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No. 126 2001–02

Security Legislation Amendment (Terrorism) Bill
2002 [No. 2]

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 126 2001–02

Security Legislation Amendment (Terrorism) Bill 2002
[No. 2]

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Law and Bills Digest Group
30 April 2002

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Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]

Date Introduced: 13 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: Most provisions commence upon Royal Assent, or the day after it is given. The commencement of some provisions is contingent on whether other elements of the anti-terrorist package of legislation commence first.

Purpose

To

- amend the *Criminal Code* in order to:
 - transfer the offence of 'treason' from the *Crimes Act 1914* and update its terms to recognise that treason may include not only assisting in regular war against the state but also assisting in irregular armed hostilities against the armed forces;
 - introduce a statutory definition of terrorism and specific terrorist offences; and
 - introduce an administrative power to proscribe terrorist and other organisations;
- amend the *Australian Protective Service Act 1987* to facilitate the involvement of the Australian Protective Service in the Air Security Officer Program; and
- amend the *Crimes (Aviation) Act 1991* to extend its operation to *intrastate* flights.

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Background

Context

The Pressure to Act

In Resolution [1373](#) the United Nations Security Council consolidated its previous comments on the need for stronger and more cooperative measures among States to counter terrorism. It 'decided' that 'all States shall ... prevent and suppress the financing of terrorist acts [and shall] [c]riminalize the wilful provision or collection ... of [terrorist] funds by their nationals or in their territories'. It also required States to ensure that terrorists, their accomplices and supporters are brought to justice, and that 'terrorist acts are established as serious criminal offences in domestic laws ... and that the punishment duly reflects the seriousness of such terrorist acts'.¹ On 17 November 2001, the International Monetary Fund backed this move by expressing grave concern at the use of the international financial system to finance terrorists acts and to launder the proceeds of illegal activities. It called on all member countries to ratify and implement fully the UN instruments to counter terrorism, particularly Resolution [1373](#).

Resolution [1373](#) was not the first exhortation in relation to anti-terrorism measures. The General Assembly has made repeated calls over three decades for States to enact anti-terrorist laws which deal with criminalising terrorist acts, state sponsorship of terrorism and the links between terrorism and organised crime. The Security Council has made calls over recent years dealing specifically with Afghanistan, the Taliban and Osama bin Laden.

At the same time, other United Nations bodies have recently urged caution. For example the United Nations Committee Against Torture recently reminded states in considering anti-terrorist laws of the 'non-derogable nature of most of the obligations undertaken by them in ratifying the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]'.² The High Commissioner for Human Rights also urged states enacting such laws 'to refrain from any excessive steps, which would violate fundamental freedoms and undermine legitimate dissent'³ and expressed concern over the detention of prisoners at the United States Naval Base at Guantanamo Bay, Cuba.⁴

The Real Obligation

While there may seem to be strong pressure on Australia to enact tough anti-terrorist laws, realistically the obligations are far less exacting. Substantively, all that Resolution [1373](#) requires is that Australia ensure that its laws criminalise terrorist activities, that those laws deal with terrorist financing and material support for terrorist organisations and that they be applied or enforced in conformity or conjunction with other foreign jurisdictions. Arguably, anything more, for example along the lines of the United Kingdom and United States approaches, exceeds our obligations to the international community. Following these precedents may be dangerous for Australia. First, overseas *experiences* may provide little guidance as to the particular threat facing Australia. Second, overseas *reactions* may

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provide little certainty regarding the extent to which safety can be guaranteed. Third, overseas *critiques* may provide ample evidence of the impact on civil liberties.

Our Preparedness

There may be strength in our existing level of legislative and administrative preparedness. In response to Resolution [1373](#) Australia stated that it had 'a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies'. Also it 'already had in place extensive measures to prevent in Australia the financing of, preparations for and basing from Australia of terrorist attacks on other countries' and that it had 'an extensive network of ... law enforcement liaison officers and bilateral treaties on extradition and mutual legal assistance ... to facilitate cooperation with other countries in the prevention, investigation and prosecution of terrorist acts'.⁵ Moreover, there are a wide range of laws which address the core elements of terrorism. We have laws dealing with intelligence, prevention, crisis management and investigation. In terms of investigation, we have laws which deal in some detail with law enforcement agencies and law enforcement methods, offences and cooperation with foreign countries.

At the same time, there may be acknowledged limitations in our preparedness. In making the above assertions, Australia acknowledged that there were gaps in its 'systemic and legislative preparedness to prevent or to respond to [terrorist attacks] and to freeze [terrorist assets]'.⁶ In theory, these gaps could relate to a range of issues including the extraterritorial reach of our laws, the absence of specific terrorist offences or terrorist financing provisions or, simply, the disjunction between the terrorist phenomena and the various existing laws. This disjunction may raise no more than drafting concerns, acknowledging the limits that any laws may have in dealing with the breadth of human behaviour. Questions of coverage in terms of extraterritorial operation, specific offences and terrorist financing raise more significant concerns requiring close examination.

The Action and Proposed Action

On 28 September 2001 the Government announced measures relating to financial support for terrorist networks. The measures also included strengthening Australia's ability to combat the use of false identities in the conduct of financial transactions, enhancing the extraterritorial application of Australian laws and improving information sharing.⁷

On 2 October the Government announced proposed amendments to legislation to:

- permit, under warrant, the formal questioning by ASIO of people 'who may have information that may be relevant to ASIO's investigations into politically motivated violence' and the arrest by State or Federal police of people 'in order to protect the public from politically motivated violence';
- introduce new general offences based on the Terrorist Act 1994 (UK) covering 'violent attacks and threats of violent attacks intended to advance a political, religious or ideological cause which are directed against or endanger Commonwealth interests'; and

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- increase AFP powers 'to search for and seize property of any kind that is used or intended to be used for terrorism or is the proceeds of terrorism'.⁸

During the General Election, on 16 October the Government announced that, if re-elected, it would introduce a retrospective criminal hoax offence 'to specifically target those who seek to terrorise others by exploiting their fear of terrorism'.⁹ On 13 February 2002, the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 was introduced. It subsequently passed both Houses and was received Royal Assent on 4 April 2002.

On 28 October the Prime Minister recommended a summit of State and Territory leaders 'to develop a new framework under which transnational crime and terrorism can be dealt with by law enforcement at a Commonwealth level'. One objective of the summit would be '[a] reference of constitutional power to the Commonwealth to support an effective national response to the threats of transnational crime and terrorism'.¹⁰ The summit would also consider the reformation, abolition or replacement of the National Crime Authority (NCA). A Leader's Summit on Terrorism and Multi-Jurisdictional Crime was held on 5 April 2002.

After the election, on 19 November the Government announced that it would introduce air marshals 'selectively on flights provided by Australian air carriers'. The Air Security Officer Program would be implemented by the Australian Protective Service.¹¹

On 16 December the Government restated its commitment to introduce 'a specific offence of terrorism and a related offence of preparing or planning, terrorist acts' and to amend the *Proceeds of Crimes Act 1987* 'so that terrorist property can be frozen and seized'.¹² On 18 December Cabinet agreed to a range of anti-terrorist measures including the new terrorist and terrorist financing offences and expanded powers of arrest and detention for the Australian Security Intelligence Organisation (ASIO).

On 18 December the Government also announced that the first group of Air Security Officers (Air Marshals) would complete their training to help ensure aviation safety.¹³ It also restated its commitment to the various legislative changes previously foreshadowed.¹⁴

On 21 December 2001 the Government listed in the Australian Government *Gazette* the names of terrorists and terrorist organisations whose assets must be frozen by the holder of those assets under the Charter of the United Nations (Anti-terrorism Measures) Regulations 2001. It also announced a review of the performance and cost-effectiveness of the NCA by the former AFP Commissioner, Mick Palmer and the former Secretary of the Attorney-General's Department, Tony Blunn.¹⁵ The review was completed in early 2002.

The Bills

This Bill is part of a package of counter-terrorism legislation introduced by the Howard Government on 12 March 2002. The other Bills in the package are the Suppression of the Financing of Terrorism Bill 2002 (the Terrorist Financing Bill), and the Border Security Legislation Amendment Bill 2002. Other components of the anti-terrorism package are the

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Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.¹⁶ The Government has also introduced a Telecommunications Interception Legislation Amendment Bill 2002 which enables interception warrants to be granted to investigate 'an offence constituted by conduct involving an act or acts or terrorism'.¹⁷ The ASIO Bill has been referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD for report by 3 May 2002. The other five Bills¹⁸ have been referred to the Senate Legal and Constitutional Legislation Committee for report by the same date.

This present Bill was introduced on 13 March 2002. The original Bill [the Security Legislation Amendment (Terrorism) Bill 2002], which was introduced on 12 March 2002, was withdrawn on 13 March 2002 and the [No.2] Bill was substituted. The reason was that the Office of Parliamentary Counsel had drawn the Government's attention to a discrepancy between the title of the original Bill and the title referred to in the notice of presentation given by the Attorney-General. This discrepancy meant that the Bill's introduction was inconsistent with House of Representatives' Standing Orders. The withdrawal and re-introduction were designed to address this problem.¹⁹

Overview

Terrorism and the Law in Australia

This digest is written against the backdrop of a larger research project by the Department of the Parliamentary Library dealing with the broad proposals announced by the Government in anticipation of the legislation introduced along with this Bill. *Terrorism and the Law in Australia* was presented in two parts. The first part, [*Legislation, Commentary and Constraints*](#), described proposals announced in anticipation of legislation introduced in 2002 in the context of existing arrangements. It gave a framework and criteria for evaluation of those laws and some more detailed analysis for parliamentary consideration. The second part, [*Supporting Materials*](#), comprised a series of documents on specific issues related to legislative and administrative arrangements.

Some of the material below is drawn from the *Terrorism and the Law in Australia* project. For example, the discussion on the 'pressure to act', the 'action and proposed action' and the rhetorical question 'what is terrorism?' is drawn together from the two papers above. Much of the material, particularly the discussion of thematic issues, is not reproduced. However, it is important to acknowledge the project's core observation and basic thesis.

In blunt terms, by default or design, there are no specific anti-terrorism laws in Australia. Even the word 'terrorism' is seldom used to describe terrorist acts or activities. But there is a wide and almost comprehensive range of laws that may be applicable in anticipation of and response to international terrorism that directly or indirectly affects Australia. Moreover, there are laws that deal with 'politically motivated violence', 'treason', 'unlawful

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associations', 'foreign incursions', 'national security', and 'organised crime'. The links among these general and specific laws, and the wider question of legislative preparedness, are canvassed in the *Legislation, Commentary and Constraints* Research Paper. For present purposes it is worth noting that there are strong intersections among 'treason', 'politically motivated violence' 'unlawful associations' and 'foreign incursions'.

In enacting specific anti-terrorism laws a cautious and considered approach must be taken. If there was a thesis in the *Terrorism and the Law in Australia* project it was that there are dangers in *underestimating* our legislative and administrative preparedness and that there are difficulties in striking an appropriate balance between safety and liberty. The question of preparedness and the difficulty of balancing safety and liberty are considered in the *Legislation, Commentary and Constraints* paper. Comparative approaches in the United Kingdom and United States are canvassed in the *Supporting Materials* paper. In summary, while precedents are useful, we will need our own views regarding the terrorist threat in Australia and whether the measures in question are necessary, sufficient and proportionate.

Obviously, much of the discussion below, being based on specific proposals, is new. For example, there is a close examination of absolute liability in the context of proposed 'terrorist offences' and there is a lengthy discussion of the scope of judicial review in the context of a proposed powers to declare, list or proscribe terrorist organisations. The thesis above remains relevant. Moreover, the key issues in this digest relate to the necessity and proportionality of the terrorist offences and the locus of control over proscription.

The Legislative Package

As indicated by the Government, this Bill forms part of a broader legislative package that is 'designed to strengthen Australia's counter-terrorism capabilities'.²⁰ In order to explain the provisions in this Bill it is necessary to consider its relationship with the other Bills.

Subject Matter

As suggested above, anti-terrorist legislation usually deals with at least four topics: intelligence, prevention, crisis management and investigation (which includes laws dealing with law enforcement agencies and methods, offences and international cooperation). As indicated, Australia already has laws dealing with all of these topics and has, by its own assertion, already dealt legislatively with crisis management and international cooperation. Amendments on these topics are canvassed in the legislative package as follows:

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Intelligence	
• <i>questioning</i>	ASIO Legislation Amendment (Terrorism) Bill 2002
• <i>intercepts</i>	Telecommunications Interception Legislation Amendment Bill 2002
• <i>financial</i>	Suppression of the Financing of Terrorism Bill 2002
Prevention	
• <i>border control</i>	Border Security Legislation Amendment Bill 2002
• <i>proscription</i>	Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]
• <i>proscription</i>	Suppression of the Financing of Terrorism Bill 2002
Offences	
• <i>general</i>	Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]
• <i>financial</i>	Suppression of the Financing of Terrorism Bill 2002
• <i>bombing</i>	Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002
• <i>hoaxes</i>	<i>Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002</i>

There are strong intersections among 'treason', 'politically motivated violence' 'unlawful associations' and 'foreign incursions'. The offence of treason and the proscription and offence provisions dealing with unlawful associations appear in the *Crimes Act 1914*. The expression 'politically motivated violence' relates to an aspect of 'security' which defines the functional responsibilities of the Australian Security Intelligence Organisation. It appears in the *Australian Security Intelligence Organisation Act 1979*. The expression 'foreign incursion' appears in the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

The legislative package updates and aligns these concepts to take account of the threat *or possible threat* of international terrorism in Australia. Key bills on these topics are:

Concepts	
• <i>treason, terrorism & foreign incursions</i>	Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]
• <i>politically motivated violence</i>	ASIO Legislation Amendment (Terrorism) Bill 2002

Provisions and Commencement Dates

This Bill and the Terrorist Financing Bill deal with a new Chapter of the *Criminal Code*: '**Chapter 5—The integrity and security of the Commonwealth**'. This Chapter is also dealt with by the Criminal Code Amendment (Espionage and Related Offences) Bill 2002. If all the bills were enacted, it would cover espionage, 'unlawful soundings', treason, terrorism, terrorist financing, proscription of terrorist organisations and related offences.

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It is also worth noting the other amendments that would result from the passage of the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 and the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002*. The amendments to the *Criminal Code* made by these Bills are indicated in italics in the following table.

Proposed new anti-terrorist provisions in the *Criminal Code*

Chapter 4	The integrity and security of the international community and foreign governments
• Division 70	Bribery of foreign public officials
• Division 71	Offences against United Nations and associated personnel
• <i>Division 72</i>	<i>International terrorist activities using explosive or lethal devices</i>
Chapter 5	<i>The integrity and security of the Commonwealth</i>
Part 5.1	<i>Treason</i>
• <i>Division 80</i>	<i>Treason</i>
Part 5.2	<i>Offences relating to espionage and similar activities</i>
• <i>Division 90</i>	<i>Preliminary</i>
• <i>Division 91</i>	<i>Offences relating to espionage and similar activities</i>
• <i>Division 92</i>	<i>Offence relating to soundings</i>
• <i>Division 93</i>	<i>Prosecutions and hearings</i>
• <i>Division 94</i>	<i>Forfeiture</i>
Part 5.3	<i>Terrorism</i>
• <i>Division 100</i>	<i>Preliminary</i>
• <i>Division 101</i>	<i>Terrorism</i>
• <i>Division 102</i>	<i>Proscribed Organisations</i>
• <i>Division 103</i>	<i>Financing Terrorism</i>
...	...
Chapter 10	National Infrastructure
• Division 471	Postal Offences
–
– <i>Section 471.10</i>	<i>Hoaxes—explosives and dangerous substances</i>

All three Bills insert the heading '**Chapter 5—The integrity and security of the Commonwealth**'. This Bill and the Terrorist Financing Bill also both insert the new heading '**Part 5.3—Terrorism**' and the text of *Division 100—Preliminary*, dealing with definition and the asserted constitutional bases for the terrorism offences. Because of these overlapping provisions, there are two basic issues in relation to commencement:

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- Generally all of the Bills commence on Royal Assent; and
- Whichever Bill commences first will remain intact, while any overlapping provisions in the other Bill(s), relating to **Chapter 5** and **Part 5.3**, will not commence at all.²¹

There are some other contingent commencement issues which are dealt with below.

Which Bill is Significant?

It is difficult to assess which will be the most significant aspect of the legislative package.

This Bill deals with specific terrorist offences and proscription of terrorist organisations. The Terrorist Financing Bill deals with controls over terrorist entities and assets, by way of a terrorist financing offence, controls over financial institutions and finance specific listing or proscription mechanisms. The ASIO Bill deals with questioning and detention of persons for terrorist intelligence gathering purposes. The Anti-Hoax and Bombing Bills are self explanatory and both relate to commitments made during the General Election.

Undoubtedly, this Bill is significant. It has received unusually strong criticism from the Senate Standing Committee for the Scrutiny of Bills. In its third *Alert Digest* for 2002 the Committee criticised the terrorist offences, proscription provisions, and the proscription-related offences. 'On its face,' the Committee stated, '[it] seems to introduce considerable scope for discretion in the criminal law'. It stated that it intended to 'seek a briefing and invite comment on the provisions of this bill and other bills in the legislative package'.²²

There are also strong connections between this Bill and the Terrorist Financing Bill. Both have proscription provisions and proscription-related offences but each takes its own approach. However, the most significant civil liberties issues arise in relation to this Bill.

But the real issue is the extent to which it 'strengthens our counter-terrorism capabilities'. As we will see, it may be that 'there is no legislative "fix" or panacea against terrorism'.²³ And while we lack a comprehensive proscription regime, we already have various provisions under which people may be prosecuted for acts of terrorism. Clearly, there is a focus on criminalising terrorist acts and destroying terrorist organisations and networks. But, it could be argued that the focus on proscription and specific terrorist offences, as opposed to effective intelligence and law enforcement powers and effective financing identification and control mechanisms, is misplaced. Most, if not all, of the acts covered by the specific terrorist offences are already covered under the ordinary criminal law. While proscription may harm terrorist organisations and networks, it is a risky mechanism that may drive the activities of these and other entities further underground.²⁴ By contrast, improvements in intelligence and law enforcement capabilities and in global cooperation and control over terrorist financing may have a far greater impact on terrorism and terrorist organisations, domestically and internationally. Either way it is necessary to consider whether the particular measures are necessary, sufficient and proportionate.

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Constitutional Bases

While various constitutional powers may be called upon to support anti-terrorist laws, there is uncertainty regarding the extent to which the Commonwealth can *cover the field*.

Criminal Laws

Generally, it may be said that terrorism is either partly or wholly about crime albeit that the criminal acts may be distinguishable by their seriousness, motivation or intention.

The Constitution does not grant the Commonwealth power over 'criminal activity' as such. But there is no doubt that within limits the Parliament can validly make laws which create criminal offences, and provide for their investigation, prosecution and punishment. In general, offences must either fall directly within, or be incidental to the exercise of, a head of constitutional power. 'In short, and generally speaking, Commonwealth criminal law is ancillary to the performance of the responsibility of the Commonwealth to protect itself, its Constitution, its institutions and services and to enforce its own laws.'²⁵ In general the test for validity of a law relying on an incidental power is that it is *reasonably necessary* for the effective operation of the law. It is not essential to show that the law is *necessary* to effect a purpose within power. Conversely, a law may be invalid if it exceeds rather than expands the main power. The key concepts are reasonableness and proportionality.

A Mosaic

Legislative power to deal with terrorism may be derived from a mosaic of various direct and indirect sources. Section 51 of the Constitution provides that the Commonwealth may make laws with respect to 'defence of the Commonwealth ... and the control of forces to execute and maintain the laws of the Commonwealth', 'external affairs' or 'matters incidental to the execution of any power vested by this Constitution in Parliament'. It also gives power over corporations, banking, aliens and interstate and overseas trade and commerce. Section 122 gives it plenary power to legislate for the government of the Territories. The Commonwealth may also be able to derive relevant legislative power from its 'inherent right of self-protection' and/or its 'character and status of the Commonwealth as a national government'. On the other hand Commonwealth legislative power is hemmed in by express and implied limits which operate to protect individual liberties.

External Affairs Power

As a general proposition the external affairs power will support a law regulating persons, places and matters which are physically external to Australia. Moreover, it will support a law which implements an international treaty or convention. When a law purports to give domestic effect to an international instrument, the primary question to be asked is whether it has selected means that are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'.²⁶ However, the power is not confined to the implementation of treaties or treaty obligations. It will support measures that address matters of international concern, at least where that concern is reasonably concrete.²⁷ It

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probably extends also to measures that implement recommendations of international agencies and may extend to measures that pursue agreed international objectives.²⁸

Nor is the external affairs power confined to the implementation of a treaty in full. A law is valid even if it only partially implements a treaty,²⁹ provided the deficiency is not so substantial as to deny the law the character of a measure implementing the treaty.³⁰ This provides considerable leeway for domestic implementation of selected parts of a treaty.

This head of power is likely to be a primary basis for anti-terrorism measures in Australia. Over the past decade, various international bodies have made statements regarding action recommended to address terrorism and its root causes (see *Supporting Materials*, 'Document 4: Terrorism and the United Nations'). Some of the statements have been of a more formally binding nature. For example, UN Security Council Resolution [1373](#), and some of the earlier resolutions, include provisions which may be construed as 'decisions' under Chapter VII of the *Charter of the United Nations* which are formally binding on Australia. Key provisions for present purposes include 'decisions' that 'all States shall ... prevent and suppress the financing of terrorist acts [and] [c]riminalize the wilful provision or collection ... of funds by their nationals or in their territories with the intention that the funds should be used ... in order to carry out terrorist acts' and that all States:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts .³¹

This sort of language may not only support the enactment of anti-terrorist measures such as the ones proposed, it may impose a positive obligation on Australia to do so.

Defence Power

The defence power relates to 'the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth'. It is a purposive power that will only support a law that is 'reasonably capable of being regarded as being appropriate and adapted' to 'the defence of the Commonwealth [etc.] [against *external* threats]'. There are three important things to note about the defence power: it is *elastic*, expanding in times of emergency, it relates to *external* threats, as opposed to domestic threats, and it has a primary and secondary aspect.

The primary aspect deals with the essence of military defence, that is, raising armed forces, maintaining and reinforcing them and so on. The secondary aspect is less directly concerned with these issues and more with measures conducive to the successful defence of Australia from external threat. The primary aspect obviously operates during wartime but it also persists as a source of power in times of peace. Whether the secondary aspect also operates at times of peace and/or in intermediate situations of heightened international tension is constitutionally less certain. As will be seen, the question of whether a particular

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series of events constitutes a threat to national security is essentially a Constitutional *fact* which is ultimately to be determined by the High Court. Moreover, in determining such a fact the Court's assessment will be based on what is called 'judicial notice', which means the information within the ordinary knowledge of judges sitting on the case.

The second part of the defence power may also come into calculations. It has been argued that the 'execution and maintenance of the laws of the Commonwealth' may extend 'to the preservation of general law and order so far as such order may be disturbed by general disobedience to the laws of the Commonwealth'.³² Conversely, it has been argued that these words are directed to 'the general control of the armed forces, including internal discipline, and the relationship among the members of the forces, between those members and outside persons [etc.]'.³³ The former view would regard the defence power as adding to the Commonwealth's array of powers to prevent, investigate and punish terrorism while the latter view would deny this. There has been little judicial support for the former view.

Inherent Power of Self Protection

The implied nationhood power is largely unexplored. It has been characterised as being incidental to the operation of the Commonwealth's executive power under section 61. It has also been characterised as an implied power that is deduced from the 'character and status of the Commonwealth as a national government'.³⁴ Broadly, it permits the Commonwealth to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.³⁵ But its application in areas such as counter-terrorism remains uncertain and has not been reviewed by the High Court for more than ten years. It may be that 'the predilections of the individual judges will be dominant in any decision' on the issue.³⁶

One aspect of the implied nationhood power is a power relating to security and integrity. It has been said that the Commonwealth has an 'inherent right of self-protection',³⁷ a right to prevent 'intentional excitement of disaffection against the Sovereign and Government'³⁸ and a legislative power to preserve its institutions which was seen to 'follow almost necessarily from their existence'.³⁹ Accordingly, the Commonwealth 'has the power to protect its own existence and the unhindered play of its legitimate activities'⁴⁰ which might be found in sections 51(vi), the defence power, 51(xxxix), the incidental power, section 61, executive power, and section 68, the vesting of command in chief of naval and military forces in the Governor-General.⁴¹ It might also be found in 'an essential and inescapable implication which must be involved in the legal constitution of any polity'.⁴²

While it may expand and contract to meet the exigencies of domestic emergency in an analogous way to the defence power, the Executive probably does not enjoy the same degree of deference from the Judiciary in its exercise. To rely on this power, Parliament would virtually need an *unarguable* case that the matters dealt with in the law are connected to the survival of the Commonwealth.⁴³ In 1951, in the *Communist Party Case*, the High Court found that the 'inherent right of self protection' if it did exist certainly did not support the *Communist Party Dissolution Act 1950*.

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Referral of Powers

In announcing the proposed new measures Prime Minister Howard noted that '[o]ne difficulty the Commonwealth has in effectively fighting transnational crime and terrorism is that these crimes may not be strictly federal offences'.⁴⁴ Moreover he noted potential constitutional limitations: 'it's not absolutely certain that the Commonwealth has the necessary power, complete constitutional power, as I'm advised, to deal in the way that it might think appropriate for a terrorist attack on a particular part of Australia'.⁴⁵

As noted above, in October 2001 the Prime Minister recommended a summit of State and Territory leaders to consider a reference of constitutional authority to the Commonwealth. Section 51(xxxvii) of the Constitution provides that the Commonwealth Parliament may make laws with respect to: 'Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law'. Thus, State Parliaments can refer 'matters' to the Commonwealth Parliament and give the Commonwealth power to pass laws about them. It is not necessary for all States to refer a matter to the Commonwealth. If only some States make a reference, the Commonwealth law can apply only in those States. Once the law is passed, it may be 'adopted' by the Parliaments of other States and so come into effect there as well.⁴⁶

On 5 April 2002, at the Leader's Summit on Terrorism and Multi-Jurisdictional Crime, the Prime Minister and State and Territory Leaders negotiated an *Agreement on Terrorism and Multi-Jurisdictional Crime*. In relation to terrorism, this included an agreement to:

... take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in legislation.⁴⁷

At present, the details and implications of the Agreement are not clear. However, in simple terms, the Attorney-General has said that 'We have an agreement on the referral of powers ... so that the Commonwealth can legislate *across the board* in relation to terrorism'.⁴⁸

Constitutional Freedoms

Although the Commonwealth may call upon a mosaic of constitutional powers to support anti-terrorism laws, it may ultimately be limited by various express and implied freedoms. In the foreword to a recent text on national security and the law Sir Anthony Mason noted that '[t]he tension between civil liberty and national security is very considerable'. 'Indeed', he wrote, 'the tension is more marked than it has ever been, granted the emphasis now

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given to freedom of information and freedom of expression as indispensable elements of effective representative democracy and government'.⁴⁹

General

The Commonwealth Constitution contains a small number of express rights and guarantees for individual citizens which put limits on how far the Parliament can go under its legislative powers. Some additional freedoms arise by *implication* from the text and structure of the Constitution. If Parliament decides to enact counter-terrorist legislation such laws may well be tested against the constitutional criteria spelt out in these express and implied limits. Some of the more relevant limits are dealt with briefly below.

The Attorney-General is perhaps unlikely to single out religious groups for proscriptive legislation. A more realistic possibility is that perhaps someone challenges counter-terrorist legislation of general application on the basis that *in its practical operation* it interferes with the free practice of their religion. The Constitution contains an express guarantee of freedom of religion in section 116 which has been given a narrow interpretation by the High Court. A law of general application is unlikely to fall foul of the guarantee in section 116 because, as presently interpreted, it appears to prohibit only those laws which *specifically* target the practice of religion. Section 116 is not likely to pose problems for Parliament in enacting counter-terrorist legislation unless it singles out particular religious groups or the High Court shifts ground and applies the requirement for free exercise of religion to laws which make no reference to religion on their face.

Freedom of Political Communication

There is a constitutionally guaranteed freedom of political communication implied from the text and structure of the Commonwealth Constitution. The High Court unanimously in *Lange v. Australian Broadcasting Corporation* agreed on the test to be applied to laws or actions which are alleged to infringe this guarantee.⁵⁰ The test requires 2 questions to be asked:

- does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?, and
- if it does, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of representative and responsible government as set out in the Constitution?

A law will only be unconstitutional if the answers are 'Yes' and 'No' respectively.

It is conceivable that counter-terrorist measures could impose a *prima facie* burden on political communication, especially when one notes that communication includes conduct as well as speech and the term 'political' seems to have a broad meaning. This being the case, such laws would project the High Court into the centre of controversy as it engaged in the difficult and somewhat subjective process of assessing whether they imposed a *permissible* burden on political communication.

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Freedom of Political Association

The freedom of political communication is said to derive by implication from the text and structure of the Constitution, particularly in the way it provides for elements of representative government. The same reasoning could well give rise to other implied freedoms. For example, in *Australian Capital Television Ltd v. Commonwealth* Gaudron J, for example, said that '[t]he notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, *freedom of association* and, perhaps, freedom of speech generally'.⁵¹ Similarly, McHugh J commented that the principle of 'representative government' implied certain constitutional rights including 'freedom of participation, *association* and communication' at least in relation to federal elections.⁵² And in *Lange* the Court seemed to endorse a statement that 'representative government' implied not only a requirement for free elections but 'all that this implies in the way of freedom of speech and *political organization*'.⁵³

Ultimately, the existence of the freedom of political association, and its scope beyond the context of federal elections, are questions that have not been fully resolved. Moreover, it is necessary in every case to ask whether measures which appear to infringe this implied freedom are nevertheless 'reasonably appropriate and adapted to serve a legitimate end'.

The *Communist Party Case* ...

There are more than a few parallels between the present circumstances and those which gave rise to the *Communist Party Dissolution Act 1950*. So, constitutional and political issues are likely to be discussed similar to those in the *Communist Party Case* of 1951.

At the same time, developments in constitutional and administrative law will mean that other issues are also likely to be discussed. The development of a greater 'rights consciousness' in the courts over the last decade points to new and powerful reasons why legislation similar to the *Communist Party Dissolution Act 1950* could suffer the same constitutional fate it did 50 years ago. On the other hand, the development of a stronger and more wide reaching body of administrative law over the last three decades suggests that courts may feel less compelled to take the all or nothing approach to constitutional validity that was taken in response to that Act in the *Communist Party Case*.

The *Communist Party Case* provides a number of lessons in relation to the present Bill:

- the Judiciary will be inclined to intervene where the Parliament or Executive seeks to unilaterally trespass upon civil liberties in the name of war or national security;
- Parliament may not use the defence power to justify encroachments on civil liberties except where there is a real external threat and where the laws are 'reasonably capable of being regarded as being appropriate and adapted' to deal with that threat;
- the Judiciary will assess the existence of constitutional facts, or facts which determine the limits of legislative and executive power, not the Parliament or Executive

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Constitutional Facts

In the *Communist Party Case* the High Court was called upon to consider the validity of a statute which sought to unilaterally proscribe the Communist Party of Australia. The *Communist Party Dissolution Act 1950*, cited as its constitutional foundation the defence power on the basis that the Communist Party posed a threat to national security. The Court held that it is for the Judiciary and not the Parliament to determine issues such as the nexus between a set of facts and the national security aspect of the defence power:

[T]he validity of a law ... cannot be made to depend on the opinion of the law-maker or the person who is to do the act that the law ... is within the constitutional power upon which the law in question itself depends for its validity.⁵⁴

This is not to say that the Judiciary will determine as a matter of objective fact whether an organisation poses a threat to national security. But it will determine whether proscription can be 'reasonably capable of being considered appropriate and adapted' to defence:

[T]he Court will not substitute an opinion of its own for an opinion of [the Executive or Parliament] but it will form an opinion as to whether the reasons for the [action] can reasonably be regarded as connected with defence preparations.⁵⁵

The key issue here is not that there is an opinion involved, but that the Judiciary will reserve the right to intervene in respect of opinions of the Parliament or Executive to the extent that they bear on the constitutional validity of a legislative or administrative act. Where opinions relate to constitutional *issues*, such as the purpose of proscription, or constitutional *facts*, such as the existence of a lighthouse, the importation of a good, or the presence of an industrial dispute, the Judiciary can trump the Parliament or Executive.

However, circumstances may point to a large degree of judicial deference. So, in relation to defence, once the Judiciary is prepared to acknowledge the existence of a war or national emergency it will give the Parliament or Executive considerable leeway to determine whether particular measures are necessary. In these circumstances, it is said, judicial deference becomes almost absolute: rights and liabilities may be made 'to depend on any event or matter the Parliament may choose including administrative opinion'.⁵⁶ Of course, this depends on the nature or depth of the emergency which prompts the measures.

Overall, the impact of the 'stream and source' doctrine or the extent of deference may be affected by the extent to which judicial review remedies provide an alternative safety net. In broad terms, the 'stream and source' doctrine can be characterised as a judicial remedy to uphold the Constitution. This 'judicial remedy' is a brutal one in the sense that a law may hang or fall on a fairly delicate issue of whether a Parliament or decision maker has been empowered to determine a fact which goes to constitutional validity of the law.

To a large extent a similar function may be served by other judicial review remedies. The development of administrative law, under the common law and statute, since the 1970s has enhanced the ability of courts to scrutinise *particular* exercises of a coercive power authorised by statute. Courts today may feel less compelled to take the all or nothing

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approach to constitutional validity which the High Court majority did in the *Communist Party Case*, confident that excesses of power will be picked up in individual cases.

Jurisdictional Facts

In *Liversidge v. Anderson* the House of Lords was called upon to consider the limits of a power which permitted the detention of persons during wartime.⁵⁷ The relevant regulations permitted the Executive to detain a person based on a '*reasonable cause to believe*' that the person was 'of hostile origin or associations'. In dissent, Lord Atkin argued that it was for the Judiciary and not the Executive to determine issues such as the limits of the discretion, or decision making jurisdiction, suggested by '*reasonable cause to believe*':

the plain and natural meaning of the words 'having reasonable cause' imports the existence of a fact or state of facts, and not the mere belief by the person challenged that the fact or state of fact exists ... 'reasonable cause' for a belief, when the subject of legal dispute, has always been treated as an objective fact, to be proved by one or other party and to be determined by the appropriate tribunal.⁵⁸

The dissenting judgment was subsequently endorsed as a correct statement of law.⁵⁹ In Australia the jurisdiction issue has been expressed, perhaps conservatively, in this way:

[T]he opinion of the authority that a particular exercise of its powers is within the law cannot be decisive of the question of the validity of a provision enacted by the authority, *unless*, indeed, the power was conferred by the law creating the power ... in terms which provided that the opinion of the authority should be decisive.⁶⁰

However, as with the constitutional situation, this is not necessarily to say that the Judiciary will always exercise its own discretion in relation to jurisdictional matters. But it will determine whether a decision in relation to *any* discretion was '*formed by a reasonable man who correctly understands the meaning of the law under which he acts*':⁶¹

It should be emphasised that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to enquire whether the opinion required by the relevant legislative provision has really been formed [under law].⁶²

The key issue here is not that there is an opinion involved, but that the Judiciary will reserve the right to intervene in respect of opinions of the Executive to the extent that they bear on the limits of a decision making power. This includes opinions that relate to jurisdictional *issues*, such as the appropriate question to be asked or the meaning of a statutory expression, or jurisdictional *facts*, such as the question of whether a person is an Aboriginal for the purposes of a public inquiry,⁶³ whether a road is a public road for the purposes of a land rights claim,⁶⁴ and whether a dismissal amounts to a punishment.⁶⁵

Arguably, there is a similarity here with the 'stream and source' doctrine discussed above. One obvious difference is that the limiting power in the previous case is constitutional whereas the power in the present case derives from statute. As a result, much will depend

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upon the language and the scope, purpose and object of the relevant legislation. This explains the comment above that an opinion as to decision making jurisdiction is not decisive 'unless, indeed, the power was conferred by the law creating the power ... in terms which provided that the opinion of the authority *should be* decisive'.⁶⁶

Main Provisions

Treason

Precedent

The *Crimes Act 1914* deals with a number of offences against the government including treason, treachery, sabotage and sedition. These offences were largely codified from the common law in a wholesale reform of the *Crimes Act 1914* by the *Crimes Act 1960*. The reform implicitly acknowledged the threat of 'non-conventional' or 'asymmetric' warfare and the need to address external threats to the Constitution, government or defence of Australia and internal threats to the government or defence of foreign countries. 'Treason' covers levying war against the Commonwealth, assisting an identified enemy at war with the Commonwealth or instigating a foreigner to invade the Commonwealth. 'Treachery' includes any act done with the intent to overthrow the Constitution by revolution or sabotage. It includes 'the overthrow by force or violence of the established government of the Commonwealth, of a State or of a proclaimed country' and acts of treason committed within the Commonwealth directed against a proclaimed country. These are similar acts to those covered in 'politically motivated violence' and unlawful associations provisions.

Allied to treason is the offence of 'foreign incursion'. Under the *Crimes (Foreign Incursions and Recruitment) Act 1978* it is an offence to recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil. It is an offence to 'engage in hostile activity in a foreign state' or to 'enter a foreign state with intent to [do so]'. It is also an offence to do preparatory things for the same purposes. And it is an offence to 'give money or goods to, or perform services for, any other person or any body or association of persons for the purpose of supporting or promoting [these activities]'. 'Hostile activities' include any acts done for the purpose of overthrowing a government by force or violence, engaging in armed hostilities in a foreign state, placing a foreign public in fear and causing damage to foreign public property. They exclude activities undertaken in the service of a foreign power's armed forces.⁶⁷ These acts essentially correspond to acts which constitute the offence of treason, but are instead committed against a foreign power.

The Bill

The Bill basically reproduces the existing offence of treason. However it extends its operation to deal not only with 'levying war against the Commonwealth' but also with other forms of 'armed hostilities' particularly those which amount to 'asymmetric warfare'. 'Asymmetric warfare' refers to a military conflict in which one participant simply avoids the conventional military strengths of the other and focuses on its civilian weaknesses.

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Under the *Crimes Act 1914*, it is an offence to intentionally engage in conduct which 'assists by any means whatever ... a [proscribed] enemy at war with the Commonwealth'. Under **proposed section 80.1** it will also be an offence to intentionally engage in conduct which 'assists by any means whatever ... another country or *an organisation* ... engaged in armed hostilities with the Australian Defence Force' (**proposed paragraph 80.1(1)(f)**).

Thus, a person will be guilty of treason for an act that is somewhere between a 'foreign incursion', in the sense that it may occur overseas but may also involve service in the armed forces of a foreign power, and a traditional act of 'treason', in the sense that it will involve hostilities but it may be directed at the Australian Defence Force rather than the Commonwealth and may involve an organisation rather than another country. Good faith exceptions will continue to apply (**proposed subsection 80.1(6)**).

The new treason provisions also differ from the old provisions in some other respects. For example, under the *Crimes Act 1914*, it is an offence to knowingly assist another person who is guilty of treason to escape punishment. Under **proposed section 80.1(2)** it will be an offence to assist a person escape punishment *or* apprehension. In addition, proceedings may not commence unless the Attorney-General has given his or her consent. Pending this consent, a person may lawfully be arrested, charged or remanded in custody or on bail (**proposed subsections 80.2(3) or (4)**). It is also worth noting that the provisions attract the widest extraterritorial jurisdiction available and apply irrespective of nationality.

The Definition of Terrorism

What is Terrorism?

The word 'terrorism' is said to derive 'from the era of the French Revolution' describing 'state-directed policy of inflicting terror ... to obtain political and social control'. Its more modern usage is almost the reverse describing offences by individuals or individual organisations against states in order to obtain discrete political objectives.⁶⁸

Overseas

In the United Kingdom 'terrorism' was once defined as 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear'⁶⁹ and as '[t]he use of serious violence against persons or property, or threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives'.⁷⁰ It is now defined in the Terrorism Act 2000 (UK) as 'the use or threat of [serious violence, property damage, threats to life, risk to health or safety or disruption of electronic systems]' that is 'designed to influence the government or to intimidate the public or a section of the public' *and* 'is made for the purpose of advancing a political, religious or ideological cause'.⁷¹ As will be seen below, this definition has been largely reproduced in this Bill.

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In the United States, it is defined variously as 'the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives' (Federal Bureau of Investigations), 'the calculated use of violence or the threat of violence to inculcate fear, intended to coerce or intimidate governments or societies as to the pursuit of goals that are generally political, religious or ideological' (Department of Defence) and 'premeditated, politically-motivated violence perpetrated against noncombatant targets by subnational or clandestine agents, usually intended to influence an audience' (State Department).⁷² In the *United States Code* 'terrorism' is defined as '[criminal] activities that involve violent acts or acts dangerous to human life' that 'appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination, or kidnapping'.⁷³ There are also more specific definitions related to collective offences such as 'federal terrorism crimes' and 'acts of terrorism transcending national boundaries'.

In Canada, terrorism is defined in the *Criminal Code* to include an act or omission endangering life or causing serious risk to public health or safety, etc. that is committed in whole or on part 'for a political, religious or ideological purpose, objective or cause' and with the intention of 'intimidating the public ... with respect to its security ... or compelling a person government or ... organisation to do or refrain from doing any act'.⁷⁴

Australia

The Australian Defence Force defines terrorism as '[t]he use or threatened use of violence for political ends, or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear'. A 1979 protective security review defined it as 'acts of small groups of persons who use criminal violence to obtain publicity for their political views, or to achieve or to break down resistance to their political aims, by the intimidation of governments or of people'.⁷⁵ A 1993 counter-terrorist review defined it as 'acts or threats of violence of national concern, calculated to evoke extreme fear for the purpose of achieving a political objective in Australia or in a foreign country'.⁷⁶

The only statutory definition of terrorism in any Australian jurisdiction is found in the Northern Territory where it is defined as 'the use or threatened use of violence to procure or attempt to procure the alteration, cessation or doing of any matter or thing established by a law of ... a legally constituted government or other political body'. It includes such acts done 'for the purpose of putting the public or a section of the public in fear' or 'for the purpose of preventing or dissuading the public or a section of the public from carrying out, either generally or at a particular place, an activity it is entitled to carry out'.⁷⁷

Lack of Consensus

A large number of definitions have been proposed domestically and internationally to describe terrorism but no comprehensive working definition has emerged. On the one hand, they may reflect differences in precision, emphasis or perspective. On the other

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hand, they may reflect differences in the underlying phenomena. Across the various definitions listed above, there appear to be four core elements: (a) acts or threats of violence or criminality that are (b) significant in seriousness or magnitude which are (c) motivated by political, social or ideological objectives and/or (d) intended to influence a government or intimidate or coerce the public or a section of the public.

The issue for present purposes is not that there is a degree of consensus on definitions. The issue is that the consensus is event driven and that it waxes and wanes over time and place. In reality, 'terrorism' is multi-faceted. It is difficult to conceptualise or operationalise. While the elements of criminality, seriousness, motivation and intention may be identifiable, a terrorist act does not fall neatly into legislative categories because the relevant laws do not all strictly correspond to 'a terrorist act'.

Moreover, 'terrorism' is subjective. It is a label which is 'both political and perjorative'. The classic statement is that '[w]hat might appear as an evil act of terrorism to people in an affluent Western society may seem like a reasonable and legitimate political action to a liberation or rebel movement operating in the poverty-stricken and desperate conditions in the Third World'.⁷⁸ Having canvassed some of these issues, an official Australian report on counter-terrorist capability noted in 1993 that: '[w]e suspect that the nature of terrorism and its relationship to politically motivated violence probably means that no one 'definition' would be satisfactory, or widely accepted in the Australian community'.⁷⁹ For this reason, it is argued, 'defining the term itself creates more problems than it solves'.⁸⁰

Few Australians would dispute that hijacking commercial aircraft and flying them into a city skyscraper, killing thousands of civilians, is an act of terrorism. But any national, let alone international, consensus over what is or is not terrorism rapidly evaporates as one moves away from the shocking immediacy of the events of 11 September 2001. Are Chechens engaged in armed conflict with Russia 'terrorists'? Is India engaged in a war on 'terrorism' in Kashmir? Did Australians who, before 1991, donated money to the African National Congress (an organisation committed to the overthrow of the apartheid regime in South Africa) help to finance a terrorist organisation? Most terrorism 'readers' appeal or refer to the adage that 'one person's terrorist is another person's freedom fighter'.

The Bill

Proposed subsection 100.1(1) effectively defines 'terrorism' as an act or threat that:

- *involves* serious harm to a person or serious damage to property; or
- endangers another's life or creates a serious risk to public health or safety; or
- seriously interferes with, disrupts or destroys an electronic system; and

is done or made 'with the intention of advancing a political, religious or ideological cause'.

This definition is virtually identical to the one used in the Terrorism Act 2000 (UK). However, the latter definition requires that the 'use or threat of action' is 'made for the

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purpose of advancing a political, religious or ideological cause' *and* that it is 'designed to influence the government or to intimidate the public or a section of the public'.⁸¹

The definition is also similar to the one in the Canadian Anti-Terrorism Act 2002 (CA). However, the latter definition relates to conduct that '*intentionally*' involves death or serious harm. The latter also relates to conduct that 'causes serious interferences with or serious disruption of an essential service, facility or system, whether public or private'.⁸²

Some disparities are worth noting:

- whereas the Canadian definition relates to acts or threats that '*intentionally*' cause death or serious harm, the Australian definition relates to acts or threats that simply '*involve*' serious harm. This is not to say that strict liability attaches to the offence (recklessness is implied by default in the *Criminal Code*)⁸³ but the disparity does reflect that a lower standard is required in relation to the fault element or test of culpability in Australia. The same disparities exist in relation to the other limbs of the terrorist offences.
- whereas the Canadian definition relates to acts or threats that seriously interfere with essential services whether public or private, the Australian definition, although it extends to essential services, is limited to interference with the *electronic systems* of those services and is limited in its application to 'public' as opposed to private utilities. Conversely, the Australian definition extends to essential and *non-essential* services.
- whereas the Canadian definition extends to property damage and interference with essential services, it is limited, unlike the Australian definition, to property damage that 'is likely to result' in serious harm, danger to life or risk to health and safety. In this way the definition focuses attention on *personal* as opposed to *property* crimes.
- whereas the United Kingdom definition relates to acts or threats '*made for the purpose of*' advancing a cause, the Australian definition relates to acts or threats '*made with the intention of*' advancing a cause. Whether this disparity reflects a difference in operation or a difference in drafting style is unclear. Arguably, both simply point to the *motivation* behind the conduct. It is significant that the focus on *motivation*, in addition to ordinary criminal intention, may cause problems in criminal trials (see below).
- whereas the United Kingdom definition extends to acts 'designed to influence' a wider audience, the Australian definition is unlimited in this respect. Thus, the Australian definition lacks one of the apparent 'core elements' of terrorism discussed above. As a result, conduct may be deemed to be terrorism even though it is '*private*' in nature.

This omission may be significant. A background brief on the Canadian *Anti-Terrorism Act* by the Canadian Justice Department remarked about statutory definitions of 'terrorism'.⁸⁴

It is not enough for an act to be an expression of political, religious or ideological belief. It must also be committed for a political, religious or ideological purpose, **and** it must also intentionally cause death or serious injury, **and** it must also have the intent to *intimidate the public or compel a person, organization or government to do something*.

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At stake in the debate over the Canadian legislation was concern that any reference to 'political, religious or ideological cause' would inadvertently target the expression of political, religious or ideological beliefs or unlawful protest activity. In defence the Justice Department argued that removing this reference 'would transform the definition from one that is designed to recognize and deal strongly with terrorism to one that is not distinguishable from a general law enforcement provision in the *Criminal Code*'.⁸⁵ The same argument might apply to references to 'intent to intimidate' or 'designed to influence'.

The Bill excludes 'lawful advocacy, protest or dissent' or 'industrial action' from the definition of a 'terrorist act'. Significantly, 'lawfulness' is not defined. On its face it would seem to be redundant. Any advocacy, protest or dissent that involves 'serious harm', 'serious property damage', 'endangers a person's life' or 'creates a serious risk' to public health or safety might rarely be considered lawful in civil or criminal terms. As noted below, most, if not all, terrorist acts are criminal acts and few anti-terrorist offences actually criminalise conduct that would otherwise be lawful in the ordinary circumstances.

It is worth noting that 'protest, dissent, ... or industrial action' are limits on the use of powers by defence forces when 'called out' in respect of aid to the civil power.⁸⁶

It is also worth noting that there is no such exception in the Terrorism Act 2000 (UK). Moreover, a similar exception was *removed* from the Anti-Terrorism Act (CA). The 'lawful advocacy, protest or dissent' exception originally applied (*only*) to acts or omissions that caused a serious interference with an essential service, facility or system. The reference to 'lawful' was removed to avoid uncertainty. In this way 'advocacy, protest or dissent' would need to meet the criteria for the other offences in order to be targeted:

This would **ensure that protest activity, whether lawful or unlawful, would not be considered a terrorist activity** unless it was *intended* to cause death, serious bodily harm, endangerment of life, or serious risk to the health or safety of the public.⁸⁷

Arguably the Canadian model is preferable. By focusing on personal as opposed to property crime, requiring intention as opposed to recklessness, and focusing on essential services the model is able to deal with finer shades of culpability and focus on conduct which is designed to *intimidate* the public. Moreover, by expanding the 'advocacy, protest or dissent' exception, limiting it to interference with essential services and tying culpability ultimately to personal offences, the model is able to accommodate a wider range of actions that might otherwise be supported, accepted or tolerated by the Australian community.

Terrorism Offences

Overseas Precedents

In the United Kingdom most of the specific terrorism offences are related to proscription. However, the Terrorism Act 2000 deals expressly with offences related to the provision of

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certain weapons training,⁸⁸ directing terrorist organisations,⁸⁹ possession of things for terrorist purposes,⁹⁰ and the collection or recording of information for terrorist purposes.⁹¹

In the United States a wide range of acts are deemed to be terrorism offences. These include killing, kidnapping, maiming, assault with a dangerous weapon, attack on property, or attack against government employees.⁹² They also include acts that create 'a substantial risk of serious bodily injury to any other person' through damage to property.⁹³

The Bill

The Bill creates a number of direct and indirect terrorist offences. It is an offence to:

- engage in a 'terrorist act' (see definition of 'terrorism' above) (**proposed section 101.1**).
- perform any act in preparation or planning for a terrorist act (**proposed section 101.6**)
- provide or receive certain weapons training that is 'connected with' preparations for a terrorist act or the engagement or assistance in a terrorist act (**proposed section 101.2**)
- direct the activities of an organisation that is directly or indirectly 'concerned with' 'fostering' such matters (**proposed section 101.3**)
- possess a thing 'connected with' such matters (**proposed section 101.4**); and
- make or collect a document 'connected with' such matters (**proposed section 101.5**)

Some general comments can be made:

- most offences apply absolute liability to the issue of whether the acts, such as training, are connected with terrorism, with a defence based on recklessness (see below);
- all offences attract a maximum penalty of life imprisonment; and
- all offences attract the widest extraterritorial jurisdiction available (see below).

It is worth noting the scope of **proposed sections 101.4** and **101.5**. They could criminalise conduct which is only remotely connected with terrorism, such as retention by a public organisation of documents or evidence relating to debate over terrorist acts. Clearly, much will depend upon the nature of the connection implied by these provisions.

A Specific Terrorist Offence?

No Panacea against Terrorism

In the report, *Inquiry into Legislation Against Terrorism*, Lord Lloyd of Berwick observed that '[i]t is an illusion to believe that the fanaticism and determination of well established terrorist organizations can be defeated by laws alone, even of the most severe and punitive kind'.⁹⁴ He concluded that 'there is no legislative "fix" or panacea against terrorism'.

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In the *Protective Security Review*, Justice Hope acknowledged bluntly that '[v]irtually all terrorist acts involve what might be called ordinary crimes – murder, kidnapping, assault, malicious damage, and so on – albeit for political motives'. On this basis there was little apparent need to enact specific offences to target terrorists and their associates. 'The appropriate objective for a government,' he commented, 'is to bring them to justice'.⁹⁵

Clearly, most, if not all, definitions recognise that terrorist acts are criminal acts. However, as one commentator has suggested, 'if ... an act of terrorism is simply "a heinous crime", much of the modern rhetoric surrounding efforts to define terrorism as a separable phenomenon appears insignificant'. Moreover, 'if the inherent political nature of terrorism is ignored, terrorist acts can be identified more easily for the purposes of prosecution'.⁹⁶ Labelling an act as 'terrorism' may not assist investigation or prosecution and may in fact harm these processes, especially in the context of exercising extraterritorial jurisdiction, or negotiating extradition arrangements and mutual assistance.

Similarly, other 'core elements' such as seriousness or motivation do not necessarily assist. A single incident involving multiple deaths may cause alarm because it is indiscriminate or newsworthy but these factors exist in other well established offences. Moreover, as one Australian commentator noted, '[t]he circumstances that the criminal activities of a terrorist group are designed to achieve', namely some political or ideological ends rather than some individual or collective financial benefit, 'does not seem ... to make the existence or the operations of the group less pernicious, nor to create any less difficulty for law enforcement agencies in the discharge of their duties'.⁹⁷ On the other hand, as Lord Lloyd of Berwick commented, '[t]he reason for making explicit the terrorist element where it exists is, quite simply, that this is how it is seen by the public. Murder in the course of a terrorist activity is thought of as a more serious offence than 'ordinary' murder'.⁹⁸ To the government and the wider community it would seem 'terrorist crime is seen as an attack on society as a whole, and our democratic institutions. It is akin to an act of war'.⁹⁹

Pressure from Various Sources

Arguably, much of the pressure for creating a specific or separate terrorist offence is the need to acknowledge a community affront at a perceived attack on society. Nowhere has this been more evident than in the United Kingdom which has the oldest specific anti-terrorist statute. As one commentator has put it, passage of the Prevention of Terrorism (Temporary Provisions) Act 1974 (UK), which followed a series of bombings by the Irish Republican Army in mainland Britain, was 'influenced by two conflicting considerations':

On the one hand, there was the unavoidable truth that terrorism could not be abolished by legislative fiat and that much could already be achieved by the fullest application of the regular criminal law. On the other hand, there was a strong desire to respond to what was perceived as 'the greatest threat since the end of the Second World War'. In short, as one Member observed 'The House wants blood'.¹⁰⁰

Lord Lloyd of Berwick canvassed the issue of a specific terrorist offence in his 1996 report. He offered two arguments in favour of a specific offence: 'that terrorism presents

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an exceptionally serious threat to society' and 'that terrorists have proved particularly difficult to catch and convict without special offences and additional police powers'. He also noted five characteristics which distinguished terrorism from ordinary crime: it is directed at the public, it frequently involves lethal force, it creates fear, it has a political or ideological purpose and it is frequently perpetrated by overseas professionals.¹⁰¹

The pressure for creating specific offences may also come from a derivative source. In addition to the arguments relating to community perceptions and the 'unique' nature of terrorism, it may be argued that a specific terrorist offence provides an anchor for arguably more important issues such as preventative or investigatory powers. For example, these powers might relate to intelligence gathering, surveillance, proscription and deportation. Overseas experience demonstrates that anti-terrorist measures should rely on the existence of specific terrorist offences with clear and workable physical and mental elements. Australian experience demonstrates a similar, albeit more limited, trend. For example, the existing proscription power in the *Crimes Act 1914* is dependent on a threat of a treasonable or seditious offence and AFP powers in relation to controlled operations are conditioned on the threat of serious offences involving potential imprisonment for 3 years.

Pressure from the United Nations

In addition to these issues, there is a concrete source of pressure from the United Nations.

As we have seen, Resolution [1373](#) decided that Australia should ensure that 'terrorist acts are established as serious criminal offences in domestic laws ... and that the punishment duly reflects the seriousness of such terrorist acts'.¹⁰² This decision is formally binding on Australia under Chapter VII of the *Charter of the United Nations*. However, it is unclear whether this translates as a requirement to create separate terrorist offences, or a requirement to provide statutory guidance in relation to sentencing and, thus, punishment.

Assuming that it is not possible or practicable to establish a complete set of terrorist offences, it may be possible to develop sentencing guidelines which focus attention on factors such as political motivation or intention to influence government or coerce the public. At the same time, it may be necessary to consider whether this would unduly interfere with judicial discretion and with the domestic and international jurisprudence on sentencing theory. It may also need to consider whether sentencing guidelines interfere with the requirement for separation of powers between the Judiciary and Parliament.

Absolute Liability

As noted above, the Scrutiny of Bills Committee criticised various aspects of this Bill. One area of concern was the fact that elements of the terrorist offences attracted absolute liability. Both the Explanatory Memorandum and the Scrutiny of Bills Committee *Alert Digest* suggest that most of the offences contain elements which attract absolute liability. As the Explanatory Memorandum notes, this ordinarily means that 'as long as the person's provision or receipt of ... training [for example] was voluntary, the person's mental state is not relevant'.¹⁰³ It also means that no defence exists based on reasonable mistake of fact.¹⁰⁴

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The Explanatory Memorandum justifies this approach on the basis that absolute liability is 'appropriate' where 'there is no legitimate ground for the person to allow a situation to occur where the absolute liability element occurs'. That is, it is appropriate where 'there is no legitimate ground for the person to allow a situation to occur' where the training that he or she provides or receives ends up being *connected with* preparations for a terrorist act. Thus, a person who provides or receives training 'should be on notice that this should not be done if there is any possibility of this being connected to a terrorist act'. Ultimately, he or she 'must avoid this possibility arising' or otherwise 'not provide or receive the training'.

The *Alert Digest* criticised this on the basis that it is a 'very considerable departure from the general principle that criminal liability should depend on the accused having acted intentionally or recklessly'. It suggested that 'criminal liability is being imposed here on the basis of 'possible connections': 'if the provision of training is possibly connected to a terrorist act then a person commits an offence [if that possibility is later realised]'. In its view the provisions 'would seem to widen the scope for criminal liability alarmingly'.¹⁰⁵

In fact, the argument over absolute liability may be misleading. In the relevant provisions (**proposed sections 101.2, 101.4 and 101.5**) it is linked to a statutory defence based on recklessness (**proposed subsections 101.2(4), 101.4(4) and 101.5(4)**). So, for example, a person will not be guilty if he or she did not know that the training he or she provided was *connected with* preparations for a terrorist act *or* he or she was either unaware that there was a substantial risk that this was the case or, having regard to the circumstances known to him or her, it was, objectively speaking, justifiable for him or her to take that risk.¹⁰⁶

The connection between absolute liability and the recklessness defence does two things. First, it deals with the 'possible connections' problem raised in the *Alert Digest*. A person will not be guilty if the 'possible connections' between the training and the act of terrorism are so remote as to justify the person taking the risk and providing the training. Second, it shifts the legal burden to the accused. If recklessness was an element of the offence, the prosecution would have to prove that the person was aware of the 'possible connections' and was not justified in taking the risk. Because it is a defence, the accused must prove that he or she was either unaware of the 'possible connections' or was otherwise justified.

Extraterritoriality

The definition and offence provisions are drafted so as to operate extraterritorially. Thus, references to persons, property, incorporated and unincorporated bodies and 'the public' are not specific to Australia or Australians (**proposed subsection 100.1(1) and 100.1(3)**) and all of the offences attract 'extended geographical jurisdiction—category D' (**proposed subsections 101.1(2), 101.2(5), 101.3(3), 101.4(5), 101.5(5) and 101.6(3)**).

General Principles

A number of issues arise regarding the enactment and enforcement of extraterritorial law. Essentially, Parliament may enact an extraterritorial criminal law wherever a valid basis exists for enacting a domestic criminal law. But the Executive and the Judiciary may face

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obstacles in enforcing or adjudicating on such a law particularly where an offence attracts the jurisdiction of a foreign power and/or lacks a real and substantial link with Australia.

The standard practice seems to be that prosecutions do not commence without consultation between the Commonwealth Attorney-General and his or her foreign counterpart.

Ultimately, courts may be called on to consider the relevance of 'international comity' or to develop principles which would govern international 'conflicts of law' over these offences.

Prescriptive and Enforcement Powers

As a matter of constitutional law, the Commonwealth Parliament has a plenary power to legislate extraterritorially that is not limited in respect of any nexus with the 'peace, order and good government' of the Commonwealth.¹⁰⁷ Indeed, it is said that extraterritorial criminal laws are supportable whenever a valid basis exists for enacting a criminal law.¹⁰⁸ The authority to legislate extraterritorially can be derived from the external affairs power because it relates to matters that are 'physically external' to Australia.¹⁰⁹ But it may also be derived from the other legislative powers of the Commonwealth either directly or indirectly, using the incidental power in section 51(xxviii) of the Constitution.

International law recognises a jurisdiction where a valid nexus exists between the alleged criminal conduct and the state. The nexus will exist where the offence occurs within the territory or where the offender is present within the territory ('territorial jurisdiction') and where the results of the conduct are felt within the territory ('extra-territorial jurisdiction'). It may also recognise a jurisdiction based on the offender's nationality ('nationality principle'), the victim's nationality ('passive personality principle') and the need to protect the interests of the state (the 'protective principle'), but there is a degree of uncertainty.¹¹⁰

These principles are generally recognised in domestic jurisprudence, within the limits implied above. So, for example, the common law explicitly recognises the categories of 'territorial jurisdiction'¹¹¹ and 'extra-territorial jurisdiction'.¹¹² Except in relation to the Commonwealth, it would not ordinarily recognise the 'passive personality principle'.¹¹³ Neither would it ordinarily recognise the 'protective principle', although there have been cases in which, having recognised an extraterritorial jurisdiction over a principal offence, it has recognised a jurisdiction over inchoate offences (such as attempt and conspiracy). This has occurred on the basis that intended results or the intended victim were within the territory and it was necessary to protect 'peace, order and good government'.¹¹⁴

Statutory Regime

The extraterritoriality provisions in this Bill draw on a regime in the *Criminal Code* that was established by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 1999*. The regime describes a 'standard geographical jurisdiction', in which the conduct or a result of the conduct occurs or is intended to occur wholly or partly within Australia. It also describes different categories of 'extended geographical jurisdiction' to capture cases in which the conduct or a result of the conduct occurs overseas, but:

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- the person is an Australian citizen ('category A');
- the person is an Australian citizen and/or a resident of Australia ('category B');
- the jurisdiction is unrestricted, subject to a 'foreign law defence'¹¹⁵ ('category C'); or
- the jurisdiction is unrestricted ('category D').

The standard jurisdiction is intended to apply to all Commonwealth offences unless a contrary intention appears. The extended categories will apply by specific reference.

By using this template, the regime covers all of the jurisdictional issues identified above.

Constitutional Bases

The Bill takes the unusual, but not extraordinary, approach of reciting, *in a non exhaustive fashion*, the constitutional bases for the terrorist offences (**proposed section 100.2**).

It is unclear, however, what purpose the recitals are meant to serve. Arguably **proposed subsection 100.2(1)** states the obvious. Ultimately, no law or offence will survive judicial scrutiny unless it falls within legislative power. Moreover, as the *Communist Party Case* shows, it is for the Judiciary to determine constitutionality not Parliament (see below). On the other hand there may be (at least) two practical points for having the provisions. They could operate as limits on power, assisting a court in reading down various provisions that appear to be beyond power (although the listed grounds in **proposed subsection 100.2(2)** are expressed so as not to limit the broad proposition in **proposed subsection 100.2(1)**). They could also assist the prosecution in determining when to lay charges in a given case.

Proscription

In 1996 Lord Lloyd of Berwick conducted a major British inquiry into anti-terrorist laws. The *Inquiry into Legislation Against Terrorism*, argued that the 'terrorist organisation' is a 'key concept ... in terms of *permanent* counter terrorist legislation'. He suggested that proscription has a twofold purpose. 'First it will furnish a conclusive presumption that an organisation which is for the time being proscribed is a terrorist organisation. This will facilitate the burden of proof in terrorist cases'. Second, he argued, 'proscription will be the starting point for the creation of a number of fundraising and other offences, especially fundraising for terrorism overseas'. However, it was acknowledged that proscription could make intelligence gathering and law enforcement tasks more difficult,¹¹⁶ at least in part because it tends to put distance between law enforcement agencies and informants.¹¹⁷ Indeed, it was conceded that the primary purpose of proscription was 'to give legislative expression to public revulsion and reassurance that severe measures were being taken'.¹¹⁸ Thus, proscription has been viewed as 'essentially a cosmetic part' of anti-terrorist laws.

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Precedents

Crimes Act 1914

Australia has had a long history of proscription, beginning in the context of World War I and expanding significantly in the aftermath of the Russian Revolution of 1917. Under the *Unlawful Associations Act 1916* any organisation which 'by its constitution or propaganda, advocates or encourages ... the taking or endangering of human life, or the destruction of property' was an unlawful association. The *Unlawful Associations Act 1917* expanded these measures by empowering the Governor-General to declare unlawful associations, creating offences relating to membership and contributions and dealing with forfeiture.

The current unlawful associations provisions, which focus on revolutionary and seditious conduct, were introduced primarily by the *Crimes Act 1926*. During the 1925 General Election, the incumbent Bruce Government had asserted that 'the paramount issue in this campaign is the maintenance of law and order, and the supremacy of constitutional government'.¹¹⁹ The provisions, which were introduced alongside provisions dealing with powers of arrest without warrant and offences related to serious industrial disputes, were considered to reflect a 'clear and definite mandate'¹²⁰ to 'defeat the nefarious designs of the extremists in our midst'.¹²¹ They were 'aimed chiefly at the rising Communist Party'.¹²²

The *Communist Party Dissolution Act 1950* sought to develop this tradition, but with a specific focus on the Australian Communist Party. The Act attempted to dissolve this organisation and provided means to declare related associations unlawful. As is discussed below, the Act was held to be constitutionally invalid in the *Communist Party Case*.¹²³

Charter of the United Nations Act 1945

There is no Act expressly permitting asset-freezing or transaction-blocking in respect of terrorism and terrorist activities. But the Commonwealth has been able to take measures to implement various international resolutions. Under the *Charter of the United Nations Act 1945* the Government has power to give domestic effect to resolutions of the United Nations. The Governor-General may make regulations giving effect to binding decisions that the Security Council has made under Chapter VII of the Charter of the United Nations in so far as they require Australia to apply measures not involving armed force.¹²⁴

Recently, the Governor-General has made regulations designed to implement aspects of the United Nations Security Council Resolutions [1267](#) and [1373](#). The Government has argued that they would 'prevent Australian[s] or people in Australia from dealing with the financial and other assets of people or entities that engage in or support terrorism'.¹²⁵ The Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 prevent Australian citizens or persons in Australia from dealing with financial assets of persons or entities that engage in or support terrorism, or are under the direct or indirect control of such persons or entities. The Charter of the United Nations (Sanctions–Afghanistan) Regulations 2001 prohibit a person in Australia or a citizen of Australia from doing

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anything that assists, or results in provision of military equipment or services or drug related chemicals from being sold, supplied or transferred to a person in Taliban territory.

These regulations, along with the Banking (Foreign Exchange) Regulations, establish a de facto proscription regime at least in relation to asset-freezing or transaction-blocking. While they are considered in more detail in the Digest for the Terrorist Financing Bill, it is worth noting that the de facto proscription regime is subject to limited control or scrutiny. To some extent Parliament may exercise control by way of disallowing the regulations. But the Judiciary would have little capacity to exercise control by way of judicial review. Even if the regulations were reviewable, they were based on an externally developed list. None of the evidential material or decision makers may be available in Australia.

Parliamentary, Executive or Judicial Control

An obvious concern in the proscription debate is the process for proscribing organisations. The general question relates to which arm of government controls proscription: the Parliament, Executive or Judiciary. The specific issue is the extent of judicial scrutiny.

Australia

In Australia, proscription has traditionally been controlled by the Judiciary. The unlawful association provisions introduced by the *Crimes Act 1926* originally contained no process for proscription. They did not mention any organisations but declared generally that any bodies which advocated or encouraged treason or sedition were unlawful associations.¹²⁶ In this way, the provisions left the issue of whether a body was indeed a security threat to be determined by the judiciary in the context of prosecutions for related offences.¹²⁷

The regime was amended by the *Crimes Act 1932* to permit the High Court or a State Supreme Court to make proscription declarations.¹²⁸ (This power was transferred to the Federal Court by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979*.¹²⁹) The amendments also gave the Commonwealth Attorney-General power to commence 'show cause' proceedings in respect of a declaration by the relevant court.¹³⁰ Thus, the Attorney-General may apply to the Federal Court for an order calling upon a body to 'show cause' as to why it should not be declared an unlawful association. An application is made on the grounds that the body falls within the ambit of the blanket provisions above. The Attorney-General must provide evidence which establishes a prima facie case and an officer or member of the body has a right to appear and make submissions. Any interested parties may appeal to the Federal Court and, presumably the High Court. Thus, while the Executive has a role in proscription, it is ultimately controlled by the Judiciary.

Overseas

In the United Kingdom, United States and Canada, proscription is controlled by the Parliament or Executive. Under the Prevention of Terrorism (Temporary Provisions) Act 1974 (UK) an organisation could be proscribed either by legislative amendment or by legislative instrument. The Secretary of State was empowered to add any organisation 'that

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appears to him to be concerned in terrorism ... or in promoting or encouraging it'.¹³¹ This approach is largely adopted in the current provisions. Under the Terrorism Act 2000 (UK) the Secretary of State is empowered to add any organisation 'if he *believes* that it is concerned in terrorism',¹³² subject to an application-based power to revoke¹³³ and a right of appeal to a judicial review-based appeal body,¹³⁴ and, by leave, to a superior court.¹³⁵ Under the Anti-terrorism and Effective Death Penalty Act of 1996 (US) the Secretary of State was empowered to designate any foreign organisation 'if he *finds* that' it is engaged in terrorist activity,¹³⁶ subject to a power to revoke,¹³⁷ a codified judicial review process¹³⁸ and disallowance by an Act of Congress.¹³⁹ Under the Anti-Terrorism Act 2002 (CA) the Governor-in-Council may proscribe an organisation if satisfied that there are 'reasonable grounds to believe' that it is knowingly involved in terrorism or is knowingly acting on behalf of or at the direction of or in association with such an entity.¹⁴⁰ This is subject to an application based power to revoke and a partially codified judicial review process.¹⁴¹ Thus, in the United Kingdom, United States and Canada, while the Executive has a primary role, supervisory control is vested in the Judiciary (to varying degrees).

Clearly, attempts to establish effective proscription processes have had to grapple with the need to balance the roles of the Parliament, Executive and Judiciary. In passing it is worth noting the struggle played out in the Northern Territory in respect of the anti-terrorism provisions in the *Criminal Code* (NT). Originally, these provisions applied to 'proscribed organisations'. These were identified by the Administrator, acting on the advice of the Executive Council, with a simple parliamentary tabling requirement.¹⁴² Early drafts of these provisions 'contained no criteria or procedures relating to such proscription'.¹⁴³ As enacted, they simply required, in the opinion of the Administrator, the organisation 'has as its object or one of its objects the use of violence to achieve its end' or that the members have 'demonstrated a propensity to use violence to achieve the organisation's ends'. The power to 'proscribe organisations' was strongly criticised on the basis that it had 'potential implications for interference with a number of civil rights'¹⁴⁴ and, on that basis, should be 'the subject of impartial judicial consideration'.¹⁴⁵ The response at the time was that an appeal to the courts would take a sensitive issue out of the Parliament. It would be 'an extraordinary, novel and dangerous precedent'¹⁴⁶ and would 'politicise the judiciary'.¹⁴⁷ But, within a year the issue was reviewed and, pursuant to an agreement between the Commonwealth and the Northern Territory,¹⁴⁸ control was surrendered to the courts.¹⁴⁹

Consequences of Proscription

Under the *Crimes Act 1914* it is an offence to be a member of or to represent an unlawful association.¹⁵⁰ Similarly, it is an offence to publish, sell or distribute material produced by an unlawful association,¹⁵¹ or to let premises to such an association.¹⁵²

Broader offence provisions have been enacted in the United Kingdom. Under the Prevention of Terrorism (Temporary Provisions) Act 1974 (UK) it was an offence to 'belong or profess to belong to a proscribed organisation',¹⁵³ to 'solicit or invite financial or other support for a proscribed organisation or knowingly make or receive any contribution in money or otherwise to the resources of a proscribed organisation',¹⁵⁴ or to 'arrange or

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assist in ... or address, a meeting' in support or furtherance of a proscribed organisation.¹⁵⁵ It was even an offence to 'wear an item of dress or ... carry ... any article' so as to 'arouse reasonable apprehension that [the person] is a member or supporter' of an organisation.¹⁵⁶ The Prevention of Terrorism (Temporary Provisions) Act 1989 extended these provisions to encompass solicitations for proscribed organisations,¹⁵⁷ and the provision of assistance in the management of funds of proscribed organisations. These provisions are effectively reproduced in the existing legislation, the Terrorism Act 2000 (UK).

Under the *Anti-terrorism and Effective Death Penalty Act of 1996* (US) it was an offence to provide 'material support or resources' to 'foreign terrorist organisations'¹⁵⁸ and it made it an offence for a financial institution not to report the existence of any funds held for the benefit of such organisations.¹⁵⁹ It also made it an offence to engage in financial transactions with governments of countries designated as countries that support terrorism.¹⁶⁰ And it applied money-laundering provisions, which among other things prohibit assistance in the management of terrorist funds, to proceeds of terrorist crime.¹⁶¹

The Bill

The Bill empowers the Attorney-General to declare in writing that an organisation is a proscribed organisation if he or she is '*satisfied on reasonable grounds*' that:

- the organisation or one of its members on its behalf 'has committed, or is committing, a [terrorist] offence' irrespective of whether there has been a charge or conviction; or
- the declaration is 'reasonably appropriate to give effect to' a United Nations Security Council decision that the organisation is an 'international terrorist organisation'; or
- the organisation poses a danger to the 'security' or 'integrity' of the Commonwealth or another country (**proposed section 102.2**).

Declarations must be published in the *Gazette* and in a newspaper circulating in each State and Territory (**proposed subsection 102.2(2)**). The power to issue declarations may be delegated to another Minister (**proposed subsection 102.2(4)**). The power to issue declarations comes with an obligation to revoke where the Attorney-General is 'satisfied on reasonable grounds' that none of the above grounds apply (**proposed section 102.3**).

It is an offence in relation to a proscribed organisation to:

- be a member,
- direct activities,
- provide or receive training,
- receive funds or make funds available, or
- otherwise provide assistance (**proposed subsection 102.4(1)**).

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The offence is subject to a maximum 25 years' imprisonment.

Strict liability applies to the issue of whether a declaration has been made (**proposed subsection 102.4(2)**). However, defences are available where the defendant can show that he or she made an honest and reasonable mistake as to the declaration¹⁶² or that he or she neither knew nor was reckless as to the matters forming the basis of the declaration (**proposed subsection 102.4(3)**). In relation to membership, there is a defence where the defendant can show that 'as soon as practicable' after the organisation was proscribed, they 'took all reasonable steps' to cease being a member (**proposed subsection 102.4(4)**).

The operation of the defence in **proposed subsection 102.4(3)** is somewhat complicated. The strict liability provision does not require intention, knowledge or recklessness. So, the prosecution does not need to show that a defendant knew or ought to have known that the organisation was a proscribed organisation. As indicated, this would admit a defence based on an honest and reasonable mistake regarding the fact of proscription. So, a person will not be criminally responsible if he or she 'considered whether or not [the organisation had been proscribed] and is under a mistaken but reasonable belief about [that fact]'.¹⁶³

But the additional defence in **proposed subsection 102.4(3)** imports recklessness. A person will not be criminally responsible if he or she was not reckless as to the matters forming the basis of the declaration. That is, a person will not be criminally responsible if:

- he or she does not know that the organisation or one of its members 'had committed or was committing' a terrorist offence; and
- he or she was either *unaware* that there was a substantial risk that this was the case or, having regard to the circumstances known to him or her it was, objectively speaking, justifiable for him or her to take that risk.¹⁶⁴

This is not to say that recklessness becomes an element of the offence. That would be contrary to **proposed subsection 102.4(2)**. What it does say is that a defendant may, in a defence against prosecution, show that he or she was unaware of, or was justified in ignoring, the circumstances that gave rise to the proscription declaration. Arguably, the intention may be to cover the situation where a defendant has considered whether or not the organisation has been proscribed but is under a mistaken but *unreasonable* belief about that fact. They would be relieved of guilt if they could show that they were not reckless as to the bases that gave rise to the declaration. However, the effect may be to cover a situation where a defendant *knows* that an organisation has been proscribed but believes that the declaration is unfounded on the basis that, from the information known to him or her, there is only a slight risk that a terrorist offence will be in fact be made out.

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Threshold Questions

Purpose

As noted above, Lord Lloyd of Berwick suggested that one purpose of proscription was to establish a presumption and a starting point for derivative offences. Another purpose was to reassure the public that measures were being taken to disrupt the terrorist machine. But, as we have seen, it may be less effective in strengthening counter-terrorism capabilities than other mechanisms and it may ultimately be a 'cosmetic part' of anti-terrorism laws.

Before considering any other issues, it is worth asking what is the purpose of proscription? Is it to deal with emergency situations that could not be dealt with under the criminal law? Is it a preventative technique, designed to capture those who would ultimately fall within the specific terrorist offence provisions? Is it an extension technique, designed to capture other third parties who could not be convicted of an offence but have guilt by association?

Grounds

As we have seen, an organisation may be proscribed on various grounds. Primarily, the focus is on terrorism or the extent to which organisations or members are involved in the commission of terrorist offences. This seems to fit the tenor of the legislative package. The focus also covers organisations that are listed by the United Nations Security Council. This also seems to fit the legislative package but it does carry significant dangers in terms of procedural fairness and domestic avenues to challenge an international proscription.

Aside from these matters, proscription also focuses on the 'security and integrity of the Commonwealth or another country'. This ground, which seems to focus on matters other than terrorism offences, does not seem to fit with the legislative package. The expression 'security and integrity' is nowhere defined and, while 'security' may be easy to construe in the context of terrorism and in light of the relevant heads of legislative power, it is difficult to see what is meant by 'integrity'. While headings are not conclusive, the intention may be that its meaning is informed by the other matters that fall within that part of the *Criminal Code*. One relevant part is '**Chapter 5—The integrity and security of the Commonwealth**' which deals with treason, espionage, unlawful soundings, terrorism, etc. Moreover, as the declaration is focused on 'the Commonwealth *or another country*' the phrase may extend to matters related to the security and integrity of foreign countries. Thus, another relevant part is '**Chapter 4—The integrity and security of the international community and foreign governments**' which deals with bribery of foreign public officials or international terrorist activities using explosive or lethal devices.

Whither Judicial Control?

Proscription has been extant in Australia for some time but it has been largely unused. Moreover, proscription, in a form controlled by the Parliament, as with the *Communist Party Dissolution Act 1950*, or the Executive, as with this Bill, has proven controversial. History, recent and past, suggests that the proscription provisions in this Bill, if enacted

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and, indeed, if activated publicly in anticipation of a real threat, will be challenged. Assuming that an organisation is proscribed and that a person is charged with a related offence, the courts may be called upon to examine the constitutionality of the proscription provisions, including the scope of legislative powers and effect of any implied freedoms or limitations, and/or the legality, and perhaps even *merits*, of the proscription declaration.

As the Explanatory Memorandum states '[t]he lawfulness of the Attorney-General's decision making process and reasoning is subject to review under the *Administrative Decisions (Judicial Review) Act 1977*'.¹⁶⁵ Issues of process and reasoning are also subject to common law judicial review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution. In addition, in a trial for a proscription related offence, a court may be asked to review the bases of the proscription declaration in order to determine whether the defendant was reckless in relation to the matters on which it was based.

Constitutional Grounds

The discussion above, and the overview of constitutional issues in the background section, imply that a constitutional challenge may focus on the defence or external affairs powers. In blunt terms, the argument would be that the proscription process is not reasonably appropriate and adapted to implementing an international obligation or to ensuring the defence of the Commonwealth and the States and Territories against an external threat.

At the same time, a range of powers may come into play depending on the circumstances as illustrated by the list of constitutional bases contained in **proposed section 100.2**. In basic terms, the argument would be that proscription is not reasonably necessary to ensure the effective regulation of the various topics canvassed in **proposed section 100.2**.

In relation to the various proscription grounds, the following questions may be relevant:

- **proposed paragraphs 102.2(1)(a)–(b)**: As noted above the offences may or may not fall within legislative power, depending on the scope of the particular head of power and the extent to which the offences are reasonably necessary to regulate the relevant subject matter. The argument as to the validity of the proscription provisions is similar to, albeit one step removed from, the argument as to the validity of the offences. Assuming that the offences are within power, proscription may also be within power.

However, while it may be easy to show that the offences are reasonably appropriate and adapted to give effect to an international obligation or to ensure defence and security *or* that they are reasonably necessary to provide for the effective regulation of other subjects covered by **proposed section 100.2**, such as postal and telegraph services, trade and commerce or banking and insurance, it may be very hard to show that proscription satisfies these tests, especially when it relies on an *opinion* of the Executive as to the commission of the offences dealt with in **proposed division 101**.

- **proposed paragraph 102.2(1)(c)**: The Attorney-General is 'satisfied on reasonable grounds' that a declaration is '*reasonably appropriate to give effect to a decision of the*

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Security Council. Is the conferral of an administrative discretion to proscribe 'reasonably capable of being considered appropriate and adapted' to give effect to a United Nations Security Council decision that the particular organisation is an 'international terrorist organisation' [external affairs power]?

- **proposed paragraph 102.2(1)(d)**: He or she is 'satisfied on reasonable grounds' that an organisation poses *a danger to the 'security or integrity of the Commonwealth'*. Is the conferral of such a discretion 'reasonably capable of being regarded as being appropriate and adapted' to the protection of the Commonwealth [defence power]? Is the conferral of this discretion necessary to preserve its existence [nationhood power]?
- **proposed paragraph 102.2(1)(d)**: He or she is 'satisfied on reasonable grounds' that an organisation poses *a danger to the 'security or integrity of ... another country'*. Is the conferral of such a discretion 'reasonably capable of being considered appropriate and adapted' to give effect to our international obligations [external affairs power]? Is it within power because it relates to a matter which is physically external to Australia?

In addition to questions regarding constitutional powers there may be questions regarding express and implied limitations. For example, many Australians have donated money to organisations dedicated to the overthrow of regimes that were perceived to be oppressive. Proscription, along with the offence in **proposed paragraph 102.4(1)(b)**, might raise interesting constitutional questions regarding freedom of political communication. Similarly, it is not inconceivable that a political party may have some relevant connections with an organisation that is listed by the United States or the United Nations. Proscription of this party in Australia, along with the offence in **proposed paragraph 102.4(1)(c)** may also raise interesting questions regarding any implied freedom of political association.

Judicial Review Grounds

The discussion above, and the overview of the *Communist Party Case* in the background, suggests that a judicial review challenge would focus on issues of process and reasoning. It may also seek to focus, to the extent permissible, on the factual bases of the declaration. In blunt terms, the argument *might* be that the language of **proposed section 102.2** and the scope, purpose and object of **proposed division 102** and **Chapter 5** suggest that the Attorney-General's decision making jurisdiction rests on the establishment of certain facts.

In terms of process, the Attorney-General's opinion will be constrained by procedural fairness obligations. The obligation to accord procedural fairness, or 'due process', is described as 'a common law duty to act fairly... in the making of administrative decisions that affect rights, interests and legitimate expectations'.¹⁶⁶ As a principle of fairness, the content of the obligation must be flexible to take account of what is fair in the circumstances,¹⁶⁷ but it often obliges the decision maker to provide a hearing¹⁶⁸ and an opportunity to deal with adverse information that is 'credible, relevant and significant to the decision to be made'.¹⁶⁹ Above all, there is a duty to disclose information regarding matters *personal* to the individual whose interests are affected by the decision.¹⁷⁰ So, it has

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been said that the right to a hearing and the right to cross examine others arise where there are grave allegations¹⁷¹ or where the decision rests on personal characteristics.¹⁷²

In terms of reasoning, the Attorney-General's opinion may be constrained by the court's view as to whether the grounds relied on to make the declaration are *in fact* 'reasonable'. On a literal reading **proposed subsection 102.2(1)** sets a standard implying that a decision will not be authorised unless it can be shown that the reasonable grounds in fact existed.¹⁷³ At the very least, the Attorney-General's opinion *will* be constrained by the court's view as to whether the opinion is 'such that it could be formed by a reasonable man who correctly understands the meaning of the law under which he acts'.¹⁷⁴ It will be constrained at least by the need to correctly interpret the law and apply it relevantly to the facts. For example, the Attorney-General must interpret and apply the offence provisions in **proposed sections 101.2–101.6** in accordance with their terms and the broader context of criminal law. He or she must ask the right questions¹⁷⁵ and rely on relevant evidence in reaching a conclusion.¹⁷⁶ If he or she is to draw any inferences—such as a conclusion that a person acted with the intention of 'advancing a political, religious or ideological cause' (**proposed subsection 101.1(1)**) or was 'not reckless' as to whether his or her actions were 'connected with' a terrorist act (**proposed section 101.2**)—they must be capable of being drawn.¹⁷⁷

The Attorney-General's opinion will also be constrained by requirements implied by the 'probative evidence rule' and the legal standard of 'reasonableness'. Among other things, natural justice requires that a decision be based on some 'logically probative material' or material 'which is *reasonably capable* of sustaining it'.¹⁷⁸ Thus, there must be some relevant evidence before the decision maker on the issue. He or she cannot rely on 'mere suspicion or speculation'.¹⁷⁹ The corollary is that factual determinations may be reviewed where they are 'unreasonable',¹⁸⁰ or where the result is 'so devoid of any plausible justification' that no reasonable person could have come to it in the circumstances.¹⁸¹

The Attorney-General's opinion may be constrained by a higher standard of proof implied by the jurisdictional fact 'doctrine' and/or the statutory 'no evidence' ground in the *Administrative Decisions (Judicial Review) Act 1977*.¹⁸² In both cases, a court may be able to consider the factual issues afresh, hearing new evidence and assessing it for itself. The key point of entry is the language of the provision conferring the decision making power.

As noted above, the Attorney-General may issue a declaration where he or she is '*satisfied on reasonable grounds*' as to the matters in **proposed paragraphs 102.2(1)(a)–(d)**. It is recognised that, given such a phrase, the Attorney-General's opinion cannot be decisive. But how far can a judicial review court go in examining the factual bases of the opinion?

As noted above Atkin LJ said in *Liverside v. Anderson* that 'the plain and natural meaning of the words "having reasonable cause" imports the existence of a fact or state of facts, and not the mere belief by the person challenged that the fact or state of fact exists'.¹⁸³ Since that case judges, particularly in the United Kingdom, have explored the limits to which judicial review courts may assess the existence of those facts on the basis that they must exist in order for a decision making jurisdiction to arise. So, for example, in *Secretary of*

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State for Education and Science v. Tameside Metropolitan Borough Council Wilberforce LJ said, of a discretion based on the person being '*satisfied*', that '[i]f a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist'.¹⁸⁴

There may be less scope for the same argument in Australia. For example, in *R v. Connell; Ex parte The Hetton Bellbird Collieries* Latham CJ said that the expression '*satisfied*' only permitted the court to inquire as to whether the opinion could be considered as having been 'formed by a reasonable man who correctly understands the meaning of the law under which he acts'.¹⁸⁵ It might be argued that the addition of 'reasonable grounds' does nothing more than restate the requirement that a decision meet the standard of 'reasonableness'.

But *if* it is explored, the jurisdictional fact doctrine may affect the operation of the Bill. To the extent that a court can identify an objective criterion or fact which forms a condition for proscription, it may be tempted to view that as a fact upon which the decision making jurisdiction rests.¹⁸⁶ It has been argued that certain facts will *become* jurisdictional facts to some judges based on 'a judicial sense of the gravity of the issues at stake' or the existence of some transcendent or important values,¹⁸⁷ such as the protection of civil liberties.¹⁸⁸

It may not be difficult to construe some of the proscription grounds as jurisdictional facts:

- **proposed paragraph 102.2(1)(a)–(b):** A court may want to assess whether the offences are made out. One difficulty with this approach is that the Attorney-General is empowered to form his or her opinion *whether or not* there have been charges or convictions over the offences. Indeed, based on this discretion, it may be possible to declare an organisation even though charges have been laid but dismissed.
- **proposed paragraph 102.2(1)(c)–(d):** Given the *Communist Party Case* it may be expected that a court *will* want to assess whether the constitutional bases are made out.
- **proposed paragraph 102.2(1)(d):** A court may, depending upon the availability of evidence, want to assess whether a given declaration is 'reasonably capable of being regarded as being appropriate and adapted' to 'the defence of the Commonwealth' and whether the organisation endangers the 'security or integrity' of the Commonwealth.

Similarly, a court may be tempted to interpret the statutory 'no evidence' ground in a way that would permit complete review of the evidence relating to the relevant facts. The 'no evidence' ground provides that were there is no evidence or other material to justify a decision, and the decision was based, in whole or in part, on the existence of a particular fact, a court may examine whether or not, in its view, that fact in existed. The issue here is whether there must be a 'complete absence of evidence' or whether it is enough to show that while there was some evidence before the decision maker it was insufficient.¹⁸⁹

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Judicial Review Limits

It is important to realise that while one judge may be tempted to test the limits of judicial review, another judge may be inclined to take a more conservative approach. Instead of asking whether a jurisdictional fact is established a judicial review court may limit its consideration to whether the decision to make a declaration has been 'formed by a reasonable man who correctly understands the meaning of the law under which he acts':¹⁹⁰

Moreover, while the context and language of the provisions may prompt adventurous judicial review actions, their success may be limited by national security considerations.

National security may affect the actual requirements relating to the decision maker. For example, national security considerations may affect the content of procedural fairness. There have been cases where the need to protect national security,¹⁹¹ and an established urgency,¹⁹² have been relevant in reducing particular procedural fairness obligations. But it is always a matter of statutory interpretation and courts will resist attempts to reduce procedural fairness obligations except where that intention is clearly expressed in the statute.¹⁹³ In the classic case, *Twist v. Randwick Municipal Council*, Barwick CJ said that '[i]n the event that the legislation does not clearly preclude such a course, the court will, as it were, itself supplement the legislation' by imposing procedural fairness obligations.¹⁹⁴

National Security may also affect the conduct of the judicial review action. While national security agencies may be subject to judicial review,¹⁹⁵ where an opinion is based on national security considerations, the scope of judicial review may be confined to allegations of bad faith or unreasonableness.¹⁹⁶ It may not be sufficient to demonstrate that the decision maker failed to take into account relevant considerations, took into account irrelevant considerations or applied policy inflexibly.¹⁹⁷ Opinions based on national security involve wide policy considerations and it has been said that '[w]hen such a breadth of considerations is involved only something amounting to lack of *bona fides* could justify [judicial] intervention in decisions made in the exercise of the power'.¹⁹⁸

It is said that where the subject matter of a decision involves complex political questions, such as national security or international relations, the tendency, as a matter of policy and statutory interpretation, is to place the relevant decision beyond review.¹⁹⁹ In the United States courts have declared that national security issues in relation to proscription are *never* justiciable.²⁰⁰ In Australia the key issue is likely to be whether a court feels *capable* of assessing the relevant questions, and, to some extent, whether it is appropriate to do so. In *Church of Scientology v. Woodward* the High Court felt that it was capable of assessing whether certain intelligence was relevant to national security and therefore whether actions of ASIO complied with the *Australian Security Intelligence Organisation Act 1979*. But it noted that the complex policy issues involved in national security, and the exclusion of evidence on national security grounds would present 'a formidable hurdle to a plaintiff'.²⁰¹ Similarly, in *Salemi v. MacKellar* Gibbs CJ accepted that a plaintiff may not be able to make out various judicial review arguments because, in effect, '[r]easons of security may make it impossible to disclose the grounds on which the executive proposes to act'.²⁰²

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A similar result may occur through the operation of evidential privileges. While the courts reserve the right to determine claims of public interest immunity, where national security considerations arise 'very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister'.²⁰³ This is not to say that the opinion of the executive will always be conclusive.²⁰⁴ So, while it is said that the national interest 'will seldom be wholly within the competence of a court to evaluate'²⁰⁵ and that the public interest in national security will seldom yield to the public interest in the administration of justice,²⁰⁶ courts will assess whether national security is threatened and will not be bound by opinions 'as to what constitutes security or what is relevant to it'.²⁰⁷

Comparison with Overseas Countries

Proscription Processes

As noted above, legislation in the United Kingdom and United States permits proscription orders based on loosely expressed opinions. The United Kingdom Secretary of State is empowered to proscribe an organisation 'if he *believes* that it is concerned in terrorism'²⁰⁸ and the United States Secretary of State may proscribe any foreign organisation 'if he *finds* that [it is engaged in terrorist activity]'.²⁰⁹ Arguably, these powers would be subject to the same considerations relating to the scope of judicial review. However, given the absence of the expression 'reasonable cause', it may be that judicial review will be more limited. (By contrast, legislation in Canada expressly includes a 'reasonable grounds' requirement.)

A commentator on the Prevention of Terrorism (Temporary Provisions) Act 1984 (UK) once argued that 'judicial review of [proscription orders] is likely to be minimal. No procedural safeguards will be implied, and the relevant substantive checks will prohibit only the most flagrant abuses'.²¹⁰ While the legal analysis was fairly thin, it did point to cases in which procedural safeguards, such as procedural fairness, had been limited on the basis that they would hinder 'prompt preventative action'²¹¹ and cases in which allegations of fraudulent or open ended proscription orders had withstood judicial review.²¹²

Review Processes

It is not possible in this Digest to examine the cases in these countries on judicial review of proscription orders. But it is possible to consider the various statutory mechanisms developed to deal with the competing issues and considerations that have been discussed.

In the United Kingdom, United States and Canada there are statutory processes for appeal in the nature of merits review and/or judicial review. Under the Terrorism Act 2000 (UK) an organisation or affected person may apply to the Secretary of State for revocation.²¹³ If refused, an application may be made to the Proscribed Organisations Appeal Commission, which shall allow the appeal 'if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review'.²¹⁴ A further appeal may be brought, by leave, 'on a question of law' to a superior court.²¹⁵

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Under the Antiterrorism and Effective Death Penalty Act 1996 (US) a proscription order may be unilaterally revoked,²¹⁶ overturned by the Parliament,²¹⁷ or challenged by way of a *codified* judicial review process.²¹⁸ The permitted grounds for review are that the decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'; that it was 'in excess of statutory jurisdiction, authority, or limitation, or short of statutory right'; or that it was 'contrary to constitutional right, power, privilege, or immunity'.²¹⁹ Significantly, the review 'shall be based solely upon the administrative record, except that the Government may submit, for *ex parte and in camera review* [ie without disclosure and an opportunity to respond], classified information used in making the designation'.²²⁰

Under the Anti-Terrorism Act 2002 (CA) a listed entity may apply for review to the Solicitor-General and may, following a decision by the Solicitor-General, apply for judicial review.²²¹ There is a partially codified judicial review process dealing with the treatment of national security information *in camera* and procedural fairness obligations. The court assesses whether the decision is 'reasonable on the basis of information available to the judge'²²² which is probably wider than the ordinary grounds of judicial review. In addition to this judicial scrutiny, the Solicitor-General must review the list biannually.²²³

Comparison

There are advantages and disadvantages in these approaches. An advantage of the United Kingdom approach, which involves appeal and merits review, is that a court may accept a wider decision making jurisdiction and may permit greater procedural defects in respect of the primary decision maker on the basis that his or her decisions may be overturned and the defects remedied in subsequent stages of merits review. A disadvantage of the United States approach, which involves codified judicial review grounds, may be that judicial scrutiny, already narrowed by the scope of judicial review and limitations on justiciability and disclosure, may be further narrowed by the terms of the relevant statutory regime.

It is worth noting that judges who have been called upon to review proscription decisions in the United States have expressed concern regarding the limits of the statutory regime. In *National Council of Resistance of Iran v. Department of State* Sentelle J was critical of the his limited capacity to go behind the 'administrative record' to examine the reasons behind the decision. In effect, he said, a proscribed organisation 'does not have the benefit of meaningful adversary proceedings on *any* of the statutory grounds, other than procedural shortfalls so obvious a Secretary of State is not likely to commit them'.²²⁴ Similarly, in *People's Mojahedin Organization of Iran v. Department of State*, Randolph J argued that 'nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities' and that 'the "administrative record" may consist of little else'.²²⁵

Significantly, Randolph J went further in his criticism of the judicial review regime. Given the limitations on disclosure, he argued that '[f]or all we know, the [proscription declaration] may be improper because the Secretary's judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her

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finding about national security may be exactly correct. We are forbidden from saying'.²²⁶ In this context, he reacted against any perception that the court was 'allowing the reputation of the Judicial Branch to be "borrowed by the political Branches to cloak their work in the neutral colors of judicial action" [quoting from *Mistretta v. United States*²²⁷']'. In effect, he argued, the court was being forced to *rubber stamp* proscription declarations.

Clearly, limitations on justiciability, as canvassed in *Church of Scientology v. Woodward* and limitations on disclosure, as canvassed in *Salemi v. MacKellar*, may play a significant role in limiting judicial control over proscription declarations made under the Bill. A judge who considers it unwise to explore the limits of judicial review and who feels unable to examine the reasons behind a proscription declaration may feel compelled to make the same sort of criticism made by Randolph J in *People's Mojahedin Organization of Iran*.

Comparison with Terrorist Financing Bill

As noted above, there are some similarities and differences between the present Bill and the Suppression of the Financing of Terrorism Bill 2002 (the Terrorist Financing Bill).

Control over Proscription

In the present Bill, proscription is controlled by the Attorney-General. In the Terrorist Financing Bill, proscription is controlled by the Governor-General and, by delegation, the Attorney-General. The Terrorist Financing Bill amends the *Charter of the United Nations Act 1945* to extend the ability of the Governor-General to make regulations and to permit the Foreign Minister to take action to control terrorist financing. The Governor-General will be empowered to proscribe, by regulation, persons or entities for the purpose of giving effect to (binding) decisions of the United Nations Security Council (**proposed section 18**). The Foreign Minister will be empowered to proscribe, by gazettal, persons, entities or *assets* for like purposes, based on criteria in regulations (**proposed section 15**).

Nexus with External Affairs Power

In the present Bill, the Attorney-General may proscribe an organisation on the basis the action is '*reasonably appropriate to give effect to*' a decision of the Security Council that it is '*an international terrorist organisation*'. In the Terrorist Financing Bill the Governor-General may prescribe matters for the Attorney-General which 'give effect to' any decision that 'relates to terrorism and deals with assets' (**proposed paragraph 15(5)(c)**). In the former case, the Attorney-General is simply proscribing an organisation that has already been proscribed by the Security Council. So it would ordinarily be within power assuming that the Security Council decision obliged States to take action and that criminalising membership, etc. was 'reasonably appropriate and adapted' to that purpose. In the latter case, the Attorney-General is either adding to a list prepared by the Security Council or is drawing on a more general obligation to take action that 'relates to terrorism'. Indeed, the Attorney-General might be allowed by the courts to draw on obligations that are implicitly related because they deal with similar issues such as money laundering or organised crime. For this reason, the process *might* be criticised as being beyond the external affairs power.

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Statutory Language and Decision Making Jurisdiction

In the present Bill, the Attorney-General must be '*satisfied on reasonable grounds*' that it has committed a terrorist offence, etc. In the Terrorist Financing Bill the Attorney-General must be '*satisfied*' of the 'prescribed matters' in the regulations. As some of the discussion above suggests, the difference may determine whether jurisdictional fact issues arise.

Leaving aside the possibility that a judicial review court may be 'tempted' to explore the limits to which it can undertake merits review of an 'if satisfied' opinion, it seems clear that the discretion in the Terrorist Financing Bill is wider than that in the present Bill. In other words, there is likely to be less scope for judicial review of proscription under the Terrorist Financing Bill. This may reflect that the real discretion in the Terrorist Financing Bill is that exercised by the Governor-General in making regulations. He or she may set criteria which are 'objective' or 'self executing' for the purposes of the Attorney-General. If this is the case, the focus, for review purposes, is likely to be on scrutiny of the regulations by disallowance in Parliament and/or by constitutional challenge in the High Court. If this is not the case (ie the criteria are subjective) concerns may arise as to the scope of review.

Other Review Avenues

In the present Bill, while the Attorney-General *must* revoke a declaration if satisfied that none of the criteria continue to apply, there is no formal process for appeal. An applicant may seek an order for mandamus in which a judicial review court, convinced that the criteria do not apply, compels the Attorney-General to exercise the obligation to revoke. By contrast, in the Terrorist Financing Bill, while there is a statutory appeal process (**proposed section 17**), the Attorney-General may revoke a listing if satisfied that the listing is no longer *necessary* to give effect to a Security Council decision. In theory, the Attorney-General should be *obliged* to revoke if satisfied that the listing is not necessary. (Clearly, it may be lawful for the Attorney-General to retain a listing if it remains 'reasonably appropriate and adapted' to give effect to a Security Council decision. In this case, a court would probably have no capacity to review on the grounds of necessity.)

Locus of Control

As noted above, proscription may be controlled by the Parliament, Executive or Judiciary. In Australia, it has typically been the Judiciary whereas in the United Kingdom and United States, it has been the Parliament or Executive. As suggested above, the proscription process, or, specifically, the locus of control, will be an area of concern. The Government has only made one comment on this topic: '[t]he lawfulness of the Attorney-General's decision making process and reasoning is subject to [statutory] judicial review'.²²⁸ As we have seen, the scope of judicial review may be affected by statutory language and national security considerations in terms of the ultimate justiciability of proscription decisions.

There would seem to be strong arguments in favour of parliamentary control. The Senate Legal and Constitutional Legislation Committee, in *Alert Digest No.3 2002*, noting that the power to make declarations was, in substance, 'more of a legislative function than an

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administrative one' argued that the power to make declarations in **proposed section 102.2** 'should be subject to parliamentary scrutiny'.²²⁹ For example, this scrutiny could be exercised either by making the declarations disallowable instruments or by having the process controlled by regulations which may be disallowed in either House of Parliament.

There may also be strong arguments in favour of judicial control. Proscription is based on the existence of some connection between the activities of individuals or organisations and specific terrorist offences (or the terms of a Security Council Resolution, or the possible danger to the security and integrity of the Commonwealth (see below)). Moreover, it creates dire consequences in terms of severe criminal liability for the individuals involved and for third parties. Whatever the arguments in favour of Executive control, including the possible urgency and complex policy issues attached to proscription decisions, it is hard to suggest that the task is beyond the capacity of the Judiciary. The fact is that superior courts have been empowered to perform a similar function under the *Crimes Act 1914* since 1932. Moreover, courts will inevitably become involved in review of the bases behind the declarations at the stage when prosecutions are brought under **proposed section 102.4**.

In addition, there may be arguments in favour of a series of statutory appeal mechanisms. As we have seen, precedents exist in the United Kingdom and United States. Significantly, a precedent also exists in the Terrorist Financing Bill. As noted above, there is a statutory appeal process for appeals to the Attorney-General (**proposed section 17**). Its appearance in the Terrorist Financing Bill, and absence in this Bill, may be explicable on the basis that the Attorney-General's opinion in the Terrorist Financing Bill (*'is satisfied'*) is more open or less fettered than in the present Bill (*'is satisfied on reasonable grounds'*). While an external merits review process would be preferable, the 'precedent' is still worth noting.

Sunset Clause

There has been a longstanding practice in the United Kingdom in which anti-terrorist legislation has been given a limited life span, subject to parliamentary review and extension (Prevention of Violence (Temporary Provisions) Act of 1939–1954 and Prevention of Terrorism (Temporary Provisions) Acts of 1974–1989). There are pros and cons to a 'sunset clause' approach. On the one hand, it can be used as a guarantee of parliamentary scrutiny and opportunity to review. In theory, it ensures that the survival of the legislation is made to depend upon a continuing demonstrated threat of terrorism. On the other hand, it can be used as a rubber stamp and soapbox opportunity. In practice, until recently, parliamentary review has largely been limited and cursory, the threat has been assumed and there has been a tendency to take ever stronger and more pervasive measures.

Two recent developments in this practice are noteworthy. It is worth noting that the existing legislation, the Terrorism Act 2000 (UK), is a permanent statute. It contains much the same material as the Prevention of Terrorism (Temporary Provisions) Acts but extends beyond the situation in Britain or Northern Ireland to encompass international terrorism. Significantly, however, the most recent legislation, the Anti-Terrorism, Crime and Security Act 2001 (UK), contains a novel and innovative 'sunset clause' mechanism.

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Under the Act, the Secretary of State must appoint a committee to conduct a review of the statute within 2 years. The report may specify particular provisions which, without parliamentary intervention, would cease to have effect within 6 months.²³⁰ Depending on the committee's composition, independence, resource levels, reporting timeframe, etc., this may be a useful approach to take in relation to the provisions contained in this Bill.

Air Security Officers

As noted in the background above, the Air Security Officer Program was one of the first proposals announced and actioned by the Government in response to 11 September 2001. As noted, the program is to be implemented by the Australian Protective Service (APS).

The APS

The functions of the APS include protection of property in which the Commonwealth or a foreign power or organisation has an interest, protection of Commonwealth office holders and internationally protected persons and the provision of detention services under the *Migration Act 1958*.²³¹ In common parlance, its role is generally to provide a 'highly visible deterrent' and 'an immediate response to a potential or actual incident'.²³² More generally, the APS may provide 'such protective and custodial services for or on behalf of the Commonwealth as the Minister ... directs'.²³³ In performing these functions APS officers have powers of arrest without warrant²³⁴ and search,²³⁵ and may use reasonable force ranging up to the use of lethal force where reasonably necessary to 'protect life or prevent serious injury to the officer or any other person'.²³⁶

On 14 February 2002, the Government announced that, from 1 July 2002, the APS would be merged to become a division of the AFP. This would 'ensure greater coordination between the AFP's close personal protection function and the APS's guarding function' strengthening the ability of each to 'fulfil their counter-terrorism responsibilities'.²³⁷

The Bill

Schedule 2 amends the *Australian Protective Service Act 1987* to extend the power of the APS to include arrest without warrant for terrorist bombing offences (*Criminal Code*, Division 72) (**item 1**) and terrorism offences (*Criminal Code*, Division 101) (**item 2**).

Aircraft Flights within a State

The Act

The *Crimes (Aviation) Act 1991* deals with a number of offences related to aviation safety. For example, it is an offence to hijack an aircraft or commit an act of violence aboard an aircraft that is engaged in a flight covered by the relevant international convention or aboard an aircraft which falls within a head of legislative power by reason of the fact that:

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- it is engaged in an interstate flight (trade and commerce power)
- it is engaged in an intra-territory flight (territories power)
- it is a Commonwealth aircraft (incidental power)
- it is a visiting government aircraft (external affairs power)

The Bill

Schedule 3 amends the *Crimes (Aviation) Act 1991* to extend the operation of the Act to *intrastate* flights. While an *intrastate* flight would not fall within the central area of the trade and commerce power, these amendments would seem to be supported as an exercise of the incidental aspect of that power, to the extent that the regulation of *intrastate* flights is reasonably necessary to allow law enforcement in relation to *interstate* flights. It would also seem to be supported as an exercise of the external affairs power, there being a strong interest in anti-terrorist measures in relation to aviation at the international level.

Endnotes

1. Resolution 1373, para 1(a), 1(b) and 2(e).
2. Statement of the Committee against Torture, [CAT/C/XXVII/Misc.7.](#), 22 November 2001.
3. [Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights](#), 29 November 2001.
4. [Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba](#), 16 January 2002.
5. [Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373 \(2001\) of 28 September 2001.](#)
6. *ibid.*
7. The Hon. John Howard, MP, 'Australian Financial Controls on Terrorists and their Sponsors', *Media Release*, 28 November 2001.
8. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.
9. The Hon. John Howard, MP, 'New Anti-Hoax Legislation', *Media Release*, 16 October 2001. The amendment would 'make it a federal criminal offence to cause an article to be carried by post, courier service, or prescribed method of delivery with the intention of inducing a false belief or fear that the article consists of, encloses or contains an explosive or a dangerous or chemical, biological or radiological substance; or that an explosive, or a dangerous or

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chemical, biological or radiological substance, is or will be left in any place'. The maximum penalty would be 10 years imprisonment.

10. The Hon. John Howard, MP, '[A Safer More Secure Australia](#)', *Media Release*, 30 October 2001.
11. Senator The Hon. Chris Ellison, '[Air Security Officers](#)', *Media Release*, 19 November 2001.
12. The Hon. Daryl Williams, MP, '[Airport Security Claims Not Justified](#)', *Media Release*, 16 December 2001.
13. The Hon. Daryl Williams, MP, '[Air Security Officers](#)', *Media Release*, 18 December 2001.
14. The Hon. Daryl Williams, MP, '[Upgrading Australia's counter-terrorism capabilities](#)', *Media Release*, 18 December 2001.
15. The Hon. Daryl Williams, MP; Senator The Hon. Chris Ellison, '[Review of National Crime Authority](#)', *Media Release*, 21 December 2001.
16. Introduced into the House of Representatives on 21 March 2002.
17. See **item 7, Schedule 1**, Telecommunications Interception Legislation Amendment Bill 2002.
18. As stated above, the Anti-hoax Bill has received Royal Assent.
19. See Mr Peter Slipper MP, House of Representatives, *Hansard*, 13 March 2002, pp.1138-9.
20. Peter Slipper, MP, Security Legislation Amendment (Terrorism) Bill 2002 [No. 2], Second Reading Speech, House of Representatives, *Debates*, 13 March 2002, p. 1041.
21. If all of the Bills commence at the same time, the provisions in the Espionage Bill relating to **Chapter 5** and the provisions in the Terrorist Financing Bill relating to **Part 5.3** take 'precedence', so to speak.
22. Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 3 of 2002](#), 20 March 2002.
23. Lord Lloyd of Berwick, *op. cit.*, Vol. 2, p. 58.
24. Proscription may make intelligence gathering and law enforcement tasks more difficult, at least in part because it tends to put distance between law enforcement agencies and informants: Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 29 (emphasis added) and p. 30 and Vol. 2, p. 57; Clive Walker, *The Prevention of Terrorism in British Law*, Manchester University Press, Manchester, 1986, p. 50.
25. Sir Garfield Barwick, Crimes Bill 1960, Second Reading Speech, House of Representatives, *Debates*, 8 September 1960, pp. 1020–1021.
26. *Victoria v. Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at p. 487. See also at p. 488.
27. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 per Murphy J at p. 242; *Polyukovich v. Commonwealth* (1991) 172 CLR 501 per Brennan J at pp. 560-562 and Toohey J at pp. 657-658.

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28. See generally, *R v. Burgess, Ex Parte Henry* (1936) 55 CLR 608 per McTiernan J at p. 687; *Commonwealth v. Tasmania* (1983) 158 CLR 1 per Deane J at pp. 258-259 and Murphy J at pp. 171-172.
29. *Victoria v. The Commonwealth* (1996) 187 CLR 416 per Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ at pp. 488-489; *The Commonwealth v. Tasmania* (1983) 158 CLR 1 per Deane J at pp. 233-234, 268; *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1 at 75 (cf *R v. Burgess; Ex parte Henry* (1936) 55 CLR 608 per Evatt and McTiernan JJ, p. 688).
30. *Victoria v. The Commonwealth* (1996) 187 CLR 416 per Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ at p. 489.
31. Resolution 1373, para 1(a) and 1(b) and para 2(e).
32. 'Current Topics: Legal and constitutional problems of protective security arrangements in Australia', *Australian Law Journal*, Vol. 52, 1978, p. 298.
33. Peter Hanks, *Constitutional Law in Australia*, Butterworths, Sydney, 1991 pp. 325-326, citing comments by Gaudron J and Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.
34. *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338 per Mason J at p. 379.
35. *Davis v. The Commonwealth* (1988) 166 CLR 79 per Mason CJ, Deane and Gaudron JJ at p. 111. See generally Dr Max Spry, 'The Executive Power of the Commonwealth: its scope and limits', *Research Paper No. 28 1995-96*, at <http://www.aph.gov.au/library/pubs/rp/1995-96/96rp28.htm> [5/7/00].
36. Leslie Zines, *The High Court and the Constitution*, 4th ed, Butterworths 1997, at p. 303.
37. *R v. Kidman* (1915) 20 CLR 425 per Isaacs J at p. 440.
38. *Burns v. Ransley* (1949) 79 CLR 101 per Latham CJ at p. 110.
39. *Ibid* per Dixon J at p. 116
40. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Dixon J at p. 188.
41. The precise constitutional bases of the 'inherent right of self-protection' are discussed in Elizabeth Ward, 'Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters', *Research Paper No. 8 1997-98*, at <http://www.aph.gov.au/library/pubs/rp/1997-98/98rp08.htm> [5/7/00]
42. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Fullagar J at p. 260.
43. *ibid* at p. 261 and pp. 266-267.
44. The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.
45. The Hon. John Howard, MP, Transcript of Doorstop Interview, Brisbane, 30 October 2001.
46. Western Australia chose this course of action in relation to mutual recognition legislation.

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- 47 Attorney-General, *News Release*, 'National Move to Combat Terror', 7 April 2002. The Attorney's News Release can be found at: http://www.ag.gov.au/aghome/agnews/2002newsag/37_02.htm (accessed 15 April 2002).
- 48 Quoted in Kerry Taylor, 'Nation to get new crime-fighting body', *The Age*, 6 April 2002 and Geoffrey Barker, 'Howard fails in bid to scale back NCA powers', *Australian Financial Review*, 6 April 2002. Emphasis added.
- 49 Lee, Hanks and Morabito, *In the Name of National Security: The legal dimensions*, Law Book Company, North Ryde, 1995 foreword by The Hon Sir Anthony Mason, AC, KBE, p. vii.
50. (1997) 189 CLR 520.
- 51 *Australian Capital Television Ltd v. Commonwealth* (1992) 177 CLR 106 at p. 212. See also McHugh J at p. 227.
52. (1992) 177 CLR 106 at 227.
53. (1997) 189 CLR 520 at 560, quoting from Anthony Birch, *Representative and Responsible Government*, Allen & Unwin, London, 1964, p. 17.
54. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1, per Fullagar at p. 258.
55. *Marcus Clark and Co Ltd v. Commonwealth* (1952) 87 CLR 177 per Fullagar J at p. 256.
56. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Dixon J at p. 189.
- 57 *Liversidge v. Anderson* [1942] AC 206.
- 58 *Liversidge v. Anderson* [1942] AC 206 per Atkin LJ at pp. 228–229.
- 59 Their Lordships ... treat the words ... 'where [X] has reasonable grounds to believe that [Y]' as imposing a condition that there must in fact exist reasonable grounds, known to [X], before he can validly exercise the power: *Nakkuda Al v. Jayaratne* (1951) AC 66, Radcliffe LJ. The [Respondent] conceded that [X] must in fact have had reasonable cause for this belief and that it is not enough to show that he honestly believed he had a cause: *Inland Revenue Commissioners v. Rossminster Ltd* (1980) 1 All ER 80, per Scarman LJ at p. 104.
- 60 *Reid v. Sinderberry* (1944) 68 CLR 504 per Latham CJ and McTiernan J at p. 511.
- 61 *R v. Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 430.
- 62 *R v. Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 432
- 63 *Queensland v. Wyvill* (1989) 90 ALR 611.
- 64 *Re: Attorney General (Northern Territory) v. Hand* (1989) 23 FCR 536.
- 65 *Potter v. Melbourne and Metropolitan Tramways Board* (1957) 98 CLR 337.
- 66 *Reid v. Sinderberry* (1944) 68 CLR 504 per Latham CJ and McTiernan J at p. 511.
67. *Crimes (Foreign Incursions and Recruitment) Act 1978*, subsection 6(1); section 7; paragraph 7(1)(e); subsection 6(3); and subsection 6(4).

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68. Elizabeth Chadwick, 'Terrorism and the law: Historical contexts, contemporary dilemmas, and the end(s) of democracy', *Crime, Law and Social Change*, Vol. 26(4), 1996/97, pp. 330–332. For an interesting 'home grown' historical overview see the transcript of a talk by Sol Encel, Professor Emeritus Social Policy Research Centre University of New South Wales, on the ABC Radio National program [Okham's Razor](#), 24 March 2002.
69. Prevention of Terrorism (Temporary Provisions) Act 1989 (UK) (repealed), section 20.
70. Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996.
71. Terrorism Act 2000 (UK), subsection 1(1).
72. David Whittaker (ed.), *The Terrorism Reader*, Routledge, 2001, p. 3.
73. This definition is used in relation to international terrorism (18 U.S.C. 2331(1)) and domestic terrorism (18 U.S.C. 2331(5)). The domestic terrorism definition was inserted by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, [Pub. L. 107-56](#), section 802.
74. Anti-Terrorism Act (CA), section 4, inserting paragraph 83.01 into the *Criminal Code*.
75. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 9.
76. Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994, p. 4.
77. *Criminal Code* (NT), section 50. Alternatively, it may serve a clear policy objective. This possibility is reflected in the fact that Northern Territory criminal laws are applied extraterritorially to the Timor Gap (*Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990*, subsection 9A(2)), the connection between terrorism and petroleum exploration having been illustrated by terms of the Timor Gap Treaty and the *Petroleum (Submerged Lands) Act 1967*.
78. Brian Martin, 'International Terrorism: Recent Developments and Implications for Australia', Legislative Research Service, *Current Issues Brief No. 5 1985–86*, p. 4.
79. Honan and Thompson, *op. cit.*, p. 4.
80. Alan Thompson, 'Management of Australia's Counter-Terrorism Program', Australian Defence Studies Centre, *Working Paper No. 28*, Canberra, September 1994.
81. Terrorism Act 2000 (UK), subsections 1(b) and (c).
82. Anti-Terrorism Act (CA), section 4, inserting section 83.01 into the *Criminal Code* (definition of 'terrorist activity').
83. *Criminal Code*, section
84. Canada. Department of Justice, '[Backgrounder: Amendments to the Anti-Terrorism Act](#)' [18/04/02].
85. Canada. Department of Justice, '[Backgrounder: Amendments to the Anti-Terrorism Act](#)' [18/04/02]. Italics added.
86. *Defence Act 1903*, section 51G.

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- 87 Canada. Department of Justice, '[Background: Amendments to the Anti-Terrorism Act](#)' [18/04/02].
- 88 Terrorism Act 2000, section 55.
- 89 Terrorism Act 2000, section 56.
- 90 Terrorism Act 2000, section 57.
- 91 Terrorism Act 2000, section 58.
- 92 18 U.S.C. 2332b(a)(1)(A).
- 93 18 U.S.C. 2332b(a)(1)(B).
94. Lord Lloyd of Berwick, *op. cit.*, Vol. 2, p. 58.
95. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 42.
96. Chadwick, *op. cit.*, pp. 329–350, p. 336.
97. Doug Meagher, *Organised Crime*, AGPS, Canberra, 1983, p. 22.
98. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 28.
99. *Ibid.*, p. xi.
100. Walker, *op. cit.*, p. 22.
101. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 23.
102. Resolution 1373, para 2(e).
- 103 Explanatory Memorandum, p. 11.
- 104 *Criminal Code*, subsection 6.2(2).
- 105 Senate Standing Committee for the Scrutiny of Bills, *op. cit.*, p. 51.
- 106 *Criminal Code*, section 5.4.
107. *Polyukhovich v. Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501.
108. The basis for this proposition would probably be the fact that the extraterritorial limitations on the States do not apply to the Commonwealth. The power of the States to legislate extraterritorially depends on a demonstrated nexus between the subject matter of the law and the 'peace, welfare and good government' of the State (*Port MacDonnell Professional Fishermen's Association Inc v. South Australia* (1989) 168 CLR 340, at pp. 372-373). However, '[s]o far as the Commonwealth is concerned, it is now for the Parliament alone to judge whether a measure in respect of any topic on which it has power to legislate is in fact for the peace order and good government of the Commonwealth' (*R v. Foster; Ex p. Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256, per Windeyer J at p. 308).
109. *Polyukhovich v. Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, per Mason CJ at pp. 530-531.

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110. See generally Ivan Shearer *op. cit.*, at pp. 165-179; Matthew Goode, 'The Tortured Tale of Criminal Jurisdiction', *Melbourne University Law Review*, 1997, vol. 21(2), pp. 411-459 at pp. 413-414.
111. *Broken Hill South Ltd (Public Officer) v. Commissioner of Taxation (NSW)* (1937) 56 CLR 337 per Dixon J at 375; *Mynott v. Barnard* (1939) 62 CLR 68 per Latham CJ at p. 75 and Starke J at p. 89; *Helmets v. Coppins* (1961) 106 CLR 156. See also *Union Steamship Co of Australia Pty Ltd v. King* (1988) 166 CLR 1.
112. *Ward v. R* (1980) 142 CLR 308.
113. *Lipohar v. The Queen; Winfield v. The Queen* (1999) 200 CLR 485 per Kirby J at para 178. This is because individuals do not have any particular status as residents of a State or Territory in contrast to the Commonwealth of Australia which is a unique legal entity having its own criminal jurisdiction and being recognised in international law.
114. *Liangsiriprasert v. United States* [1991] 1 AC 225 at 251; *R v. Manning* [1999] QB 980 at 1000; *Lipohar* per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan at para 269. However, the approach in *Liangsiriprasert* was criticised in Goode, *op. cit.*, p. 436 and *Lipohar* per Kirby J paras 175-176. The previous cases were *Board of Trade v. Owen* per Tucker LJ, at pp. 625-626 (conspiracy to defraud); *Department of Public Prosecutions v. Doot* [1973] AC 807, per Wilberforce LJ at pp. 817-818 and Salmon LJ at p. 832-833 (conspiracy to defraud); *DPP v. Stonehouse* [1977] 2 All ER 909 (attempt). See also comments in *R v. Hansford* (1974) 8 SASR 164, per Wells J at p. 195; *McNeilly v. The Queen* (1981) 4 Australian Criminal Reports 46; *R v. Millar* [1970] 2 QB 54; *R v. El-Hakkaoui* [1975] 2 All ER 146 discussed in Goode, *op. cit.*, at pp. 433-436. Aside from *Liangsiriprasert* **all** of these cases could be viewed as examples of crimes where some element of the principal offence occurred within the territory.
115. Where the conduct occurs wholly in a foreign country, a foreign person or corporation cannot be found guilty if there is no corresponding offence in the relevant foreign jurisdiction: for example subsection 15.3 (2).
116. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 29 (emphasis added) and p. 30 and Vol. 2, p. 57.
117. Walker, *op. cit.*, p. 50.
118. Lord Lloyd of Berwick, *op. cit.*, Vol. 2, p. 57.
119. Mr Bruce, Policy Speech, Dandenong, Victoria, 5 October 1925.
120. Mr Latham, 'Crimes Bill', Second Reading Speech, House of Representatives, *Debates*, 18 January 1926, p. 457.
121. Mr Bruce, *op. cit.*
122. Geoffrey Sawer, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press, 1956, p. 268.
123. *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1.
124. Section 6.

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125. The Hon. Alexander Downer, MP, 'Government Implements New Anti-Terrorism Regulations', *Media Release*, 15 October 2001.
- 126 Section 30A.
- 127 For example, membership (section 30B), giving or receiving contributions (section 30D).
- 128 Subsection 30A(1A).
- 129 Schedule.
130. *Crimes Act 1914*, section 30AA.
- 131 Subsection 1(3).
- 132 Subsection 3(4).
- 133 Section 4.
- 134 Section 5. The body is the Proscribed Organisations Appeal Commission.
- 135 Subsection 6.
136. [Pub. L. 104-132](#), section 302, inserting 8 U.S.C. 1189.
- 137 8 U.S.C. 1189(a)(6).
- 138 8 U.S.C. 1189(b).
- 139 8 U.S.C. 1189(a)(5).
- 140 Anti-Terrorism Act (CA), section 4, inserting subsection 83.05(1) into the *Criminal Code*.
- 141 Anti-Terrorism Act (CA), section 4, inserting subsection 83.05(5) into the *Criminal Code*.
142. *Criminal Code Act 1983* (NT), section 51 (amended).
143. David Weisbrot, 'Criminal Law: NT Prepares for War', *Legal Service Bulletin*, Vol. 7(4), August 1982, p. 184.
144. 'Concerns have been expressed that this section [original section 51] has potential implications for interference with a number of civil rights, which Australia has international obligations to protect including the right to freedom of expression, the right to freedom of association and the right to peaceful assembly': Letter from the Prime Minister to the Chief Minister of the Northern Territory, 17 November 1983 reproduced in Senator Gareth Evans, '[Northern Territory Criminal Code](#)', Senate, *Debates*, 18 November 1983, Answer to Question on Notice, p. 2856.
145. 'The proscribing of organisations under the terrorism provision in the code is in the hands of the executive and is thus a political decision. In our view it is inappropriate that this be so. Such decisions should be the subject of impartial judicial consideration': Mr Bob Collins, MLA, Legislative Assembly of the Northern Territory, *Parliamentary Record*, 31 August 1983, p. 981.
146. Letter from the Chief Minister of the Northern Territory to the Prime Minister tabled by Senator Bernie Kilgariff in Adjournment, '[Northern Territory Criminal Code-Presentation of Petitions](#)', Senate, *Debates*, 15 December 1983, p. 3932.

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147. Robertson, MLA, Legislative Assembly of the Northern Territory, *Parliamentary Record*, 31 August 1983, p. 981.
148. Senator Gareth Evans, '[Northern Territory Criminal Code](#)', Senate, *Debates*, 29 March 1984, Answer to Question Without Notice, p. 877.
149. The provisions on 'proscribed organisations' were replaced with the current provisions on 'unlawful organisations' by section 5 of the *Criminal Code Amendment Act 1984*.
150. *Crimes Act 1914*, section 30B.
151. *Crimes Act 1914*, section 30D.
152. *Crimes Act 1914*, section 30FC.
- 153 Paragraph 1(1)(a).
- 154 Paragraph 1(1)(b).
- 155 Paragraph 1(1)(c).
- 156 Section 2.
- 157 Section 10.
158. [Pub. L. 104-132](#), section 303, inserting 18 U.S.C. 2339B(a)(1).
159. [ibid.](#), inserting 18 U.S.C. 2339B(a)(2).
160. [ibid.](#), section 321, inserting 18 U.S.C. 2332d.
161. [ibid.](#), section 726, amending 18 U.S.C. 1956.
- 162 *Criminal Code*, section 6.1.
- 163 *Criminal Code*, section 9.2.
- 164 *Criminal Code*, section 5.4.
- 165 Explanatory Memorandum, p. 16.
166. *Kioa v. West* (1985) 159 CLR 550 per Mason J at 584.
167. *Mobil Oil Australia Pty Ltd v. Federal Commissioner of Taxation* (1963) 113 CLR 475 per Kitto J at p. 504; *Salemi v. Minister for Immigration and Ethnic Affairs* (1977) 14 ALR 1 at p. 19; *Kioa v. West*, loc. cit. per Mason J at p. 585; *Haoucher v. Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 per Deane J at p. 652.
168. *F.A.I. Insurances Ltd v. Winneke* (1982-83) 151 CLR 342 per Mason J at 363.
169. *Kioa v. West*, loc. cit. per Brennan J at 629; See *Cooper v. Wandsworth Board of Works* (1863) 143 ER 414; *Commissioner of Police v. Tanos* (1958) 98 CLR 383 per Dixon CJ and Webb J at p. 395; *T. A. Miller Ltd v. Minister of Housing and Local Government* [1968] 1 WLR per Denning MR, at 995; *Twist v. Randwick Municipal Council* (1976) 136 CLR 106.
170. *F.A.I. Insurances Ltd. v. Winneke* per Mason J at 370-71; cf. *State of South Australia v. O'Shea* (1987) 73 ALR 1 per Mason J at 6 and Brennan J at 20.
171. *Roderick v. AOTC* (1992) 111 ALR 83.

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172. *Excell v. Harris* (1983) 51 ALR 137.
- 173 *Administrative Decisions (Judicial Review) Act 1977*, paragraph 5(1)(d).
- 174 *R v. Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 430.
- 175 *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147.
- 176 *Baldwin and Francis Ltd v. Patents Appeal Tribunal* [1959] AC 663 at 693; *R v. District Court; Ex parte White* (1966) 116 CLR 644; *Kuswardana v. Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186; *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24 at pp. 39-46.
- 177 *Australian Gas Light Co v. Valuer-General* (1940) 40 SR(NSW) 126; *Hope v. Bathurst City Council* (1980) 144 CLR 1 at pp. 8-9.
- 178 *Minister for Immigration and Ethnic Affairs v. Pochi* (1980) 44 FLR 41, per Deane J at p. 68, adopting the approach of Diplock LJ in *R v. Deputy Industrial Injuries Commissioner; ex parte Moore* (1965) 1 QB 456 at p. 488.
- 179 *Minister for Immigration and Ethnic Affairs v. Pochi* (1980), 44 FLR 41, per Deane J, at p. 68.
- 180 *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223.
- 181 *Prasad v. Minister for Immigration and Ethnic Affairs* (1984-1985) 6 FCR 155, per Wilcox J, at p. 169.
- 182 *Administrative Decisions (Judicial Review) Act 1977*, sections 5(1)(h) and 5(3)(b).
- 183 *Liversidge v. Anderson* [1942] AC 206 per Atkin LJ at pp. 228-229.
- 184 *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977) AC 1014, per Wilberforce LJ, at 1047
- 185 *R v. Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 430.
- 186 *Administrative Decisions (Judicial Review) Act 1977*, section 5(1)(c).
- 187 Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action*, 2nd Edition, Law Book Company, Sydney, 2000, p. 200.
- 188 In this context it is significant to note that Atkin LJ was motivated in part by the need to protect civil liberties: '[i]t has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law': *Liversidge v. Anderson* [1942] AC 206 per Atkin LJ at p. 244
- 189 *Curragh Queensland Mining Ltd v. Daniel* (1992) 41 FCR 212, per Black CJ at p. 221. Black CJ expressly left this question open.
- 190 *R v. Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 430.

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- 191 *Salemi v. MacKellar* (1977) 137 CLR 396; *The Queen v. MacKellar; ex parte Ratu* (1977) 137 CLR 461.
- 192 *In Re: Marine Hull Liability Insurance Co. And Hurford and the Insurance Commissioner* (1985) 3 ANZ Insurance Cases 60-664.
- 193 *Commissioner of Police v. Tanos* (1958) 98 CLR 383 per Dixon CJ and Webb J at p. 396.
- 194 *Twist v. Randwick Municipal Council* (1976) 136 CLR 106, per Barwick CJ at pp. 109-110.
195. This judicial review would be an action taken under section 75(v) of the Constitution rather than the *Administrative Decisions (Judicial Review) Act 1977*. This is because ASIO, DSD and ASIS is exempt from AD(JR) actions: *Administrative Decisions (Judicial Review) Act 1977*, Schedule 1, paragraph (d).
196. In *Leisure and Entertainment Pty Ltd v. Willis* No. QG 204 of 1995 FED No. 1/96, Spender J commented, in relation to an opinion by the Treasurer based on national interest considerations, that an applicant must demonstrate 'that the opinion was not genuinely entertained or that the opinion was wholly unreasonable'
197. *Administrative Decisions (Judicial Review) Act 1977*, paragraphs 5(1)(e), 5(2)(a), 5(2)(b), and 5(2)(f).
198. *Murphyores Incorporated Pty. Ltd. v. The Commonwealth* (1976) 136 CLR 1 per Stephen J at 14.
- 199 *Minister for the Arts, Heritage and Environment v. Peko-Wallsend Ltd* (1987) 75 ALR 218
- 200 *People's Mojahedin Organization of Iran v. Department of State* 182 F3d 17 (D.C. Cir. 1999) per Randolph J using the reasoning that proscription involves foreign policy considerations that are themselves non-justiciable: *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) at p. 111.
201. *Church of Scientology v. Woodward* (1982) 154 CLR 25 at pp. 59-61.
- 202 (1977) 137 CLR 396, per Gibbs J at p. 422.
203. *Alister and Others v. The Queen* (1984) 154 CLR 404, per Wilson and Dawson JJ, at p. 435.
204. Ibid.
205. Ibid.
206. *Reg. v. Lewes Justices; Ex parte Home Secretary* (1973) AC 388, at p. 407, cited by Brennan J in *Church of Scientology v. Woodward* (1983) 154 CLR 25 at p. 75.
207. *Church of Scientology v. Woodward*, *ibid*.
- 208 Terrorism Act 2000, subsection 3(4).
209. [Pub. L. 104-132](#), section 302, inserting 8 U.S.C. 1189.
210. Walker, *op. cit.*, p. 36.
- 211 *South African Defence and Aid Fund and another v. Minister for Justice* (1971) 1 SA 263 (South Africa).

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- 212 *Ningkan v. Government of Malaysia* [1970] AC 632 (Privy Council).
- 213 Section 4.
- 214 Section 5.
- 215 Section 6.
- 216 8 U.S.C. 1189(a)(6).
- 217 8 U.S.C. 1189(a)(5).
- 218 8 U.S.C. 1189(b).
- 219 8 U.S.C. 1189(b)(3).
- 220 8 U.S.C. 1189(b)(2).
- 221 Anti-Terrorism Act (CA), section 4, inserting subsection 83.05(5) into the *Criminal Code*.
- 222 Anti-Terrorism Act (CA), section 4, inserting paragraph 83.05(6)(d) into the *Criminal Code*.
- 223 Anti-Terrorism Act (CA), section 4, inserting subsection 83.05(9) into the *Criminal Code*.
- 224 251 F3d 192 (D.C. Cir. 2001).
- 225 182 F3d 17 (D.C. Cir. 1999).
- 226 182 F3d 17 (D.C. Cir. 1999).
- 227 488 U.S. 361, 407 (1989).
- 228 Explanatory Memorandum, p. 16.
- 229 Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 51.
- 230 *Anti-Terrorism, Crime and Security Act 2001* (UK), [Part 14—Supplemental](#), sections 122 and 123.
231. *Australian Protective Service Act 1987*, section 6.
232. Michael Codd AC, *Review of Plans and arrangements in relation to Counter-Terrorism*, AGPS, 25 May 1992, tabled 24 March 1994, Parliamentary Paper No. 151/1994, p. 6.
- 233 *Australian Protective Service Act 1987*, subsection 6(1).
- 234 *Australian Protective Service Act 1987*, section 13.
- 235 *Australian Protective Service Act 1987*, section 16.
- 236 *Australian Protective Service Act 1987*, section 14.
237. Senator The Hon. Chris Ellison, '[Australian Protective Services to become a division of the Australian Federal Police](#)', *Media Release*, 14 February 2002; Peter Clack, 'AFP to control Protective Services', *The Canberra Times*, 15 February 2002.

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