for consideration, ASIO may also have regard to a range of other factors, often referred to as the non-legislative factors. The key non-legislative factors are:*
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> - *the organisation's engagement in terrorism*
> - *the organisation's ideology*
> - *links to other terrorist groups*
> - *links to Australia*
> - *threats to Australian interests*
> - *listing by the United Nations or like-minded countries, or*
> - *engagement in peace or mediation processes.*[16]

Regulation of terrorism-related symbols and insignia

21. The Law Council also cautions against resorting to further criminalisation to manage perceived risks arising from the use of symbols or insignia by persons or groups of security concern.

22. Chapter 2 of the Criminal Code already provides for the inchoate offence of inciting the commission of an offence.[17] It can be prosecuted in connection with any of the terrorism offences in Part 5.3 of the Criminal Code, which target the commission of terrorist acts, and a wide range of preparatory and ancillary actions. Division 80 of the Criminal Code also contains offences which specifically criminalise advocating the commission of a terrorist act or terrorism offence, and urging violence against groups or individual members. The extensions of criminal liability in Chapter 2 of the Criminal Code, including attempt, conspiracy and incitement, also apply to Division 80.

23. The Law Council further cautions against specifically criminalising conduct that involves the use or dissemination of symbols or insignia as an effective 'proxy' for proving the commission of a terrorism offence (such as membership of, or recruitment for, a terrorist organisation). This raises the significant risk of overcriminalisation of activity that has no material connection with terrorism, with disproportionately harsh and oppressive impacts on individuals. Significant problems may also arise in attempting to accommodate circumstances in which groups of security concern appropriate symbols or insignia that have existing, innocent uses; as well as legitimate

[15] COAG Review of Counter Terrorism Legislation, *Final Report*, (March 2013), 19-24. (See the summary of four previous reviews at 20.)
[16] Australian Government Attorney-General's Department, *Protocol for listing terrorist organisations under the Criminal Code*, (undated), 2-3.
[17] Criminal Code, section 11.4

usage in the context of journalism, research, public debate and discourse, and potentially the provision of professional advice including legal advice.

24. Any such proposal would create a further risk that any offence or offences will be so complex that enforcement may be impossible. Such a proposal is also likely to raise significant issues of international human rights law with respect to the right to freedom of expression, and domestic constitutional issues with respect to the implied freedom of political communication.[18] Accordingly, rather than seeking to specifically criminalise or otherwise prohibit the actions of persons who display or disseminate certain symbols or insignia, a preferable approach would be for security agencies to continue examining such actions as part of their investigations, including as a potential basis for placing a particular person or group under investigation. (That is, to determine whether that person or others have committed, are committing, or are likely to commit terrorism or other offences, or other acts acts prejudicial to security.)

Justice impact analysis for any legislative proposals considered in this inquiry

25. The Law Council also submits that proposals to amend counter-terrorism legislation, particularly criminal and quasi-criminal laws, should be routinely accompanied by a comprehensive assessment of their impacts on the justice system.[19] Just as the Richardson Review recommended better integration of independent operational oversight into the design of legislative proposals to expand security agencies' powers,[20] the Law Council considers that an equivalent degree of weight and importance should be given to the justice impacts of proposed expansions to coercive and intrusive counter-terrorism and security related powers.

26. It is especially important that the foreseeable impacts on legal assistance funding for criminal defendants and respondents to applications for quasi-criminal orders (such as control orders and post-sentence orders) are considered routinely, as part of any proposals to enact or amend applicable laws. As the Law Council has commented in the Committee's other current and recent inquiries into extraordinary counter-terrorism powers, it should not be assumed that the additional need and associated costs can simply be absorbed by existing legal assistance funding.[21] Close engagement with the legal assistance sector, in particular, legal aid commissions, is required to have a clear understanding of resource implications. It is also crucial that ongoing efforts are made, in consultation with the courts, to gauge anticipated resource impacts of expanded powers on judicial workloads, both in the exercise of federal judicial power and powers conferred *persona designata*.

27. If the Committee is inclined to support changes to statutory listing thresholds, offences or agency powers relevant to violent extremism and radicalisation, the Law Council submits that efforts should be made to undertake an analysis of their impacts on the justice system, before any final recommendations are presented to Parliament.

Other matters: investment in prevention and rehabilitation programs

28. Paragraph (b) of the Committee's third term of reference is directed to potential policy changes to Australia's Counter-Terrorism Strategy, in relation to preventing radicalisation and extremism. The Law Council emphasises the importance of the

[18] Similar laws have been litigated under Article 10 of the European Charter of Human Rights, and the First Amendment of the US Constitution. See, for example: *Nix v Germany* (2018) ECHR 35285/16; *Vajnai v Hungary* (2008) ECHR 33629/06; *Fratanoló v Hungary* (2011) ECHR 29459/10; and *National Socialist Party of America v Village of Skokie*, 432 U.S. 43 (1977).
[19] See further: Law Council of Australia, *The Justice Project, Final Report, Part 2: Governments and Policy Makers* (August 2018), especially 14-36 and recommendations 7.3 and 7.4.
[20] Richardson Review, Unclassified Report, Volume 3, (December 2019), 264-267.
[21] Law Council of Australia, *Submission to the PJCIS Review of AFP Powers*, (October 2020), 31-33.

Australian Government playing a leadership role in adequately funding the delivery of programs, as well as investment in research and development of global best practice.

29. While robust and fair legal responses, including criminal justice responses, are an important component of any national counter-terrorism strategy, they are secondary to the prevention of such conduct in the first place. The objective of prevention requires mechanisms other than criminal justice or quasi-criminal responses, which are directed to early, community-based identification, intervention and rehabilitation of 'at-risk' individuals, without the immediate threat of criminal punishment or coercion. It is important that prevention and rehabilitation strategies are adapted specifically to the needs of children and young people, especially before they reach the point of contact with the criminal justice system.

30. Similar investments are also required in programs for the rehabilitation of people who are serving sentences of imprisonment for terrorism offences, or who are released into the community upon completion of their custodial sentence, or who are on bail or remand. Access to effective rehabilitation and social support is also critical for people who are subject to control orders, post-sentence orders and parole conditions which limit their movements within the community on security-related grounds.

31. More generally on the issue of children who come into contact with the criminal justice system in relation to terrorism offences, the Law Council draws the Committee's attention to the recommendations of the third Independent National Security Legislation Monitor, Dr James Renwick SC, in his 2018 report on the prosecution and sentencing of children for terrorism offences.[22] These recommendations covered both legislative amendments to sentencing and procedure laws, and investments in de-radicalisation programs for children and young persons. They remain largely outstanding, and the Law Council continues to support their prompt implementation. The Committee may wish to request a progress update from Government agencies.

Further information

32. Should it assist the Committee, the Law Council would be pleased to provide comment on any specific legislative proposals that may be under consideration. The Law Council's contact officer is [redacted] Director of Policy, [redacted]

Yours sincerely

[redacted]

Dr Jacoba Brasch QC
President

[22] Dr James Renwick SC, Independent National Security Legislation Monitor, *Report on the Prosecution and Sentencing of Children for Terrorism Offences*, (November 2018).