The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

Consideration of Legislation Referred to the Committee

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

Suppression of the Financing of Terrorism Bill 2002

Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002

Border Security Legislation Amendment Bill 2002

Telecommunications Interception Legislation Amendment Bill 2002

May 2002

ISSN 1326-9364

This document was produced from camera-ready copy prepared by the Senate Legal and Constitutional Legislation Committee, and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Senator McKiernan (Deputy Chair) *

Senator Cooney

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Senator Mason

Senator Scullion

*Senator Ludwig replaced Senator McKiernan as Deputy Chair from 13 March to 12 April 2002

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Sen Andrew Bartlett, AD Qld (for DIMIA)	Sen Brian Harradine, Ind Tas
Sen the Hon Nick Bolkus, ALP SA	Sen Susan Knowles, LP WA
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Sen Alan Ferguson, LP SA	Sen John Watson, LP Tas

Senators Bolkus and Ludwig participated in the hearings and in finalising the report.

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TABLE OF CONTENTS

RECOMMENDATIONS

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

Recommendation 1

The Committee recommends that proposed section 80.1 in the Bill be amended so that the terms 'conduct that assists by any means whatever' and 'engaged in armed hostilities' are defined, in order to ensure that the humanitarian activities of aid agencies are not caught within the ambit of the offence of treason.

Recommendation 2

The Committee recommends that the definition of 'terrorist act' in proposed section 100.1 in the Bill be amended to include a third element, namely that the action or threat of action is designed to influence government by undue intimidation or undue coercion, or to unduly intimidate the public or a section of the public.

Recommendation 3

The Committee recommends that:

(i) the Bill be amended to remove proposed sections 101.2(2), 101.4(2) and 101.5(2), which impose absolute liability in respect of certain elements of those offences; and

(ii) the offences in proposed sections 101.2(1), 101.4(1) and 101.5(1) be amended to provide that they are committed if the person knew or was reckless as to the required element in 101.2(1)(b), 101.4(1)(b) and 101.5(1)(b).

Recommendation 4

The Committee recommends:

(i) that proposed Division 102 in the Bill in relation to the proscription of organisations with a terrorist connection not be agreed to; and

(ii) that the Attorney-General review the proscription provisions with a view to developing a statutory procedure which:

- does not vest a broad and effectively unreviewable discretion in a member of the Executive;
- restricts the proposed ground under which an organisation may be proscribed if it has endangered or is likely to endanger the 'security or integrity' of the

Commonwealth or any country, by defining 'integrity' as meaning 'territorial integrity';

- provides detailed procedures for revocation, including giving a proscribed organisation the right to apply for review of that decision;
- provides for adequate judicial review of the grounds for declarations of proscription;
- more appropriately identifies and defines the proposed offences in relation to proscribed organisations, particularly in relation to the offence of 'assisting' such an organisation; and
- does not create offences with elements of strict liability, given the very high proposed penalties.

Telecommunications Interception Legislation Amendment Bill 2002

Recommendation 5

The Committee recommends that the Attorney-General review the current law on access to stored communications of delayed messages services with a view to amending the Telecommunications Interception Legislation Amendment Bill 2002 so that the accessing of such data requires a telecommunication interception warrant.

Suppression of the Financing of Terrorism Bill 2002

Recommendation 6

The Committee recommends that proposed section 103.1 in the Suppression of the Financing of Terrorism Bill 2002 be amended so that the financing of terrorism offence includes an element of intent.

Recommendation 7

The Committee recommends that:

(a) provision be made, either by way of an amendment to the Suppression of the Financing of Terrorism Bill 2002 or under regulations, that before any decision is taken to freeze assets in respect of a proscribed person or entity, the Australian Federal Police set an appropriate course of action in consultation with the relevant financial institution or institutions before any asset is frozen; and

(b) once action has been taken to freeze an asset, the owner of assets must be advised in writing as soon as possible and their rights and obligations explained.

ABBREVIATIONS

AFP	Australian Federal Police
ASIC	Australian Securities and Investment Commission
ASIO	Australian Security Intelligence Organisation
AUSTRAC	Australian Transaction Reports and Analysis Centre
Customs Brokers	Customs Brokers & Forwarders Council
Customs	Australian Customs Service
DPP	Director of Public Prosecutions
ICCPR	International Covenant on Civil and Political Rights
ISP	Internet Service Provider
NCA	National Crime Authority
RIS	Regulatory Impact Statement
PNR	Passenger Name Record
SMS	Short Message Services
UN	United Nations
VCOSS	Victorian Council of Social Service

CHAPTER 1

INTRODUCTION

Background

1.1 On 12 March 2002, the Suppression of the Financing of Terrorism Bill 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, the Border Security Legislation Amendment Bill 2002 and the Telecommunications Interception Legislation Amendment Bill 2002 were introduced into the House of Representatives, together with the Security Legislation Amendment (Terrorism) Bill 2002.

1.2 A discrepancy was discovered between the title of the last-mentioned Bill as introduced and its title as referred to in the notice of presentation given on 11 March 2002. It was considered that the discrepancy meant that the introduction of the Bill was inconsistent with the standing orders and that the Bill should be withdrawn. The Bill was withdrawn on 13 March 2002 and replaced by the Security Legislation Amendment (Terrorism) Bill 2002 [No.2].

1.3 The House of Representatives passed the five Bills on 13 March 2002. On 14 March 2002, the Bills were introduced into the Senate and the second reading debate was adjourned.

Reasons for referral to the Committee

1.4 The Selection of Bills Committee Report No. 2 of 2002 (which was adopted by the Senate on 20 March 2002) recommended that the Bills be referred to the Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. The report gave the following as the reasons for referral/principal issues for consideration:

> To allow all non-government stakeholders to undertake a comprehensive scrutiny of the numerous and detailed matters in this 120 page package. Significant issues include creation of new offences, imposition of life sentence penalties, capacity to proscribe organisations, expansion of executive power, increase in policing powers for customs service and telecommunications powers.

1.5 The report also indicated that possible submissions or evidence could be expected from a broad range of legal, civil liberties and public interest organisations.

Conduct of the inquiry

1.6 The Committee advertised the inquiry in *The Weekend Australian* newspaper of 23-24 March and wrote to more than one hundred organisations and individuals, inviting submissions by 5 April 2002. The Committee received 431 submissions and these are listed at Appendix 1. Submissions were placed on the Committee's web-site for ease of access by the public.

1.7 The Committee held hearings in Sydney on 8 April, in Melbourne on 17 and 18 April and in Canberra on 19 April 2002. Proof transcripts of these hearings were placed on the Hansard web-site, as they became available. In addition, the Committee held a public

forum in Sydney on 1 May 2002 to enable persons who had not otherwise been called to give evidence to state their views orally. A list of witnesses who appeared at these hearings is at Appendix 2.

Timeframe for the inquiry

1.8 The Committee received many representations concerning the timeframe for the Committee's inquiry and, in particular, the inadequate time for proper consideration of the Bills. This matter was of such concern to the Law Council of Australia that it requested that the Committee record the Council's 'strong protest at the totally inadequate consultation period'.[1]

1.9 In response to these concerns, the Chair of the Committee, at each public hearing, advised those attending that:

> … the timetable under which the committee works is one that is set down by the Senate and that the Committee was provided in the last sitting week of the Senate with a program of 10 bills to inquire into and report on by early May.
>
> The Committee has undertaken, as it always does, to inquire into and report on matters referred to it by the Senate in the most comprehensive and considered way possible within the guidelines that are provided by the Senate.

1.10 In response to these concerns, the Committee also extended its public hearing schedule and held a public forum in Sydney on 1 May 2002 in order to hear as many witnesses as possible on the Bills. It should be noted that 67 individuals representing a variety of agencies and organisations gave public evidence to the inquiry.

Scope of the report

1.11 The Committee has examined five inter-related Bills that must rank as some of the most important to come before the Parliament in the last twenty years. The Bills raised significant and sometimes complex and technical issues.

1.12 The Committee's report concentrates on key issues raised in submissions and evidence to the inquiry. The Committee is aware that the legislation is likely to proceed and in the event that it is passed, the Committee makes several recommendations in an endeavour to remedy some significant defects and to seek clarification of key aspects of the legislation.

Acknowledgements

1.13 The Committee thanks all those organisations and individuals who made submissions and gave evidence at public hearings, particularly in light of the short timeframe for this inquiry.

1.14 The Committee also acknowledges the work of Nathan Hancock of the Department of the Parliamentary Library in *Terrorism and the Law in Australia: Legislation, commentary and constraints* (Research Paper no. 12) and *Terrorism and the Law in Australia: Supporting materials* (Research Paper no. 13).

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1 Correspondence, Law Council of Australia, 16 April 2002, p.2.

Note on references

1.15 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

THE CONTENT OF THE BILLS

Introduction

2.1 This chapter:

- outlines the context in which the Bills have been developed, including UN Security Council Resolution 1373; and
- briefly outlines the main provisions of the five Bills.

Background to the Bills

2.2 Over the last thirty years the United Nations General Assembly has made repeated calls 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.[1] Two international conventions, the Convention for the Suppression of Financing of Terrorism and the Convention for the Suppression of Terrorist Bombings, are addressed by two of the Bills (discussed in more detail below). In recent years the United Nations Security Council has also made calls dealing specifically with Afghanistan, the Taliban and Osama bin Laden.[2]

2.3 Following the tragic events of 11 September 2001 in the United States of America, the United Nations Security Council issued Resolution 1373, a copy of which is at Appendix 3.[3]

UN Security Council Resolution 1373

2.4 Amongst other matters, by Resolution 1373 the UN Security Council decided that all States are to:

- prevent and suppress the financing of terrorist acts, criminalize the wilful provision or collection of terrorist funds by their nationals or in their territories and freeze the assets of those connected with terrorism;

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1 Conventions relevant to terrorism include the Convention Against the Taking of Hostages; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the Convention on the Marking of Plastic Explosives for the Purpose of Identification; the Convention for the Suppression of Financing of Terrorism; the Convention for the Suppression of Terrorist Bombings; and the Protocol for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. For more detail, see N Hancock *Terrorism and the Law in Australia: Supporting Materials*, Research Paper No. 13 2001-02, Department of the Parliamentary Library Information and Research Services, pp.25-27.

2 For detail, see N Hancock *Terrorism and the Law in Australia: Supporting Materials*, Research Paper No. 13 2001-02, Department of the Parliamentary Library Information and Research Services, pp.25-27.

3 S/RES/1373 (2001), adopted on 28 September 2001. Article 25 of the United Nations Charter requires member States to carry out the resolutions of the Security Council.

- refrain from providing any active or passive support to those involved in terrorist acts and take necessary steps to prevent the commission of terrorist acts; and

- ensure that terrorists, their accomplices and supporters are brought to justice, that terrorist acts are established as serious criminal offences in domestic laws and that the punishment duly reflects the seriousness of such acts.[4]

2.5 The Resolution also called on all States to:

- intensify and accelerate the exchange of relevant operational information;

- cooperate to prevent and suppress terrorist attacks, particularly through bilateral and multilateral agreements;

- become parties as soon as possible to relevant international conventions and protocols, including the International Convention for the Suppression of Financing of Terrorism; and

- take appropriate measures, in conformity with international law to ensure that the granting of refugee status is not abused by those involved in terrorist acts.[5]

2.6 A Counter-Terrorism Committee to monitor implementation of the resolution was also established by Resolution 1373.

2.7 On 17 November 2001, the International Monetary Fund called on all member countries to ratify and implement fully the UN instruments to counter terrorism, particularly Resolution 1373, expressing grave concern at the use of the international financial system to finance terrorists' acts and to launder the proceeds of illegal activities.[6]

2.8 Other United Nations bodies have urged caution in implementing Resolution 1373. The High Commissioner for Human Rights urged States enacting such laws 'to refrain from any excessive steps, which would violate fundamental freedoms and undermine legitimate dissent'.[7] The United Nations Committee Against Torture also reminded States considering anti-terrorist laws of the 'non-derogable nature of most of the obligations' undertaken by ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[8]

2.9 On 27 February 2002, the High Commissioner for Human Rights confirmed the importance of ensuring that innocent people do not become the victims of counter-terrorism

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4 Paragraphs 1 & 2.

5 Paragraph 3.

6 See N Hancock *Terrorism and the Law in Australia: Legislation, commentary and materials*, Research Paper No. 12 2001-02, Department of the Parliamentary Library Information and Research Services, p. 23.

7 Joint statement by Mary Robinson, UN High Commisisoner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gerard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, 29 November 2001.

8 Statement of the Committee against Torture, CAT/C/XXVII/Misc.7., 22 November 2001.

strategies[9]. In order to assist States in complying with international human rights standards in implementing of Security Council resolution 1373, the High Commissioner proposed the following criteria:[10]

1. The Security Council has asked States to take specific measure against terrorism. States' action in this area should also be guided by human rights principles contained in international law.

2. Human rights law strikes a balance between the enjoyment of freedoms and legitimate concerns for national security. It allows some rights to be limited in specific and defined circumstances.

3. Where this is permitted, the laws authorizing restrictions:

   (a) should use precise criteria;

   (b) may not confer unfettered discretion on those charged with their execution.

4. For limitations of rights to be lawful they must:

   (a) be prescribed by law;

   (b) be necessary for public safety or public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;

   (c) not impair the essence of the right;

   (d) be interpreted strictly in favour of the rights at issue;

   (e) be necessary in a democratic society;

   (f) conform to the principle of proportionality;

   (g) be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;

   (h) be compatible with the objects and purposes of human rights treaties;

   (i) respect the principle of non-discrimination;

   (j) not be arbitrarily applied.

2.10 In addition to the human rights criteria proposed by the High Commissioner for Human Rights (set out in the previous paragraph), in assessing the proposals for new security legislation it is useful to have regard to the following principles formulated by Lord Lloyd of Berwick for applying the rule of law to the challenge of terrorism:

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9 UN Doc E/C/N.4/2002/18 (27 February 2002), para 2.

10 Ibid, Annex.

a) legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure;

b) additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual;

c) the need for additional safeguards should be considered alongside any additional powers;

d) the law should comply with the UK's obligations in international law.

2.11 To these principles, it can be added that in striking the right balance between the needs of security and the rights and liberties of the individual, the possibility of other means of combating the perceived security threat should always be considered.[11]

Australia's response

2.12 On 18 December 2001, the Attorney-General announced that, following an inter-agency review established in September 2001, Cabinet had agreed that new counter-terrorism legislation and enhanced Commonwealth powers were needed to combat terrorism.[12] As part of that new legislation, specific terrorism offences would be created.

2.13 The purpose of the Bills that were subsequently introduced was outlined by the Attorney-General, the Hon. Daryl Williams AM QC MP, in his second reading speech on the Security Legislation Amendment (Terrorism) Bill 2002:

> The [Bill] is part of a package of important counter-terrorism legislation designed to strengthen Australia's counter-terrorism capabilities.
>
> Since 11 September there has been a profound shift in the international security environment. This has meant that Australia's profile as a terrorist target has risen and our interests abroad face a higher level of terrorist threat.
>
> … This package, and other measures taken by the Government, are designed to bolster our armoury in the war against terrorism and deliver on our commitment to enhance our ability to meet the challenges of the new terrorist environment.[13]

2.14 The Attorney-General referred to two other Bills in the Government's 'package': the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002, and a forthcoming

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11 See Tony Abbott, President, Law Council of Australia, "The World since September 11: Can democracy limited by the rule of law combat terrorism effectively?", address to the First Plenary Session of the Australian Academy of Forensic Sciences, 13 February 2002, at 15.

12 Attorney-General "Upgrading Australia's Counter-Terrorism Capabilities" *News Release*, 18 December 2001.

13 House of Representatives *Hansard*, Second Reading Speech, *Security Legislation Amendment (Terrorism) Bill 2002,* 12 March 2002, p. 1040. The Second Reading Speech was subsequently incorporated into Hansard when the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] was introduced into the House of Representatives by the Parliamentary Secretary to the Minister for Finance and Administration, Mr Slipper, on 13 March 2002.

Bill on the Australian Security and Intelligence Organisation (ASIO).[14] These Bills are not considered in this report.

2.15 Regulations under the *Charter of the United Nations Act 1945* were also made in late 2001 to prevent dealing with the financial assets of those engaged in or supporting terrorism. The regulations provide for the listing by the Minister for Foreign Affairs of persons, entities or classes of assets.[15] These regulations will be superseded by the Suppression of Financing of Terrorism Bill 2002, discussed below at paragraph 2.30.

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

2.16 Schedule 1 of the Bill inserts in the Criminal Code a new Chapter 5 "The integrity and security of the Commonwealth" to:

- update and expand the existing offence of treason;
- create new terrorism offences;
- allow the Attorney-General to proscribe an organisation that has a specified terrorist connection or is likely to endanger the security or integrity of the Commonwealth; and
- make membership of or links with such organisations an offence.

2.17 Schedule 2 of the Bill also amends the powers of Australian Protective Service officers (discussed in more detail below at paragraph 2.28).

Treason

2.18 The proposed new provisions (Division 80) update the existing offence of treason under section 24 of the *Crimes Act 1914*. Specifically, the provisions replace the death penalty with life imprisonment and remove the gender-specific references to the sovereign. They also provide:

- a new ground for the offence, that is, engaging in conduct that is intended to assist, and does assist, another country or organisation that is 'engaged in armed hostilities' against the Australian Defence Force (ADF);
- that proceedings may not be instituted without the Attorney-General's written consent; and
- that the offence of treason has extended jurisdiction, that is, it applies whether or not the offence was committed in Australia.

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14 The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 was subsequently introduced and is the subject of a separate inquiry by the Parliamentary Joint Committee on ASIO, ASIS and the DSD.

15 Charter of the United Nations (Anti-terrorism Measures) Regulations 2001, 8 October 2001. The Minister for Foreign Affairs has issued two lists under those regulations.

New terrorism offences

2.19 The new offences (proposed sections 101.1 - 101.6) are:

- engaging in a terrorist act;
- providing or receiving training for a terrorist act;
- directing organisations concerned with a terrorist act;
- possessing things connected with a terrorist act;
- collecting documents likely to facilitate a terrorist act; and
- acts in preparation for a terrorist act.

2.20 Apart from the offence of engaging in a terrorist act, the offences do not require that a terrorist act actually occurs. All the offences are punishable by life imprisonment.

2.21 A terrorist act is defined as a specified action or threat of action that is made with the intention of advancing a political, religious or ideological cause (proposed section 100.1). A terrorist 'action' must:

- involve serious harm to a person or endanger a person's life;
- involve serious damage to property;
- create a serious risk to public health or safety; or
- seriously interfere with, seriously disrupt or destroy an electronic system, including telecommunications and information systems, financial systems, a system for the delivery of essential government services, systems used by an essential public utility and transport systems.

2.22 The definition does not include 'lawful advocacy, protest or dissent' or 'industrial action' (proposed section 100.1).

Proscription of organisations

2.23 A new Division 102 of the Criminal Code will allow the Attorney-General to declare an organisation to be a proscribed organisation if satisfied on reasonable grounds that:

- the organisation, or a member of the organisation, has committed or is committing a terrorism offence (whether or not the organisation or the member has been charged with or convicted of the offence);
- the declaration is reasonably appropriate to give effect to a decision of the UN Security Council that the organisation is an international terrorist organisation; or
- the organisation has endangered or is likely to endanger the security or integrity of the Commonwealth or another country (proposed section 102.2).

2.24 The Attorney-General must publish a declaration of proscription in the Gazette and a newspaper in each State and Territory. The declaration comes into force on publication and stays in force until the expiry date specified in the declaration or revocation (proposed section 102.2). Under proposed section 102.3, the Attorney-General must revoke the declaration if satisfied on reasonable grounds that none of the grounds apply. The Attorney-General may delegate his or her powers and functions to another Minister.

2.25 The Explanatory Memorandum states that the Attorney-General's decision would be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The Explanatory Memorandum states:

> The lawfulness of the Attorney-General's decision-making process and reasoning is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

2.26 The Committee notes that the Bill is silent on this issue.

2.27 The Bill also creates a wide range of new offences concerning activities in relation to proscribed organisations, all of which are punishable by imprisonment for 25 years. These new offences are:

- directing the activities of the organisation;
- directly or indirectly receiving funds from or making funds available to the organisation;
- membership of the organisation;
- providing training to, or training with, the organisation; or
- assisting the organisation (proposed section 102.4).

Air security officers

2.28 Schedule 2 of the Bill amends the *Australian Protective Service Act 1987* to allow members of the Australian Protective Service to exercise their powers of arrest without warrant in relation to the new terrorism offences.

2.29 It also amends the *Crimes (Aviation) Act 1991* to allow the air security officer program to extend to flights operating purely within a State.

Suppression of the Financing of Terrorism Bill 2002

2.30 This Bill:

- creates an offence directed at those who provide or collect funds with the intention that they be used to facilitate terrorist activities;
- requires cash dealers to report transactions that are suspected to relate to terrorist activities;
- enables the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Commissioner of the Australian Federal Police (AFP) and the Director-

General of Security to disclose financial transaction reports directly to foreign countries, foreign law enforcement agencies and foreign intelligence agencies; and

- supersedes the Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 by incorporating those matters in the Bill and creating higher penalty offences for providing assets to, or dealing in assets of, those engaged in terrorist activities.

2.31 The Explanatory Memorandum states that the Bill implements obligations under UN Security Council Resolution 1373 to criminalise the provision of funds for terrorism and allow the freezing of assets and the International Convention for the Suppression of Financing of Terrorism.[16]

2.32 The Bill includes provisions identical to those in the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] in relation to the definition of terrorist act and other relevant terms, and the constitutional basis for offences (proposed sections 100.1 and 100.2 respectively). If the other Bill receives assent first, the provisions will not commence (subclause 2(3)).

Collecting or providing funds

2.33 The Bill makes it an offence to provide or collect funds where the person is reckless as to whether those funds will be used to facilitate or carry out a 'terrorist act' (proposed section 103.1). The penalty is life imprisonment.

2.34 This offence is separate to the offence of providing funds to proscribed organisations in the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2].

Reporting by cash dealers

2.35 Schedule 2 of the Bill requires a cash dealer to report financial transactions to AUSTRAC where he or she has reasonable grounds to suspect:

- that the transaction is preparatory to the commission of a financing of terrorism offence; or

- that the information may be relevant to investigating or prosecuting such an offence.

2.36 'Cash dealer' is defined broadly in the *Financial Transactions Reports Act 1988*, to include financial institutions, insurers, futures brokers, trustees and persons who hold or transfer cash and non-cash funds on behalf of others. Cash dealers are currently required to report other suspicious transactions, including those relevant to Commonwealth offences.

2.37 The Bill also allows AUSTRAC and the AFP Commissioner to disclose financial transaction information to foreign countries, foreign law enforcement agencies and intelligence agencies (proposed subsections 27(11A) and 27(11B)). These amendments are not confined to terrorist offences. There is currently a procedure by which the Attorney-General may pass information to foreign countries on their request under the *Mutual*

16 Suppression of the Financing of Terrorism Bill 2002 *Explanatory Memorandum*, p. 1. It notes also that the Proceeds of Crime Bill 2002 will also give effect to Article 8 of the Convention which requires States to provide for the forfeiture of property that is the proceeds of, or has been used in, terrorist activity.

Assistance in Criminal Matters Act 1987. However, that process relies on a request being made by the foreign country and may be 'unnecessarily cumbersome'.[17]

2.38 In relation to privacy issues, the new provisions will require the Director of AUSTRAC or the AFP Commissioner, as relevant, to be satisfied that the foreign country has given appropriate undertakings for protecting the confidentiality and controlling the use of that information, and that the disclosure is appropriate in all the circumstances. The Bill also authorises the AFP Commissioner to access financial transaction information in order to pass it to a foreign law enforcement agency, where authorised in writing by the Director of AUSTRAC (proposed paragraph 27(1)(d)).

2.39 The Bill amends the *Mutual Assistance in Criminal Matters Act 1987* to require a review of the financial reporting amendments after two years. The review is to be conducted by members nominated by the Attorney-General, the AFP Commissioner, the Director-General of Security, the Inspector-General, the Director of AUSTRAC and the Federal Privacy Commissioner, and a report is to be tabled in Parliament (subject to the exclusion of sensitive material).

Assets of those involved in terrorism

2.40 Schedule 3 of the Bill amends the *Charter of the United Nations Act 1945* to create new offences directed at those who provide assets to, or deal in the assets of, those involved in terrorist activities. The amendments supersede the existing provisions in the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001 and provide significantly higher penalties.

2.41 Persons and entities may be proscribed for the purposes of the offences in two ways.

2.42 First, the Minister for Foreign Affairs may list persons and entities for the purpose of the offences, and assets or classes of assets, if satisfied of matters prescribed by regulation (proposed section 15). The Bill also provides that matters must not be prescribed by regulation unless such action would give effect to a decision of the UN Security Council that Australia is required to carry out and that relates to terrorism and dealings with assets (proposed subsection 15(5)). The Minister may revoke the listing if satisfied it is no longer necessary to give effect to such a decision (proposed section 16).

2.43 Secondly, the Governor-General may also make regulations proscribing persons or entities (proposed section 18), subject to similar conditions to those applying to the Minister where the person or entity is identified (proposed subsection 18(2)). The reason given for this provision is that UN Security Council decisions often list specific persons or entities, and enabling those lists to be incorporated in regulations would be 'more expedient' than requiring the Minister to list each person and entity in the Gazette.[18]

2.44 The Bill creates offences (punishable by imprisonment for 5 years) of dealing with a freezable asset, or making an asset available to a proscribed person or entity, other than in accordance with a notice from the Minister permitting specified use (proposed sections 20-

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17 Suppression of the Financing of Terrorism Bill 2002, *Explanatory Memorandum*, p. 8.

18 Suppression of the Financing of Terrorism Bill 2002 *Explanatory Memorandum*, p. 17. The Explanatory Memorandum notes that the Minister's proposed listing power is still required to cover UN Security Council decisions which do not nominate specific persons or entities.

22). The Minister's power to issue such a notice may be delegated to the Departmental Secretary or an SES officer (proposed section 22(6)).

2.45 'Assets' are broadly defined to include any tangible or intangible asset and any legal document or instrument, including cheques, shares, bank credits etc (proposed section 14). While such offences are currently included in the Charter of the UN (Anti-Terrorism) Regulations 2001, they attract much lower penalties (50 penalty units or $5500).

2.46 The Federal Court or a Supreme Court on application by the Attorney-General may issue an injunction restraining a person from conduct which would contravene these laws (proposed section 26). There is also provision for compensation for persons wrongly affected (proposed section 25).

Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002

2.47 This Bill:

- gives effect to the International Convention for the Suppression of Terrorist Bombings; and

- creates offences of international terrorist activities using explosive or lethal devices.

The Convention

2.48 The International Convention for the Suppression of Terrorist Bombings was made in New York on 15 December 1997 and came into effect on 23 May 2001. It was tabled in the House of Representatives on 12 March 2002 and is being examined by the Joint Standing Committee on Treaties.

2.49 The preamble to the Convention notes that 'existing multilateral provisions do not adequately address' the increasing incidence of terrorist attacks by explosive or other lethal devices, and that there is an urgent need to enhance international cooperation to prevent such attacks and punish the perpetrators. Amongst other matters, the Convention calls on States to enact legislation criminalising the unlawful and intentional delivery, placement, discharge or detonation of an explosive or other lethal device in specified places, to provide for ancillary offences such as attempt and to establish jurisdiction over such offences.

New offences

2.50 Proposed section 72.3 creates new offences of placing or detonating explosive or other lethal devices in prescribed places with the intention of causing:

- death or serious harm; or

- extensive destruction to the place, where the person is reckless as to whether that destruction results or is likely to result in major economic loss.

2.51 The prescribed places are:

- a place of public use;

- a government facility;
- a public transportation system; or
- an infrastructure facility (that is, a facility that distributes services for public benefit, including water, sewage, energy, fuel or communications).

2.52 Proposed section 72.10 states that those terms have the same meaning as applies in the Convention, as does the term 'explosive or other lethal device'.[19]

2.53 The penalty for the proposed offences is life imprisonment. The offences do not apply where the circumstances are exclusively internal to Australia (as explained in more detail in proposed section 72.4: the conduct occurred wholly within Australia, was committed by an Australian citizen who is in Australia, all victims were Australian citizens or bodies corporate incorporated in Australia, and no other country which is party to the Convention can exercise jurisdiction).

2.54 The offences apply in a broad range of circumstances where there is some nexus to Australia, defined to include not only offences by Australian citizens and conduct occurring in Australia, but also where the offence is committed against an Australian citizen or body corporate, or the offender is in Australia and is subject to another country's jurisdiction under the Convention.

2.55 Prosecution for these offences must not commence without the Attorney-General's written consent, although a person may be arrested, charged, remanded in custody or released on bail before that consent is given. The Attorney-General must have regard to the terms of the Convention and also whether a prosecution will be initiated under relevant State and Territory law (proposed section 72.7).

2.56 The Bill states that the provisions are not intended to limit or exclude the operation of any other State, Territory or federal law (proposed section 72.5). Proposed section 72.6 states that the "double jeopardy" rule applies (that is, a person cannot be convicted if he or she has already been convicted or acquitted of an offence for that conduct in a foreign country).

Extradition

2.57 The Bill also amends the *Extradition Act 1988* to ensure that the new offences are not regarded as 'political offences' for the purposes of extradition (since effectively a person will not be subject to extradition for a political offence).

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19 The term means an explosive or incendiary device capable of causing death, serious bodily injury or substantial material damage, and devices capable of doing the same through the release of toxic chemicals, biological agents/toxins and radiation or radioactive material (Art. 1.3).

Border Security Legislation Amendment Bill 2002

2.58 The Bill amends the *Customs Act 1901* and four other Acts to:

- increase Customs powers at airports by allowing Customs officers to patrol airports, increasing restricted areas and allowing Customs officers to remove people from those areas;
- require employers of staff in restricted areas and issuers of security identification cards to provide information about those people to Customs;
- require goods in transit through Australia to be reported to Customs;
- require certain airlines and shipping operators to report details of passengers and crew electronically to Customs and the Department of Immigration, Multicultural and Indigenous Affairs;
- require certain airlines to provide Customs with access to their computer reservation systems, in order to help identify high risk passengers;
- clarify that the Australian Fisheries Management Authority may disclose vessel monitoring system data to Customs;
- standardise provisions relating to the authorisation of the carriage of firearms and personal defence equipment by Customs officers;
- restore the powers of arrest to Customs officers 'inadvertently removed' in 2000;[20]
- include the Australian Bureau of Criminal Intelligence as a Commonwealth agency under Customs legislation;
- clarify that 'cargo' includes mail; and
- provide that certain undeclared dutiable goods found in personal and household effects are forfeited goods.

Access to information on passengers

2.59 The key change proposed by the Bill concerns the provision by airlines of passenger information to Customs, in order to assist in the screening of arriving passengers. Currently the pilot or owner of an aircraft must provide Customs with details of crew and the number of passengers, to allow Customs to allocate sufficient staff. Customs can also request additional information on passengers, to help to establish the truth of a passenger declaration and assist in deciding prior to arrival whether to search a passenger or his or her baggage.

2.60 The information usually provided is the Passenger Name Record (PNR) from airline reservations systems, including details on the passenger's booking, baggage and form of payment. Under this Bill, Customs will be given access to the airline reservations systems to

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20 Border Security Legislation Amendment Bill 2002 *Explanatory Memorandum,* p. 2, referring to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000.*

check the PNRs (Schedule 6). The Explanatory Memorandum states that the international airline industry is 'generally prepared' to provide PNR information, and that some already do on a voluntary basis.[21] It also states that Customs has consulted Qantas, United Airlines, Air New Zealand and the Board of Airline Representatives of Australia.[22]

2.61 The *Privacy Act 1988* was amended in 2000 to allow airlines in Australia to provide PNR information to Customs, but some countries (particularly in the European Union which has a Privacy Directive that requires a legal obligation for such information to be disclosed) have other privacy obligations.

2.62 The Bill creates an offence of refusing Customs access to the records either intentionally (120 penalty units, that is, $13,200) or as a strict liability offence (60 penalty units, that is, $6,600) (subject to the defence of reasonable excuse).

2.63 Customs estimates that the cost to each airline (to be met by Customs) will be less than $5,000 to allow access to their systems. The Explanatory Memorandum states that there will also be a cost for ongoing service fees and that the issue of supplementation is under consideration.[23]

Customs officers' powers

2.64 The Bill makes certain changes to the powers of Customs officers, the key ones of which are:

- Schedule 3 adds airports to the list of places that Customs officers may patrol.
- Schedule 7 ensures that the CEO of Customs can authorise offices or positions even if they do not yet exist, and provides that such authorisations may be limited.
- The carriage of firearms and personal defence equipment can currently be authorised in various circumstances under the *Customs Act 1901* (such as when authorised by the CEO in remote areas for self-defence; or when issued by the Commander of a Customs vessel to board a ship that Customs has pursued). Schedule 10 of the Bill establishes a system of arms issuing officers authorised by the CEO. They will be able to approve the issue of firearms and personal defence equipment to enable the safe exercise of Customs officers' powers.

Goods in transit

2.65 If dangerous or harmful goods are found in transit in Australia, Customs currently has limited powers to deal with them (for example, to seize narcotic drugs and to order hazardous waste be taken out of Australia within 30 days).

2.66 The Bill will ensure that Customs:

- receives more information about goods in transit, and

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21 Border Security Legislation Amendment Bill 2002 *Explanatory Memorandum*, p. 5.

22 ibid, p. 8.

23 ibid, p. 8.

- can seize goods under a warrant (issued by a judge) where the Minister suspects on reasonable grounds that the goods are connected with a terrorist act, or that they prejudice or are likely to prejudice Australia's defence or security, or international peace and security (Schedule 4).

2.67 Other provisions in Schedule 4 provide for the issue of seizure notices to the owner; the owner's right to apply to a court for return of the goods; disposal of the goods where they constitute a danger to public health or safety; and the right to compensation if the goods were lawful and have been disposed of.

Telecommunications Interception Legislation Amendment Bill 2002

2.68 Most of the Telecommunications Interception Legislation Amendment Bill 2002 deals with amendments that were introduced to the House of Representatives in 2001 but lapsed with the prorogation of Parliament.[24] Since that time, the planned changes have been extended to take account of the proposed new terrorism offences.

2.69 The Bill:

- extends telecommunications interception to include terrorism offences, child pornography and serious arson offences;

- seeks to clarify the application of the *Telecommunications (Interception) Act 1979* to services which have a delay between the initiation of a message and access, such as email and short messaging services;

- extends the purpose for which intercepted information can be communicated and used to include information relating to a police officer that could be used to dismiss that officer, and investigation by the Anti-Corruption Commission of WA;

- includes the Royal Commission into Police Corruption as an 'eligible authority' to receive relevant intercepted information, and updates the reference to the Queensland Crime and Misconduct Commission (formerly the Criminal Justice Commission and the Queensland Crime Commission);

- clarifies the operation of warrants authorising entry onto premises; and

- makes other 'housekeeping' amendments to the Act.

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24 The Telecommunications Interception Legislation Amendment Bill 2001 was introduced into the House of Representatives on 27 September 2001. However, it had not passed either Chamber before the Parliament was prorogued for the 2001 general election and, consequently, it lapsed.

CHAPTER 3

THE SECURITY LEGISLATION AMENDMENT (TERRORISM) BILL 2002 [NO. 2]

3.1 This chapter considers the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] (the Security Bill) and discusses the following key issues:

- whether there is a need for the legislation;
- other major concerns about the enactment of the legislation;
- the proposed treason offence;
- the definition of terrorism; and
- the proposed proscription power.

3.2 Unless otherwise indicated, the references to proposed sections are to proposed sections of the Criminal Code.

The need for the legislation

3.3 Many submissions opposed the Security Bill in particular on the basis that the need for such legislation in Australia had not been demonstrated and that existing criminal offences such as murder, grievous bodily harm, criminal damage, arson, conspiracy and attempt were adequate to address terrorist acts.[1]

3.4 The Honourable Justice John Dowd, President of the Australian Section, International Commission of Jurists, noted Australia's obligations to comply with resolutions of the United Nations, including Resolution 1373, and stated that the International Commission of Jurists did not oppose the legislation as such. However, 'the infelicity of expression and the width' of the Bill was of serious concern.[2]

3.5 The Law Council of Australia pointed out:

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1 For example, the Women's International League for Peace and Freedom (Australia) *Submission 15*, p.2; New South Wales Council for Civil Liberties *Submission 58*, p. 1; Mr Joo-Cheong Tham *Submission 61*, p. 2; Ms Eva Cox *Submission 62*, p. 1; the Federation of Community Legal Centres (Vic) Inc *Submission 97A*, p. 2; the Hills Greens *Submission 119*, p. 1; Islamic Council of Victoria *Submission 138*, p. 6; Dr Hannah Middleton *Submission 144*, p.3; ACTU *Submission 147*, p. 4; Liberty Victoria *Submission 149*, p.1; Fitzroy Legal Service Inc. *Submission 151*, p. 2; National Association of Community Legal Centres *Submission 161*, p.2; Australian Anti-Bases Campaign Coalition *Submission 163*, p. 1; Women's Rights Action Network Australia *Submission 164*, p.2; the Supreme Islamic Council of NSW *Submission 177*, p. 3; Law Council of Australia *Submission 251*, pp. 30-36; People for Peace through Justice - Beyond September 11 *Submission 220*, p.1. This point was also raised in many letters from individuals.

2 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 8.

> It is by no means clear that Australia's international obligations require the creation of **separate** terrorism offences. Security Council resolution 1373 requires that Australia 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*."[3]

3.6 The Law Council of Australia argued that the Government needed to justify the creation of new statutory offences and powers 'and to demonstrate that these strike the right balance between the needs of security and the rights and liberties of the individual'.[4] The Council referred to the range of legislative and administrative measures already in place in the event of a mainland terrorist incident in Australia,[5] noting:

> In its first report to the UN Counter-Terrorism Committee on implementation of Security Council resolution 1373, Australia stated that it had "a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies". The report stated that Australia "already had in place extensive measures to prevent in Australia for financing of, preparation 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".
>
> Existing Commonwealth and State and Territory legislation covers offences of murder, conspiracy, aiding and abetting, kidnapping, conduct likely to involve serious risk of life, personal injury, damage to property, all involving heavy penalties, as well as dealing with proscribed organisations, intelligence, investigation and enforcement. At the Commonwealth level alone, legislation includes:
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> - Laws dealing with investigation and enforcement: *Australian Federal Police Act* 1979; *National Crime Authority Act* 1984; *Telecommunications Act* 1977; *Australian Security Intelligence Organisation Act* 1979; *Measures to Combat Serious and Organised Crime Act* 2001;
> - laws dealing with criminal procedure and international cooperation: *Extradition Act* 1988; *Mutual Assistance in Criminal Matters Act* 1987; *International Transfer of Prisoners Act* 1977;
> - laws creating specific offences: *Crimes Act* 1914 (including treason, treachery, sabotage, sedition, unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, taking unlawful soundings, computer related acts, postal and telecommunications offences); *Air Navigation Act* 1921; *Public Order (Protection of Persons and Property) Act* 1971; *Crimes (Biological Weapons) Act*

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3 *Submission 251*, p. 32.

4 *Submission 251*, pp. 32-33.

5 The Law Council of Australia referred in particular to the discussion of such legislative and administrative measures in N Hancock *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, Research Paper No. 12 2001-02, Department of the Parliamentary Library Information and Research Services.

1976; *Crimes (Foreign Incursions and Recruitment) Act* 1978; *Nuclear Non-Proliferation (Safeguards) Act* 1984; *Crimes (Hostages) Act* 1989; *Crimes (Aviation) Act* 1991; *Crimes (Ships and Fixed Platforms Act) Act* 1992; *Chemical Weapons (Prohibition) Act* 1994; *Weapons of Mass Destruction (prevention of Proliferation) Act* 1994;

- laws dealing with the proscribing of organisation: *Crimes Act* 1914 (Part 11A concerning unlawful associations); *Charter of the United Nations Act* 1945;
- laws regulating the entry and deportation of aliens: *Migration Act* 1958;
- laws concerning intelligence services agencies: *Intelligence Services Act* 2001; *Australian Security Intelligence Organisation Act* 1979; and
- laws concerning suspect transactions (*Proceeds of Crime Act* 1987; Financial Transaction Reports Act *1988;* Charter of the United Nations Act *1945*).[6]

3.7 Ms Sandra Cornish, National Executive Officer of the Australian Catholic Social Justice Council noted:

> … while the government must ensure that Australia's national security arrangements are adequate especially in the light of last year's terrible terror attacks, it is essential that all such arrangements respect and protect human rights. It is the experience of the church that national security legislation in many countries in our region is often misused as a tool of oppression. While we do not believe this to be the intention of the Australian government's counter-terrorism legislative package, we do want to be sure that Australian national security legislation will not be open to such abuse ... To fight terrorism effectively, we must ensure that our methods respect and protect human rights and do not fall into the logic of ends justifying means, as this is the logic of terrorism itself.[7]

3.8 Justice Elizabeth Evatt argued that if the legislation were enacted, it should be brought into force only if the need were established and then only for a limited time, with a sunset clause applying.[8] The Human Rights Council similarly argued that if the Bill were enacted it should be 'subject to renewal on a regular basis', perhaps annually following a review by a parliamentary committee.[9]

3.9 In querying the need for new legislation, various submissions noted that the Hope Review of Australia's protective security powers and arrangements in the late 1970s did not call for any more offences to address the threat of terrorism.[10] They also pointed to the Attorney-General's statements that there is no known specific

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6 *Submission 251,* pp.30-32.

7 Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002, p. 220.

8 *Submission 170*, p.2. Greenpeace Australia also argued that a sunset clause should be included (*Submission 179*, p.1).

9 *Submission 174*, p. 6. The submission noted that the UK *Prevention of Terrorism Act,* introduced in the 1970s following pub bombings in England, was subject to annual renewal.

10 Protective Security Review *Report*, (Justice Robert Hope), AGPS 1979.

threat of terrorism in Australia[11] and that Australia had 'well practiced and coordinated national security arrangements'.[12]

3.10 Dr Jenny Hocking, Head of the National Key Centre for Australian Studies at Monash University, told the Committee:

> … I think the Attorney-General is correct in his comment that we do not have a high level of threat and there is no known specific threat at this stage — and historically we have not had a high level of terrorist threat either. We need to ask why that is the case. Justice Hope addressed that briefly … in the early eighties, when he said that it is possible that in part a functioning democracy that protects the rule of law is one of the best protections against the use of political violence.
>
> … a marginalised political society is more likely to give rise to political violence than is a society in which all elements of society feel that they can have an avenue, through the political and parliamentary process, for some voice. What worries me about this particular package of bills is that it starts to chip away at that through the avenue that it allows for the criminalisation of support for political positions that are being proscribed and so on. So I think one of our great protections is in fact, as Justice Kirby said, to maintain our constitutionalism and adhere to the great principles of the rule of law.[13]

3.11 Social commentator and activist Ms Eva Cox expressed similar views:

> [I]f you deny people the capacity to sometimes be unlawful in minor ways, as a form of protest, this is exactly the sort of situation that leads people to take up terrorism ...
>
> The provision of good civil interactions, the ability to demonstrate, and accountability and transparency in decision making are keys to people accepting the rule of law.[14]

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11 Attorney-General 'Upgrading Australia's Counter-Terrorism Capabilities' *News Release*, 18 December 2001. The National Security Internet Site linked to the website of the Attorney-General's Department also states that 'no specific terrorist threat within Australia has been identified' (http://nationalsecurity.ag.gov.au, accessed 6 May 2002).

12 Attorney-General 'Possible Terrorism Threat' *News Release*, 24 December 2001.

13 Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, pp. 69-70. Justice Kirby, whose speech was referred to with approval by other groups such as the Law Council of Australia (*Submission 251*, p. 55) and the Australian Council of Civil Liberties (*Submission 187*, p. 6), commented on Australia's rejection in the 1951 referendum of the proposal to grant the Commonwealth power to legislate with respect to communism: 'History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States. Keeping proportion. Adhering to the ways of democracies. Upholding constitutionalism and the rule of law. Defending, even under assault, the legal rights of suspects. These are the way to maintain the love and confidence of the people over the long haul. We should never forget these lessons … Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the Communist Party case of 1951'. M Kirby 'Australian Law after September 11, 2001', *Speech*, 32nd Australian Legal Convention, Canberra, 11 October 2001.

14 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 29.

3.12 The Committee was keen to explore with government agencies why such legislation was necessary. The Australian Security Intelligence Organisation (ASIO) advised the Committee that the events of September 11 'represented a profound shift in international terrorism' and that:

> … threat levels to Australian interests at home and abroad have risen. While there is no known specific terrorist threat to Australia at present, the heightened threat levels can be expected to remain for some years at least.
>
> Threat levels to United States and United Kingdom (and a number of other countries) interests in Australia have also risen and can be expected to remain for some years at least. [15]

3.13 ASIO pointed to several factors which it considered had raised the level of threat against Australia, including 'the specific mention of Australia by Usama Bin Laden on two occasions since 11 September, including his description of Australian troops in East Timor as a "crusader force"'. ASIO also noted that some international militant groups which view terrorism as legitimate have 'a small number of supporters in Australia' and that 'a small number of Australians have trained in UBL terrorist camps in Afghanistan'. ASIO advised:

> None of this is to suggest that there is any reason for assessing that Australia is a prime terrorist target. Clearly, the interests of a number of other countries are at considerably greater risk, such as the United States. At the same time, 11 September does mark a profound shift, with real implications for Australian interests themselves and in respect of our responsibilities for foreign interests in Australia.[16]

3.14 During public hearings the Director-General of Security Mr Dennis Richardson explained why he considered the proposed legislation necessary and why existing laws were inadequate:

> The proposed bills certainly will not stop terrorism, any more than legislation against murder and robbery of itself stops those crimes. But the legislation is, in my view, necessary to deter, to punish and to seek to prevent. It is the latter — that is, prevention — which is a central element in the legislation.[17]

3.15 The Director-General stated that current criminal laws did not provide an effective legislative framework for prevention, citing as an example training with a terrorist organisation:

> The *Crimes (Foreign Incursions and Recruitment) Act* makes it an offence to receive training in the use of arms or explosives or to practise military exercises for certain purposes. These purposes include the overthrow by force or violence of the government of a foreign state and causing by force or violence the public in a foreign state to be in fear of suffering death or personal injury. However, the provisions are dependent upon proof that the

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15 Attorney-General's Department *Submission 383*, pp. 3-4.

16 Attorney-General's Department *Submission 383*, pp. 3-4.

17 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 166.

> training was provided for those specific purposes. There is no criminal offence of undertaking training with an identified terrorist network, such as Al-Qaeda. I understand that not everyone would agree with my view, but I think it ought to be a criminal offence to undertake terrorist training with a network such as Al-Qaeda. No existing legislation caters for this. The proposed legislation would.[18]

3.16 The Director-General noted that in recent years the movement of people, money and goods across international borders had grown enormously, particularly with the growth of the Internet, and that those changes had 'presented opportunities for those committed to using violence for political, religious or ideological reasons':

> In order to properly combat terrorism, it is necessary to institute measures which will deprive terrorist networks of the means of support and assistance which they exploit for the purpose of conducting their activities. This includes financial support, the provision of training and the provision of materials which may be used in the commission of terrorist acts in Australia and overseas. Although the instruments used in terrorism may sometimes be crude, various networks have become increasingly sophisticated in their use of communications, movements and methods to achieve their objectives. The nature and level of threats posed by particular groups may, as demonstrated on 11 September, change quickly and without forewarning.[19]

3.17 The Australian Federal Police also supported the Bills on the basis that they would address 'identified inadequacies' in existing legislation, particularly in relation to the financing of terrorism:

> Importantly, the overall package of bills will allow law enforcement to meet the increased expectations of government and the community who want to see those responsible for terrorist activity brought to justice.[20]

3.18 In response to questions on notice from the Committee and to issues raised in the public hearings, the Attorney-General's Department gave several reasons why the existing legislative framework was inadequate:

- The counter-terrorism legislative 'package' clearly expresses Australia's commitment to act to prevent terrorism and prosecute those who participate, and has the advantage of dealing with terrorism comprehensively rather than relying on a myriad of other laws which may apply;
- Specific laws are needed to address legislative gaps, particularly in relation to providing or receiving training, directing an organisation that fosters preparation for a terrorist act and possessing things connected with a terrorist act;

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18 ibid.

19 ibid.

20 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 191. The AFP particularly stressed the importance of legislation aimed at financial support for terrorist activities: 'For the first time, law enforcement will be able to target the base of terrorist organisations — that is, their funding'.

- The laws concerning conspiracy, attempt, incitement and aiding and abetting are problematic, in that many ancillary offences can only be proven if they attach to a specific primary offence. The nature of terrorism is such that many persons involved in terrorist activity may not know the specific details of the act or offence that will be committed;
- Existing provisions relating to the proscription of unlawful associations under Part IIA of the *Crimes Act 1914* are primarily directed at politically-motivated organisations rather than those inspired by religious or ideological motivations. In addition, the penalties for those offences (maximum two years' imprisonment) are clearly inadequate;
- The primary reason for developing terrorist offences is prevention, whereas existing laws generally relate to acts that have already been completed.[21]

Other concerns about the enactment of the legislation

3.19 Three other major concerns relating to legal and social issues were reflected in submissions and during public hearings, and are discussed below:

- whether the Bill would be held to be constitutionally valid;
- whether the Bill might breach provisions of international law; and
- concerns about possible adverse effects on Muslim, Arab and other ethnic communities.

Constitutional issues

3.20 Proposed section 100.2 sets out the constitutional basis for the terrorism offences in the Bill. Without limiting the grounds, the provision specifies fifteen sets of circumstances in which an action or threat of action would give rise to an offence. They include where the action: affects the interests of the Commonwealth or a Commonwealth authority; affects foreign or interstate trade or commerce; involves the use of a postal service or electronic communication; or takes place outside Australia.

3.21 A submission from Professor George Williams and Mr Iain Gentle noted that the primary heads of constitutional power which could support anti-terrorist legislation were the powers over defence,[22] external affairs[23] and the implied 'nationhood' power. They stated that in their view there were 'significant questions' as to whether those powers could support the Bill 'in a time of relative peace' because of the need for the laws to be reasonably appropriate and adapted to that purpose:

> Members of the High Court have made it clear that a law may fail this test if, for example, it unduly infringes upon basic rights, such as freedom of speech (see *Davis v Commonwealth* (1988) 166 CLR 79), or contains retrospective criminal sanctions (see *Polyukhovich v Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501).

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21 Attorney-General's Department *Submission 383A*, pp. 1-3.

22 Section 51(vi).

23 Section 51(xxix).

> Certain provisions in the [Security] Bill may exceed what the High Court would consider to be appropriate and adapted to the purpose of combating terrorist activity. For example, it is arguable, but unlikely, that the Court would consider that life imprisonment for an offence prosecuted under absolute liability is disproportionate to the threat facing Australia. A more likely basis of attack would be upon the proscription power in [proposed] section 102.2 …[24]

3.22 The particular concerns about the validity of the proposed proscription power are discussed in more detail at paragraphs 3.101-3.158 below.

3.23 The Committee notes that at a recent COAG meeting on 5 April 2002, State and Territory governments agreed to refer further powers to the Commonwealth in the future to 'plug any gaps'.[25]

Possible breach of international law

3.24 Several submissions expressed concern that the Security Bill could breach international human rights standards, particularly the International Covenant on Civil and Political Rights (ICCPR).

3.25 For example, in its submission, the Law Council of Australia noted its concern about ambiguous and imprecise language in the definitions of 'terrorist act' and related offences, which do not include any requirement of intention to terrorise the government or the public through intimidation, coercion or the evocation of extreme fear, and which include action involving serious damage to property.

3.26 The Council also considered there was no justification for the creation of absolute liability in respect of crimes involving serious criminality and penalties involving life imprisonment. Non-compliance with important international human rights standards, such as the right to personal liberty, freedom from arbitrary arrest or detention, the right to a fair trial, the protection against arbitrary interference with privacy, freedom of expression, the right of peaceful assembly, and freedom of association was manifest. The Council noted:

> Some may argue that little harm is done by the creation of such offences, as ultimately the prosecutorial authorities are unlikely to lay charges of terrorism in relation to other than the most serious of acts and against other than the most dangerous and threatening of organisations. The Law Council does not accept such arguments and is vigorously opposed to the conferral on the prosecutorial authorities of such sweeping and arbitrary powers in the characterisation of offences and laying of charges. Such conferral of power is contrary to the prohibition of arbitrary arrest and detention in article 9(a) of the ICCPR … "arbitrariness" must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. This means that deprivation of liberty provided for

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24 *Submission 8*, p. 2. The Human Rights Council of Australia also argued that because of inadequate definition of the elements of certain offences in the Bill, those offences could be unconstitutional (Mr Andrew Naylor, Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002, p. 218).

25 Attorney-General's Department *Submission 383*, p. 7.

> by law must not be manifestly unproportional, unjust or unpredictable. The Law Council considers that an unacceptable element of arbitrariness and unpredictability arises in that determining whether or not a person is charged with a terrorist offence, with another offence or with any offence at all (a determination which has profound implications in terms of the onus of proof, available defences, stigma of conviction and heaviness of penalties), is left to the prosecutorial authorities without any transparency or public scrutiny.[26]

3.27 While the ICCPR allows for derogation from the prohibition against arbitrary arrest and detention in article 9 in time of 'public emergency which threatens the life of the nation',[27] the Human Rights Council of Australia noted that there was no evidence of such an emergency.[28]

3.28 It was also argued that the Security Bill could infringe other fundamental rights recognised by the ICCPR, including the rights to freedom of association,[29] freedom of expression[30] and the right to be presumed innocent until proven guilty.[31] The Law Council of Australia also noted that the United Nations High Commissioner for Human Rights in a document to guide States reporting their compliance with Resolution 1373 stressed the importance of observing international human rights principles.[32]

Adverse effects on particular groups

3.29 During public hearings Mr Bilal Cleland, Secretary of the Islamic Council of Victoria, raised concerns about the potential adverse effects the passage of such legislation might have on Muslim communities in Australia:

> We are concerned that the definition of terrorism will take on a religious, bigoted tone, and it could mean that the Muslim community here will

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26 *Submission 251,* pp.39-40.

27 ICCPR, art 4(1) which also specifies that the existence of the public emergency must be officially proclaimed.

28 *Submission 174*, p. 6. Concerns were also raised by Dr Hannah Middleton *Submission 144*, p.2; Justice Elizabeth Evatt *Submission 170*, p.4; VCOSS *Submission 145*, p.2; and Women's Rights Action Network Australia *Submission 164*, p.2.

29 ICCPR, art 22. See, for example, Dr Patricia Ranald on behalf of the Public Interest Advocacy Centre, Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002*,* p. 232; Dr Hannah Middleton *Submission 144*, p. 2.

30 ICCPR, art 19(2). The exercise of both these rights may be subject to such limitations as are prescribed by law and are necessary to protect national security or public order.

31 ICCPR, art 14(2). See further discussion in paragraph 3.85.

32 'Proposals for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001)', annex to 'Human rights: a uniting framework' *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, E/CN.4/2002/18, 27 February 2002. The document states that laws authorising restrictions to those rights should use precise criteria and not confer unfettered discretion on those charted with their execution (paragraph 3).

> become unjustified targets of interference and hostility from the state authorities.[33]

3.30 Similar concerns about the possible impact on Muslim and Arabic communities were expressed by the Supreme Islamic Council of NSW Inc,[34] Liberty Victoria,[35] Fitzroy Legal Service,[36] the Federation of Community Legal Centres (Vic) Inc[37], the Australian Arabic Council[38] and the Ethnic Communities' Council of Victoria.[39] The Victorian Council of Social Service stated that after September 11:

> … Arab and Muslim communities in Australia, and women in particular, were, and continue to be, the targets of high levels of racial and religious vilification and discrimination.[40]

3.31 Mr Victor Borg, representing the Ethnic Communities' Council of Victoria, told the Committee that the incidents of September 11 had a 'tremendous impact' on the community, particularly in Sydney and Melbourne. Mr Laurence Aboukhater, the Deputy Chair of the Council, elaborated on this impact:

> This is an important point. It is affecting the diversity of Australia, it is affecting multiculturalism and is affecting our community. The first failing of this Bill is that it is attacking a portion of the community …[41]

3.32 The Director-General of Security, Mr Dennis Richardson, told the Committee that he understood the concerns that had been expressed, and noted that it was important to ensure that organisations such as ASIO had good relationships with communities and community leaders. If there was a legitimate concern about particular individuals, it would be clear that those individuals were targeted, rather than particular communities.[42]

Committee conclusion

3.33 The Committee notes the concerns expressed by many organisations and individuals about whether the legislative package, particularly the Security Bill, is necessary. The Committee also notes serious reservations about the breadth of the proposed legislation in relation to constitutional issues, potential breaches of

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33 Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 74. See also Islamic Council of Victoria *Submission 138*, pp. 4-6, which discusses the effect on Muslim communities in Australia, the United States of America and elsewhere.

34 *Submission 177*, p.2.

35 *Submission 149*, p.2.

36 *Submission 151*, p.3.

37 *Submission 97A*, p. 2.

38 *Submission 133*, p. 3.

39 *Submission 135*. p. 2.

40 *Submission 145*, p. 1.

41 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 172.

42 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 172.

international law and possible adverse effects on particular groups within the Australian community.

3.34 While acknowledging that existing criminal laws would cover the results of many terrorist acts, the Committee also notes that Australia has signed various international treaties that seek to address terrorism, including the Convention for the Suppression of Financing of Terrorism and the Convention for the Suppression of Terrorist Bombings that are the subject of two of the Bills under consideration. United Nations Security Council Resolution 1373 adopted on 28 September 2001 indicates a worldwide determination to develop measures to address terrorism and demonstrate a commitment to prevent acts of terrorism and punish those who commit them. The Committee has also heard evidence of certain gaps in Australia's current legislative framework. Consequently the Committee considers that new legislation to achieve a comprehensive approach to dealing with terrorism is justified.

3.35 The Committee considers that there is no intention that the Bill should have any adverse impact on particular communities, but notes the concerns that have been expressed during the inquiry. The Committee is also mindful of the serious concerns expressed about the width of various provisions of the Security Bill in particular, and for that reason considers that certain amendments must be made. Particular concerns and the Committee's recommendations in response to them are discussed in more detail in the rest of this chapter.

The treason offence

3.36 Proposed section 80.1 contains a new treason offence which is designed to replace the existing treason offence (contained in section 24 of the *Crimes Act 1914*). The Bill modernises the wording of the treason offence and provides a new ground for the offence, namely, engaging in conduct that is intended to assist and does assist, by any means whatever, another country or an organisation engaged in armed hostilities against the Australian Defence Force (ADF) (paragraph 80.1(1)(f)).

Criticism of the provisions

3.37 The definition of treason was the focus of a number of submissions. The Association of Criminal Defence Lawyers argued that proposed paragraph 80.1(1)(f) broadens the definition of treason in an unacceptable manner. The Association argued that this definition would include non-military assistance and humanitarian aid such as medical assistance, sustenance and disaster relief.[43]

3.38 The Human Rights Council supported this view, adding that the lack of a definition of the word 'assists' exposes humanitarian organisations such as the International Committee of the Red Cross and Medicins sans Frontieres and their members to criminal liability.[44] The Law Council of Australia pointed out that the potential for the criminalisation of humanitarian aid was made particularly acute 'given the increased deployment of the ADF in peace keeping, border protection,

43 *Submission 173*, pp 1-2.

44 *Submission 174,* pp. 2-3.

disaster relief and other forms of non-military action'.[45] NOWAR (Adelaide) expressed concern that the definition could also encompass those people in Australia demonstrating in support of a country or organisation against whom the ADF was engaged in conflict.[46]

3.39 Concerns were also expressed about the definition of 'enemy' and the meaning of 'armed hostilities' in proposed paragraphs 80.1(1)(e) and (f). During the public hearings, Ms Dimity Fifer of the Victoria Council of Social Service (VCOSS) noted that the Explanatory Memorandum states that an 'enemy' may be a country or an organisation, and raised the question of who exactly was the enemy in the current conflict in Afghanistan - the people, or the suspected terrorist organisation.[47] VCOSS called for 'enemy' to be defined.

3.40 The Hon Justice Dowd on behalf of the International Commission of Jurists suggested that paragraph (f) could have the effect of rendering guilty of treason any person involved in the Afghanistan civil war who fought against an Australian soldier.[48] The NSW Council for Civil Liberties argued that it would have been 'a simple matter' for the government to proclaim the Taliban or Al-Qaeda to be an enemy under existing law,[49] so as to make it clear that activity with them would be treason. By contrast, the Council said that the new provision in paragraph (f):

> … now makes it such that you could be convicted of treason for fighting the Australian Defence Forces whether you are aware that they are involved in the activities or not. Particularly in covert sorts of operations, you could find yourself fighting the ADF without knowing about it and in those circumstances be guilty of treason.[50]

3.41 In response to the concerns about the ambit of proposed subparagraph 80.1(1)(f), the Attorney-General's Department acknowledged that the offence could apply in a circumstance that had begun as a civil war, but that:

> In practice the offence would only be used when an Australian or a person connected with Australia assisted a country or organisation engaged in armed hostilities against the ADF.[51]

3.42 Further concerns were expressed by Justice Dowd[52] and Liberty Victoria[53] about proposed subsection 80.1(3), which requires the Attorney-General's consent before proceedings for treason can be brought. They argued that this provision could politicise the prosecution process.

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45 *Submission 251,* p. 26.

46 *Submission 159*, p.2.

47 Legal and Constitutional Legislation Committee *Hansard*, 18 April 2002*,* pp. 133-135.

48 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002*,* pp 2-3.

49 The existing treason offence in *Crimes Act 1914,* s. 24(1)(d).

50 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002*,* p.33.

51 *Submission 383*, p. 28.

52 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002*,* p.3.

53 *Submission 149A*, p. 3.

3.43 On another point, the NSW Council for Civil Liberties also noted that while the Second Reading Speech referred to an intention to 'modernise' the law of treason:

> … we still have the rather odd situation that killing the Duke of Edinburgh is an act of treason but conspiring to blow up the federal Cabinet or the federal parliament is not an act of treason.[54]

3.44 Justice Dowd on behalf of the International Commission of Jurists also drew the Committee's attention to proposed paragraph 80.1(2)(b), which creates an offence that used to be called 'misprision of felony'. The provision, which effectively restates in modified form the existing provision in the *Crimes Act 1914*,[55] creates an offence if a person 'knowing that another person intends to commit treason, does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence'.[56] The maximum penalty for such an offence is imprisonment for life. Justice Dowd observed that most countries and most Australian States have 'moved away from misprision of felony' and that it was often difficult to know whether someone was going to commit an act of treason or whether it was mere talk or rumour.[57]

3.45 The Committee referred these concerns to the Attorney-General's Department, who advised that misprision is recognised both in the USA and the United Kingdom, attracting severe penalties.[58]

Committee conclusion

3.46 The Committee considers that there are serious problems arising from definitional issues in proposed subsection 80.1(1).

3.47 The Committee notes the concerns expressed by the Victorian Council of Social Service in relation to the definition of 'enemy' in proposed paragraph 80.1(1)(e), but considers that, since that paragraph merely restates the existing provision[59] and requires an enemy to be specified by proclamation to be an enemy at war with the Commonwealth, this provision does not require amendment.

3.48 Nevertheless, the Committee considers that the breadth of terms such as 'engaged in armed hostilities' and the potential for humanitarian aid to be included as a treasonous activity require review.

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54 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p.33.

55 s. 24(2).

56 'Constable' is defined to mean a member or special member of the AFP or an officer of a State or Territory police force (proposed subsection 80.1(8)).

57 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p.3.

58 Attorney-General's Department *Submission 383A*, p.7, referring to maximum penalties of life imprisonment in the United Kingdom and 7 years in the USA. See also Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, pp. 11-12, where the Attorney-General's Department noted that the general offence of misprision of felony (that is, failing to report a serious offence) still exists in some Australian jurisdictions.

59 As set out in the *Crimes Act 1914,* s. 24(1)(d).

3.49 The Committee notes that the courts must have regard to legislation as drafted. Where there are definitional gaps, or definitions so broad that there is potential for inappropriate interpretation, the legislation must be amended to ensure the courts have a clear view of what the legislation is intended to achieve. In the Committee's view, it cannot be intended that the legislation includes the possibility — however remote — of an aid worker being convicted of treason.

3.50 Accordingly, the Committee recommends that the Attorney-General review the provisions in order to clarify their meaning, as set out in the following recommendation.

3.51 In relation to the concerns expressed about possible politicisation of the prosecution process because of the need for the Attorney-General's consent for proceedings, the Committee notes that this provision merely restates the existing law.[60] As the Commonwealth Director of Public Prosecutions (DPP) will still need to be satisfied that prosecution would be appropriate, the Committee considers that this extra requirement will act as an additional safeguard rather than displacing the DPP's discretion.

3.52 In relation to NSW Council for Civil Liberties' point about the failure of the proposed 'modernised' offence to include any reference to Australian democratic institutions or heads of state, the Committee urges the Attorney-General to consider whether further amendments should be made in the longer term.

Recommendation 1

The Committee recommends that proposed section 80.1 in the Bill be amended so that the terms 'conduct that assists by any means whatever' and 'engaged in armed hostilities' are defined, in order to ensure that the humanitarian activities of aid agencies are not caught within the ambit of the offence of treason.

The definition of terrorism

3.53 There is an acknowledged difficulty in defining terrorism at international law.[61]

3.54 As noted in Chapter 2, proposed section 100.1 of the Security Bill defines a terrorist act as action or threat of action where:

- the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- the action:

60 *Crimes Act 1914*, s. 24AC.

61 See discussion in N Hancock *Terrorism and the Law in Australia: Supporting Materials*, Research Paper No. 13 2001-02, Department of the Parliamentary Library Information and Research Services, pp. 3-10. See also Law Council of Australia *Submission 251*, pp. 26-29, and Legal and Constitutional Legislation Committee *Hansard*, April 2002, pp. 201-202.

- involves serious harm to a person;
- involves serious damage to property;
- endangers a person's life (other than that of the person taking the action);
- creates a serious risk to the health or safety of the public or a section of the public; or
- seriously interferes with, seriously disrupts, or destroys, an electronic system, including an information, telecommunications or financial system, a system used to deliver essential government services, or a system used by an essential public utility or transport system.

3.55 The same definition is used in the other Bills under consideration.[62]

Intent to intimidate or coerce

3.56 A submission from Professor David Kinley from the Castan Centre for Human Rights Law at Monash University argued:

> There is no mention of an intention to cause harm to persons or property, or to instil fear in the public and government. These should be a key element of any definition of terrorism.[63]

3.57 Professor Kinley told the Committee that the inclusion of this element would avoid some of the potential problems identified during the inquiry as to the breadth of the activities that could be caught:[64]

> … the notion of intention would provide an extra safeguard for those who would otherwise fall under the current scope [of terrorism] when their intention was never anything to do with terrorism but rather some sort of other consequential damage or criminal act.[65]

3.58 The submission listed examples of definitions of terrorism used elsewhere:

- 'intended or calculated to provoke a state of terror' (UN General Assembly);[66]
- 'calculated use of violence or the threat of violence to inculcate fear' (USA);[67]
- 'intended to intimidate or coerce' (USA);[68] and

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62 See chapter 4.

63 *Submission 136*, p. 1.

64 Those activities are discussed in more detail in the next section.

65 Legal and Constitutional Legislation Committee *Hansard*, 18 April 2002, p. 160.

66 *Submission 136,* citing United Nations General Assembly, 'Measures to eliminate international terrorism', A/RES/51/210 (17/12/96).

67 *Submission 136,* citing US Department of Defence per David Whittaker (ed), *The Terrorism Reader,* Routledge, 2001, p. 3.

- 'calculated to evoke extreme fear' (a 1993 Australian counter-terrorist review).[69]

3.59 The same point was made by other submissions.[70] Some noted that the omission in the Bill of such an element differed from the definition outlined by the Attorney-General when he announced Cabinet's agreement to the development of new terrorist offences in 2001.[71]

3.60 The Committee notes that legislation in the United Kingdom[72], the USA[73] and Canada[74] and the proposed NZ legislation[75] also include the element of intention to intimidate the population and/or coerce the government.

3.61 When questioned by the Committee about why the Security Bill does not include such an element, a representative from the Attorney-General's Department explained:

> The argument for not including that extra limb in the definition is that, if a terrorist's objective is pure destruction and their intent or agenda is merely to impair the functioning of the nation, to destroy its buildings, to kill people, but they have no broader purpose beyond that in terms of how people will react to that, as to whether people will be intimidated or as to whether government policy will be influenced, that can still be seen as terrorism. So that is the additional category of cases that is caught. [76]

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68 *Submission 136,* citing 18 U.S.C. 2331(5) 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; Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism,* Cm 3420, October 1996.

69 *Submission 136,* citing F.Honan and A Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994, p. 4.

70 For example, the Islamic Council of Victoria *Submission 138*, p. 2; Monash Student Association and Law Students Society *Submission 141,* p. 3; Law Council of Australia *Submission 251*, p. 34.

71 Attorney-General 'Upgrading Australia's counter-terrorism capabilities' *News Release*, 18 December 2001. The Attorney-General referred to terrorist activity being defined as 'an act or omission that constitutes an offence under the UN and other international counter-terrorism instruments, or an act committed for a political, religious or ideological purpose designed to intimidate the public with regard to its security and intended to cause serious damage to persons, property or infrastructure'.

72 The definition in the *Terrorism Act 2000* (UK), s. 1, is very similar to that in the Security Bill, except that it adds the element that 'the use or threat is designed to influence the government or to intimidate the public or a section of the public'.

73 USA PATRIOT Act 2001 s. 802 refers to activities that appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping.

74 Anti-terrorism Act 2001 (Canada), which inserted in section 83.01 of the *Criminal Code* (Canada) a definition of 'terrorist activity' that requires an act to be committed in whole or in part with the intention of intimidating the public or a segment of the public with regard to its security, or compelling a person, government or organisation to do or refrain from doing any act.

75 As referred to by the Attorney-General 's Department, *Submission 383*, Attachment 1.

76 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 203.

3.62 The Department argued that inclusion of such an element 'would potentially exclude an important category of cases where the objective is just pure destruction'.[77] The Committee notes the Department's explanation but is concerned about the width of the definition, as discussed further at paragraphs 3.75-3.78.

Specific concerns about the definition of terrorist action

3.63 Particular concerns about the width of the definition of the action required in proposed section 100.1 for a terrorist act to be committed included :

- the width of 'serious' harm or 'serious' property damage. The meaning of this term is potentially very broad. Witnesses argued that serious damage to property could include putting something on the wall of a building,[78] damage by protesters to the walls or fences of embassies, immigration and other detention centres,[79] or damage to logging trucks, chicken sheds or fishing nets.[80] It was also argued that 'harm' should be restricted to physical harm,[81] and that damage to property should be restricted to 'destruction of property that threatens life or serious injury'.[82] The Attorney-General's Department when asked to respond on this matter commented only that 'A court would interpret "serious" in the context of this provision as meaning damage on a very substantial scale. It is very common for offences to include the word "serious" and for the court to interpret the term in the context of the relevant legislation';[83]

- the use of the word 'involving', rather than causing, such serious harm or damage. Victorian law lecturer Mr Joo-Cheong Tham argued that this phrase 'significantly loosens the nexus' between the person carrying out the act and the harm or damage that is caused, so that it is 'seriously arguable' that the definition would be satisfied where a person's act results in a third party inflicting the harm or damage;[84]

- the width of 'creating a serious risk to the health or safety of the public', which could arguably include industrial action by police officers, nurses or other emergency services personnel resulting in reduced essential services;[85] and

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77 ibid.

78 Justice Dowd, Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 4.

79 Law Council of Australia *Submission 251*, p. 34. The Law Institute of Victoria Young Lawyers' Section argued that the definition would fall 'unduly harshly on young people and innocent acts of civil disobedience' (*Submission 168*, p. 1).

80 Association of Criminal Defence Lawyers *Submission 173*, p.2.

81 NOWAR - Adelaide *Submission 159*, p.4.

82 Mr Phillip Boulton, Convenor, Association of Criminal Defence Lawyers, Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002, p. 233.

83 Attorney-General's Department *Submission 383*, p. 1.

84 *Submission 61*, p. 6. Similar concerns were expressed by Justice Elizabeth Evatt (*Submission 170*, p. 4).

85 Law Council of Australia *Submission 251*, pp. 35-36.

- the width of 'serious interference' or 'serious disruption' of electronic communications systems. It was argued that this could include flooding a system with emails as part of a protest;[86] air traffic controllers taking industrial action;[87] or the destruction of traffic lights.[88]

The proposed exemptions

3.64 The definition of 'terrorist act' in proposed section 100.1 specifies that it does not include:

- 'lawful advocacy, protest or dissent'; or
- 'industrial action'.

3.65 These exemptions also attracted much criticism during the inquiry. Many submissions noted that unlawful acts, such as property damage, obstructing police, unlawful assembly and offensive behaviour, frequently occurred in the course of protests or industrial action.[89] There was concern that what is intended to be industrial action could be labelled as political, and when any violence is involved it may mean that it ceases to be an industrial action.

3.66 Particular examples given in submissions and during public hearings included protests outside Parliament House resulting in damage to the building, or the recent protest at the detention centre in Woomera. For example, the Monash Student Association and Law Student Society noted that the unplanned dismantling of perimeter fencing by activists at Woomera could be construed as a 'terrorist act', since it could be described as serious damage to property and was done with the intention of advancing a political and ideological cause. Moreover, those who had acted in any organisational capacity, who had circulated information about the planned protest or who had been found in possession of items such as screwdrivers or bolt cutters, even though they had not used them, would potentially face penalties of life imprisonment.[90] When questioned by the Committee, the Attorney-General's Department noted that while such acts might satisfy the definition of 'serious' damage to property, all the circumstances of the offence, including the specific purpose of the legislation in combatting terrorism, would need to be considered.[91]

3.67 Questions were also asked about whether acts of civil disobedience would be caught, and whether the word 'lawful' was confined to advocacy or extended to 'protest and dissent'.

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86 Liberty Victoria *Submission 149*, p.2; Law Council of Australia *Submission 251*, p. 35; ACTU *Submission 147*, p.5.

87 Justice Dowd, Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 4.

88 NSW Bar Association *Submission 102*, p. 2.

89 For example, Mr Joo-Cheong Tham *Submission 61*, pp. 6-8.

90 *Submission 141*, pp. 6-7.

91 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, pp. 12-14, 19-20. See also *Submission 383A*, pp. 3-4, where the Attorney-General's Department referred to investigative practices and prosecution policy.

3.68 The Director-General of Security noted that the phrase 'lawful advocacy, protest or dissent' was a phrase used in the legislation governing ASIO's functions and that it was 'designed to limit, not expand' the ambit of that legislation.[92] In response to a question from the Committee, the Attorney-General's Department noted that the Office of Parliamentary Counsel had confirmed that the word 'lawful' was intended to qualify each of the words 'advocacy, protest and dissent', rather than being confined to 'advocacy'.[93]

3.69 Both the Attorney-General's Department[94] and the AFP[95] submitted that police and prosecuting authorities would not proceed against people with terrorism offences in such cases. AFP representatives referred to various safeguards in the process for charging and prosecuting offenders:

> In practice, police officers have a look at the offences that exist in legislation and then have to take additional steps, all of which involve safeguards — some of which are enshrined already in the criminal justice system and some of which are enshrined in policing practice. Once an officer forms a reasonable suspicion that an offence is being committed they have to exercise their discretion guided by the ultimate brief of evidence that will be scrutinised and adjudicated by the courts. They will also need to respect people's civil liberties and rights while interacting with them face-to-face and with regard to whatever they may subsequently follow up with that person. Policing practice is governed formally and informally —formally, by our commissioner's instructions and informally by being embedded within the police officer's training and professional development in terms of exercising their discretion.[96]

3.70 The Attorney-General's Department also argued that:

> Read literally and out of context, many statutes could be construed so as to create unintended consequences with the result that virtually all Australians would commit an offence every day ... [A] court would read

92 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 171, referring to the *Australian Security Intelligence Organisation Act 1979*, s. 15, which states that the Act 'shall not limit the right of person to engage in lawful advocacy, protest or dissent and that the exercise of that right shall not of itself be regarded as prejudicial to security'. The Director-General went on to say: '… theoretically, if you were to read our Act and if you were to take it literally, you could put up an argument that the Act would allow us to be targeting people who are engaged in lawful advocacy' (p. 172).

93 *Submission 383A*, p. 6.

94 *Submission 383A*, p. 4.

95 *Submission 189A*, p. 9; Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 193, where AFP representatives gave examples of protest activities, one of which resulted in substantial damage to a consulate but no institution of proceedings. The AFP noted that the demonstration, although involving 'an ethnic group committed to an ideological cause, was viewed as being at the outer limit of lawful advocacy or demonstration. It was not then, and would not now be, considered as a terrorist act. These sorts of demonstrations are clearly excluded [from] the definition.'

96 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, pp. 192-193.

> the counter-terrorism provisions as a whole in the context that they are provisions directed at terrorism, not minor instances of civil disorder.[97]

3.71 However, Justice Dowd on behalf of the International Commission of Jurists noted that the very existence of such offences created the potential for abuse:

> … once you give this power, you give the power to investigating policemen or policewomen to say, 'I can charge you with this.' It makes it very easy when you have alternative Commonwealth and State offences to say, 'We could charge you under the Terrorism Act,' and it becomes much easier for you to plead guilty to a street offence or a minor property offence under a state law because you have that sanction. Do not lightly give law enforcement agencies powers because, although we have a very good record in Australia with law enforcement agencies, available powers can be abused.[98]

3.72 Another key concern was the meaning of 'industrial action'. Submissions noted that the term was not defined in the Bill and argued that the definition in the *Workplace Relations Act 1996* would be considered highly influential in a court's interpretation of the term. Mr Joo-Cheong Tham argued that as the Federal Court had found that 'industrial action' in the *Workplace Relations Act 1996* excluded picketing, picketing might be excluded from the exemption in the Security Bill.[99] The ACTU[100] and Liberty Victoria[101] expressed similar concerns.

3.73 However, representatives of the Attorney-General's Department noted that the definition of industrial action in the *Workplace Relations Act 1996* was limited in order to protect the rights of those involved in picketing, because a court could make an order prohibiting industrial action in certain circumstances. In the current Bill, the context was different, 'and clearly industrial action is meant to have a more expansive meaning that would encompass actions like picketing'.[102]

3.74 During the public hearing, AFP representatives also emphasised that police would not use the new provisions 'for something that fell within the public order regime':

> … picketing is clearly a tool of industrial action ... It is to stop entry or egress from a work site or to stop access to materials coming in and out and so on. That is why people picket. When that sort of behaviour is apparent and it is causing disruption to people's lawful movement around a city, police have access to a range of legislative powers to remove people

97 *Submission 383A*, pp. 3-4.

98 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 9.

99 *Submission 61*, pp. 8-10; Legal and Constitutional Legislation Committee *Hansard*, 18 April 2002, pp. 116-117.

100 *Submission 147*, pp. 5-8.

101 *Submission 149*, p. 3.

102 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 204.

> who are picketing, to ensure that public access is available and so on. Those powers are available already to deal with that sort of activity.[103]

Committee conclusion

3.75 The Committee notes the significant concern expressed about the width of the definition of 'terrorist act' in proposed section 100.1.

3.76 The Committee considers that there is no compelling reason why Australian legislation should reach further than legislation enacted in the United Kingdom, the USA or Canada, or as proposed in New Zealand. The United Kingdom and the USA have experienced significantly higher levels of terrorist threat and, indeed, acts of terrorism than Australia has faced or is considered to be facing. While the Committee acknowledges the difficulties that have been experienced internationally in defining terrorism, all the definitions that have been drawn to the Committee's attention during this inquiry contain some element of intent to cause extreme fear to the public and/or coerce the government. The Committee considers that this element is at the very heart of the nature of terrorism.

3.77 The Committee is also mindful of the concerns about the potential width of other elements of the definition, in particular 'serious damage' and 'serious harm', and interference with electronic systems, as well as the lack of clarity in the proposed exemptions for 'lawful advocacy, protest or dissent' and 'industrial action'. The Committee considers that the inclusion of the necessary element of intimidation/coercion in the definition of 'terrorist act' would go a long way towards addressing the concerns it has heard that terrorist offences might otherwise be broad enough to capture those people who cause damage or commit other less serious offences as a consequence of protest, civil disobedience or industrial action.

3.78 Accordingly the Committee considers that the definition of ‘terrorist act’ should include reference to a design to influence government by undue intimidation or undue coercion, or to intimidate the public. The Committee notes that it is not clear that the term ‘government’ would necessarily include all elements of Australia’s system of government, including non-government members of Parliament, State and Territory governments and the judiciary. The Committee notes, for example, that the equivalent definition in the Canadian legislation refers to individuals, government and domestic and international organisations. The term ‘government’ should be clarified in any proposed amendments to the Bill.

Recommendation 2

The Committee recommends that the definition of 'terrorist act' in proposed section 100.1 in the Bill be amended to include a third element, namely that the action or threat of action is designed to influence government by undue intimidation or undue coercion, or to unduly intimidate the public or a section of the public.

103 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 196.

The new terrorist offences

3.79 The new offences, all of which are punishable by imprisonment for life, are:

- engaging in a terrorist act (proposed section 101.1);
- providing or receiving training for a terrorist act (proposed section 101.2);
- directing organisations concerned with a terrorist act (proposed section 101.3);
- possessing things connected with a terrorist act (proposed section 101.4);
- collecting documents likely to facilitate a terrorist act (proposed section 101.5); and
- acts in preparation for a terrorist act (proposed section 101.6).

3.80 Apart from the offence in proposed section 101.1 (engaging in a terrorist act), there is no need for a terrorist act to have actually been committed.

Absolute liability

3.81 In addition, the offences of providing or receiving training (proposed section 101.2), possessing things (proposed section 101.4) and collecting or making documents likely to facilitate terrorist acts (proposed section 101.5) contain an element of absolute liability. That means that the prosecution need not prove that the person knew or intended that the training, thing or document was connected with a terrorist act, and the defence of honest and reasonable mistake of fact is not available.[104] The legislation contains, however, a limited defence that applies where the person can prove that he or she was not reckless with respect to the connection with a terrorist act.[105]

3.82 The imposition of absolute liability in respect of certain elements of the offences caused significant concern in submissions and during the public hearings, particularly in light of the high penalties and the fact that no terrorist act need be committed for the offences in proposed sections 101.2, 101.4 and 101.5. Many submissions noted that absolute and strict liability offences have traditionally been limited to relatively minor or regulatory offences, such as parking or traffic offences.[106] Justice Dowd on behalf of the International Commission of Jurists noted:

> We in Australia have a system of law which obliges the prosecution, in almost all offences and in all serious offences, to prove all the elements of the offence and to negative self-defence and other defences. This [Bill]

104 *Criminal Code*, s. 6.2.

105 Proposed subsections 101.2(4), 101.4(4) and 101.5(4) respectively.

106 For example, the Human Rights Council *Submission 174*, p. 9; Law Council of Australia *Submission 251*, p. 36.

> obliges the person to go into evidence … That is not reasonable here, no matter how much we may be concerned with terrorist acts.[107]

3.83 The Scrutiny of Bills Committee also drew attention to these provisions on the grounds that they may be considered to trespass unduly on personal rights and liberties.[108]

3.84 The Law Council of Australia noted:

> … reversed onuses are potentially very oppressive, particularly where it is difficult to grasp what an ordinary person should do in the relevant circumstances in order to exhibit sufficient care to avoid imprisonment for life.[109]

3.85 Several organisations such as Amnesty International[110] and the Human Rights Council[111] argued that such provisions violate article 14(2) of the ICCPR and article 11 of the Universal Declaration on Human Rights, which provide that everyone charged with a criminal offence has a right to be presumed innocent until proved guilty.

3.86 The Association of Criminal Defence Lawyers also noted that the proposed offences in the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 require proof of intent to cause death or serious harm or extensive destruction to a place. Consequently two different standards of proof could apply to the same activity, depending on which Act was used.[112]

3.87 In relation to the proposed training offence, ACTU representative Mr Robert Durbridge told the Committee that the absolute liability element and the defence of recklessness were inappropriate. He gave as an example TAFE teachers who instruct mining personnel in the use of explosives:

> How do they know that any of the people that they have trained will use that knowledge in ways other than intended? They could be completely unaware that a trainee later intended to use that knowledge at some time in the future to blow up something in Australia or somewhere else in the world. They would have to prove that they were not reckless in not knowing that the training could be used or was being undertaken with a terrorist act in mind — or later formed — to avoid conviction and imprisonment for life … How do you show that you were not reckless in

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107 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 4. A similar view was expressed by the Law Council of Australia *Submission 251*, pp. 36-37.

108 Senate Standing Committee for the Scrutiny of Bills *Alert Digest No. 3 of 2002*, 20 March 2002, p. 51.

109 *Submission 251*, p. 36.

110 *Submission 169*, p.4.

111 *Submission 174*, pp. 4-5.

112 Mr Phillip Boulton, Convenor, Association of Criminal Defence Lawyers, Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002, p. 233.

> the provision of training? TAFE colleges do not conduct security checks on their students.…[113]

3.88 Similarly, the New South Wales Bar Association argued that in relation to providing training at a rifle range:

> There should be a requirement of some degree of actual knowledge of circumstances indicating connexion with a terrorist act before otherwise lawful and innocent training is so seriously criminalised.[114]

3.89 In response, the Attorney-General's Department stated that the question of whether the person providing training was reckless would be determined with regard to the facts known at the time he or she conducted the training. The Department asserted that it would not be necessary for the person to make inquiries or obtain additional information to confirm the students' bona fides.[115]

3.90 The Committee heard similar arguments that the offence in proposed section 101.4 of possessing a 'thing' (not defined in the Bill) that was connected with preparation for or assistance in a terrorist act was unacceptably broad. Mr Joo-Cheong Tham argued that this provision would unduly impact on businesses that sold items that could be used for terrorist acts. It would effectively require businesses to determine customers' use of the items sold if they were to avail themselves of the defence that they were not reckless.[116]

3.91 Similar arguments were also heard in relation to proposed section 101.5 which concerns collecting or making a 'document' connected with preparation for or assistance in a terrorist act. Oz Netlaw, the Internet law practice of the Communications Law Centre at the University of New South Wales, argued that the offence could apply to journalists and news organisations who receive information in the course of their investigations, or to people who merely download information from a website. The submission also argued that it was the use or disclosure of the documents, rather than their collection, that should attract fault, and that the onus of proof should in any case remain with the prosecution. [117]

3.92 In relation to this concern, the Law Council of Australia told the Committee:

> The absence of any requirement of some degree of actual knowledge of circumstances indicating connection with a terrorist act, or of an intention to assist in an act of terrorism is surely a most objectionable aspect of the proposed treatment of terrorist acts. Thus, s.101.4 would criminalise the possession of things connected with preparation for, the engagement of a person in, or assistance in a terrorist act, such as objects and documents, by persons such as scholars, researchers and journalists who have no intention

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113 Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 49. Similar concerns were expressed by the Australian Education Union *Submission 153*, p.4.

114 *Submission 102*, p. 2. The Rail, Tram and Bus Union also raised concern about this scenario (*Submission 158*, p.3).

115 *Submission 383A*, p. 8.

116 *Submission 61*, p. 14.

117 *Submission 139*, pp. 2-3.

> of assisting in a terrorist act and whose scholarship, research of journalism may in fact be in opposition to or intended to expose terrorist acts. The defence in s.101.4(4) would not save such scholars, researchers or journalists because that defence would apply only where such persons could prove on the balance of probabilities that they were not reckless with respect to the thing's connection with a terrorist act. Such persons would, notwithstanding the absence of any intention to assist in a terrorist act, be guilty of an offence and, potentially, liable to life imprisonment.[118]

3.93 However, the Attorney-General's Department pointed to the dangers of defining terrorist activity too narrowly:

> It is difficult to conceive of the exact nature of a terrorist attack before it has been completed. The unprecedented attacks of September 11 clearly demonstrated this. It is even more difficult to create a legislative scheme that effectively addresses the problem of terrorism and terrorist networks. If legislation is worded too narrowly, activity that is clearly terrorist in nature may be immune to prosecution and, worse, still, may not be affected by the measures aimed at preventing it.[119]

3.94 While acknowledging that the provisions 'depart from general practices', the Attorney-General's Department noted two examples of serious Commonwealth offences which contain elements of strict or absolute liability.[120] They are the offence of murder of United Nations or associated personnel[121] and the child sex tourism offence.[122] The Department concluded:

> All Government action requires a balance to be achieved between different interests. In this case, the balance is between the need to safeguard the security of all Australians, and the need to preserve individual liberty. The evil at which the proposed legislation is aimed justifies the balance that has been achieved.[123]

3.95 However, Justice Evatt told the Committee that the proposed offences were not sufficiently precise to satisfy fundamental criminal law principles:

> Being put in fear of prosecution will lead to many organisations and individuals not knowing whether they have committed an offence … [P]art of the rule of law [in a just society] is that people should know with certainty whether their acts are likely or not likely to be criminal. I defy anybody to know, if this bill were enacted, whether certain actions would be or would not be seen by the security forces or the Attorney-General as

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118 *Submission 251*, p.37.

119 *Submission 383A*, p. 5.

120 *Submission 383A*, p. 6.

121 *Criminal Code*, s. 71.2. Strict liability applies to the elements that (i) the victim is a 'UN or associated person' and (ii) that the victim is engaged in a UN operation that is not a UN enforcement action.

122 *Crimes Act 1914*, s. 50BA. Absolute liability applies to the elements that (i) the conduct occurs outside Australia, and (ii) that the victim is under 16 years of age.

123 *Submission 383A*, p. 7.

> contrary to law. It will never be known whether they are contrary to law until it has been through the courts. It is very risky stuff, this.[124]

Committee conclusion

3.96 The Committee considers that the significant concerns expressed in many submissions and during public hearings about the very broad nature of the proposed terrorist offences and the reversal of the onus of proof for the 'ancillary offences' connected with terrorist acts must be addressed.

3.97 The concerns are even more pressing given the proposed maximum penalties of life imprisonment. In Australia's system of law, it is not the practice to create strict or absolute liability offences for other than regulatory or minor offences. Such a departure from fundamental principles of criminal law needs to be justified. While the Committee acknowledges that the nature of terrorist offences is very serious and that the safety and interests of the Australian population must be protected, the rights and liberties of individuals, including those charged with criminal offences, must also be safeguarded. The fact that the offences are very broadly defined and could potentially cover a wide range of activities and items make this even more compelling.

3.98 The Committee notes advice from the Attorney-General's Department that the approach in the Security Bill is consistent with that in the United Kingdom *Terrorism Act 2000*.[125] However, the Committee also notes that the UK legislation contains a narrower definition of 'terrorist act', as outlined in paragraph 3.60 above. In addition, the Committee notes that legislation in both the USA and Canada requires intention that the act causes serious harm or other serious consequences, rather than the looser connection of 'involving' serious harm that the Security Bill requires (discussed in paragraph 3.63 above). Thus a more onerous burden of proof would appear to be required in those jurisdictions than will apply under the current provisions.

3.99 The Committee considers that the fact that the Scrutiny of Bills Committee drew attention to the danger that these provisions could be considered to trespass unduly on personal rights and liberties emphasises the seriousness of this issue. The Committee notes also that intent to cause death or serious harm or extensive destruction to a place must be proven in the proposed offences in the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (discussed further in Chapter 4). Consequently the burden of proof which the prosecution must discharge would differ markedly if a person were charged with the same offence under the two different sets of provisions.

3.100 Accordingly the Committee concludes that the Bill should be amended to remove the absolute liability elements in proposed sections 101.2(2), 101.4(2) and 101.5(2). The Committee notes that there may be concerns raised by law enforcement

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124 Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002, p. 228. Justice Evatt also commented in her written submission that vague or imprecise terms in a criminal offence could infringe the protection against retrospectivity in the ICCPR (art 15). The Human Rights Council of Australia expressed similar concerns about the lack of certainty in the proposed offences (*Submission 174,* p.8).

125 *Submission 383*, p. 6.

agencies about the difficulty of proving that a defendant who was peripherally involved in preparation for or the commission of a terrorist act intended that this should be the result. To address those concerns, the Committee considers that recklessness as to that result should suffice, but that the onus of proof should remain with the prosecution. The Bill should provide that the offences are committed if the person knew or was reckless as to the required element in 101.2(1)(b), 101.4(1)(b) and 101.5(1)(b).

Recommendation 3

The Committee recommends that:

(i) the Bill be amended to remove proposed subsections 101.2(2), 101.4(2) and 101.5(2), which impose absolute liability in respect of certain elements of those offences; and

(ii) the offences in proposed subsections 101.2(1), 101.4(1) and 101.5(1) be amended to provide that they are committed if the person knew or was reckless as to the required element in 101.2(1)(b), 101.4(1)(b) and 101.5(1)(b).

The Attorney-General's proposed proscription power

3.101 The provisions of the Bill dealing with the Attorney-General's proposed proscription powers raised the most concern in submissions and during public hearings.[126] The overwhelming view was that the provisions as currently drafted are inappropriate and should be rejected. The Committee recognises that the proposal to proscribe organisations is a very serious one and has considered the circumstances and elements of the process in detail.

3.102 The remainder of this chapter discusses:

- the provisions;
- constitutional issues;
- the grounds for proscription;
- the delegation of power;
- revocation procedures;
- review procedures;
- alternatives to the current model; and

126 For example, Australian Council for Civil Liberties *Submission 187*, p.3; Dr Jenny Hocking *Submission 140*; Law Council of Australia *Submission 251*; ACTU *Submission 147*, p. 10; Association of Criminal Defence Lawyers *Submission 173*, p.3; People Against Repressive Legislation *Submission 10*, p.1; Women's International League for Peace and Freedom (Australia) *Submission 15*, p.2; Federation of Community Legal Centres (Vic) Inc *Submission 97A*; Liberty Victoria *Submission 149A;* Uniting Church in Australia National Assembly, Social Responsibility and Justice *Submission 150*, p.1; Fitzroy Legal Service Inc *Submission 151*, National Association of Community Legal Centres *Submission 161*, p.2; 3CR Community Radio *Submission 166*, p. 2; Ms Joan Coxsedge *Submission 167*, p.4; Law Institute of Victoria - Young Lawyers Section *Submission 168*, p.4; People for Nuclear Disarmament (NSW) *Submission 178*, p.1; Progressive Labour Party *Submission 352*, p.3.

- the Committee's conclusion.

The provisions

3.103 Proposed section 102.2 allows the Attorney-General to declare an organisation to be a proscribed organisation if he or she is satisfied on reasonable grounds that:

- the organisation, or a member of the organisation, has committed or is committing a terrorism offence, whether or not the organisation or member has been charged with, or convicted of, the offence;

- the declaration is reasonably appropriate to give effect to a decision of the UN Security Council that the organisation is an international terrorist organisation; or

- the organisation has endangered or is likely to endanger the security or integrity of the Commonwealth or another country.

3.104 A submission from the Law Council of Australia typified the concerns of many organisations and individuals in outlining its reasons for opposing the proposed proscription powers. The Council called the provisions:

> … a serious departure from the principle of proportionality, unnecessary in a democratic society, subject to arbitrary application, and contrary to a raft of international human rights standards including the right to personal liberty, the right to a fair trial, protection against arbitrary interference with privacy, freedom of expression, freedom of association and rights of participation. Important principles of the rule of law are infringed, including the need for effective judicial remedies when a person breaches the law, and the requirement that criminal offences for which liberty can be deprived after conviction, be clearly defined so that citizens can know permissible limits of activity.[127]

3.105 Mr Cameron Murphy, President of the NSW Council for Civil Liberties, argued:

> It allows the government to outlaw virtually any group — any church, any political party or any human rights activist ... It destroys the fundamental principles of our democracy in order to suppress and prevent terrorism … Many people around the world who were once labelled as terrorists are now regarded as international leaders or even statesmen. People such as Gandhi and Nelson Mandela have been labelled as terrorists in the past. Hindsight shows us that these people are not terrorists but freedom fighters. Even today, Aung San Suu Kyi, Xanana Gusmao, or the Falun Gong movement — who have groups in Australia that support and assist them — could be regarded as terrorists under this legislation.
>
> There is a belief that this power is safe because none of us would use it to outlaw the Catholic Church or the Australian Labor Party or some other group that might not be supporting the government of the day. But none of

127 *Submission 251*, p. 50.

> us can predict who will be in power or when this legislation will be used, and that is the danger of putting this sort of legislation on the statute books.[128]

3.106 Dr Jenny Hocking emphasised similar concerns, arguing that:

> [T]here can be no adequate safeguards [against] the dangers raised [by] the workings of such a Bill, for the danger is the Bill itself. It is subversive of the rule of law in its failure to allow for a trial in this aspect, it breaches the notion of equality before the law in its creation of groups for which the usual judicial process does not apply and it breaches absolutely the separation of powers in even allowing for such a use of Executive power.[129]

Constitutional issues

3.107 Professor Williams raised the 'disturbing similarity' between the Security Bill and the Communist Party legislation that the High Court found invalid in the 1950s.[130]

3.108 The *Communist Party Dissolution Act 1950* granted the Governor-General an unfettered and unreviewable power to declare an organisation to be unlawful or a person to be a communist, relying on the defence power. By a 6:1 margin the High Court found the Act constitutionally invalid, holding that it was beyond the Parliament's power to suppress an organisation under its defence power on the opinion of the Governor-General in a time of relative peace.[131]

3.109 Professor Williams argued that the Security Bill might similarly be struck down by the High Court if passed in its current form.[132] While the Bill contains some provision for review of the Attorney-General's decisions, he noted that, while the High Court has not yet determined a case on an implied freedom of association, it was 'clearly arguable' that the High Court would find such a freedom and that the proscription power might infringe that freedom.[133] He noted that the Security Bill:

> … is different in some critical respects, but still there are definite constitutional issues there. But, apart from those constitutional issues, you would have to say we ought to have learnt our lesson from that legislation:

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128 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 32. Dr Jenny Hocking (*Submission 140*, p. 3) also noted that '[A]n imprecise and inappropriate definition can be applied politically and can readily degenerate into a means of entrenching existing political order rather than combatting serious crimes. That Nelson Mandela subsequently became President of the very country which had imprisoned him for so long, reveals if nothing else the essential contingency of the very notion of "terrorism" and the dangers implicit in the criminalisation of organised political activity around a presumed connection to "terrorism".'

129 *Submission 140,* p.7.

130 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 42.

131 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

132 Mr Julian Burnside QC from Liberty Victoria (Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 84) and the Law Council of Australia (*Submission 251*, pp. 46-48) also considered that there was a risk as to whether the Security Bill might be unconstitutional.

133 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 41.

> do not vest powers of this kind in the executive and do not vest powers of this kind where there is not adequate review. As the High Court itself reflected in that case, the dangers to our civil liberties do not just extend from at that point communism or at this point terrorism; they extend from the fact that we might unbalance our democracy by giving too much power to any arm of government.[134]

The grounds for proscription

3.110 Several submissions and witnesses to the inquiry, including the NSW Council for Civil Liberties, noted with concern that it is sufficient for a member to state that he or she is acting on behalf of the organisation, for the organisation to be proscribed, and that more extreme or 'fringe' members would therefore pose a real danger to organisations.[135] Others argued that as criminal acts were committed by individuals, those individuals should be punished under existing criminal laws, rather than enacting laws to allow organisations to be banned.[136]

3.111 A particular concern was the width of the power in relation to a threat to 'security and integrity' of Australian or any other country. The meaning of 'integrity' was queried, given that the term is not defined in the Bill. For example, Professor Williams told the Committee:

> … 'integrity' has no fixed meaning that is clearly understood in the popular or legal community. We have searched through cases to find out what 'integrity' might mean and we have found nothing which would suggest a clear meaning of that word.
>
> This means we have a word which is malleable in the sense that an Attorney can use it to mean what he wants it to mean, and there is nothing in the law or otherwise that might be used to suggest otherwise. It is a word that clearly on the current meaning — an unbounded, open meaning — would extend to organisations such as freedom fighters using violence and whether or not they should be proscribed, and also to organisations that might seek to challenge the territorial integrity of nations by peaceful means, organisations such as those supporting independence for Tibet or organisations perhaps supporting independence for East Timor in prior periods. This legislation, in extending to those organisations, is clearly far too broad. Australians do not regard those organisations as terrorist organisations. Those organisations ought not to be within the ambit of this power, and it is disturbing to see how broad it might go.[137]

3.112 The ACTU argued that if such a provision had been law in the past in Australia, membership of organisations that supported the East Timor independence

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134 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 42.

135 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 33.

136 Ms Sharan Burrow, President, ACTU, Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, pp. 52, 54; Mr Julian Burnside QC, Committee Member, Liberty Victoria, Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 83.

137 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 42.

movement or the anti-apartheid movement in South Africa could have been caught.[138] Similarly, the New South Wales Bar Association stated that the power could apply to:

> (p)eople banding together, raising money, publishing arguments, encouraging otherwise lawful protests, to secure the downfall of a tyranny elsewhere …[139]

3.113 Ms Eva Cox pointed to the difficulties international aid organisations might face, querying what would have happened if the proposed laws had been in place when Care Australia workers in the former Yugoslavia were imprisoned some years ago:

> What would have happened if the Yugoslav government had requested that the Australian government declare Care a terrorist organisation on the grounds that they had arrested some members of Care who had come to their country's notice for what they deemed to be terrorist-type activities? … it sets Australia up in a very difficult position.[140]

3.114 Ms Cox also argued that groups in Australia 'which are probably perfectly innocent but noisy', could be deemed by certain countries to be against the government and as threats to their security and integrity. She gave as an example the YWCA whose projects supported women in other countries in relation to such issues as genital mutilation. She expressed concern that such projects might be closed down because of the organisation's fear of being seen to be opposing a particular government or undermining the security of the country in some way, thus leaving the organisation or its staff vulnerable.[141]

3.115 During public hearings, the Attorney-General's Department told the Committee that the phrase 'integrity of the Commonwealth' was used in various international conventions, and would be interpreted as meaning 'territorial integrity' of the Commonwealth.[142] However, there is no reference to this in the Explanatory Memorandum. The Committee raised with the Department the concerns expressed by witnesses and in submissions about support by Australians for pro-independence or other similar movements in other countries, but was not persuaded by the Department's response. The Committee considers that any review of the proscription provisions must ensure that such organisations would not be caught by the provisions.

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138 *Submission 147*, p. 10. The Uniting Church in Australia (Social Responsibility and Justice) also argued that the legislation could be misused to proscribe non-violent political independence movements in other countries, and those Australians who offer non-violent support (*Submission 150*, p.1).

139 *Submission 102*, p. 3.

140 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 24.

141 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 27.

142 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 211. In *Submission 383*, p. 8, the Attorney-General's Department referred to the Charter of the United Nations (Art. 1), the Security Treaty between Australia, New Zealand and the United States (Art. 3), and the preambles to the International Convention on the Suppression of the Financing of Terrorism, the International Convention for the Suppression of Terrorist Bombings and the Rome Statute of the International Criminal Court. The submission noted: 'By referring to "integrity" as well as "security", the legislation ensures that organisations whose actions would impair the functioning of the Australian nation over its full territorial area are encompassed' (p.5).

3.116 Professor Williams opposed making a decision by the UN Security Council sufficient grounds for proscription:

> You are setting up quite severe penalties based not upon ascertainable or knowable criteria but upon a decision of that council that might have been made that day or the day before. It is very hard for anyone to take account of what that council might do. When you think of current conflicts in the Middle East and other issues which can change so rapidly—today's freedom fighter can be tomorrow's terrorist—that is quite dangerous in this context.[143]

3.117 Professor Williams argued that organisations should only be targeted:

> … because of their relationship to clear, identified criteria that target terrorist acts. So, if an organisation bombs or does something else, that is why you target them; you do not do so because of some other more convoluted process. In a sense, what you have here is that you become proscribed because of a political decision made by the United Nations.[144]

Delegation of power

3.118 Justice Dowd on behalf of the International Commission of Jurists raised concern about the fact that the Attorney-General's power could be delegated to any minister (proposed section 102.2(4) and 102.3(5)). He argued:

> The most junior minister in the government may in fact be the person with a power to delegate to deal with proscribed organisations ... That power should be subject to review, not just disallowance by a parliamentary committee controlled by the government. It should be reviewable as a matter of law by the courts.[145]

3.119 Similar concerns about the delegation of the Attorney-General's power were expressed by the Australian Catholic Social Justice Council.[146]

Revocation

3.120 Amnesty International raised concern that the Bill does not spell out procedures for having a proscription revoked, and stated:

> The legislation should make provision for the organisation to apply directly to the Attorney-General to have their status reviewed. Further the legislation should allow the proscribed organisation to make

143 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 45.

144 ibid.

145 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 5.

146 Ms Sandra Cornish, National Executive Officer, Australian Catholic Social Justice Council, Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002, p. 220.

> representations as to their status during a review process … a failure to provide this may breach the principles of natural justice.[147]

3.121 The Committee notes that the UK legislation includes specific provisions providing for an application by a proscribed organisation or any person affected by the proscription to the Secretary of State, and establishes a Proscribed Organisations Appeal Commission to hear appeals against a refusal to deproscribe an organisation.[148]

3.122 Amnesty International[149] and Liberty Victoria[150] also argued that compensation should be available where an organisation is wrongly proscribed and suffers consequent damage, on the basis that such provision is consistent with the principles of natural justice.

The new proscription offences

3.123 Many submissions expressed concern about the width of the new offences connected with the activities of proscribed organisations. Those concerns are discussed below.

The new offences

3.124 A wide range of new offences connected with the activities of proscribed organisations is created under proposed section 102.4:

- directing the activities of the organisation;
- directly or indirectly receiving funds from or making funds available to the organisation;
- being a member of the organisation;
- providing training to or training with the organisation; or
- assisting the organisation.

3.125 The offences are punishable by imprisonment for a maximum of 25 years.

3.126 Strict liability applies to the element of the offence that the organisation is a proscribed organisation (proposed subsection 102.4(2)). In other words, the prosecution need not show that the defendant knew or was reckless as to the fact that

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147 *Submission 169*, p. 12. Amnesty International also argued that the Attorney-General should be obliged to inform the organisation of the proposed declaration, giving the organisation an opportunity to be heard prior to that action being taken (p. 11).

148 *Terrorism Act 2000* (UK), Part II. This point was raised in evidence by Ms Nicole Bieske from Amnesty International, Legal and Constitutional Legislation Committee *Hansard*, 18 April 2002, p. 114.

149 *Submission 169,* p. 12.

150 *Submission 149*, p. 4.

the organisation was proscribed. Instead, the defendant must prove that he or she did not know and was not reckless as to whether:

- the organisation or one of its members was committing a terrorist offence;
- the UN Security Council had decided that the organisation was a terrorist organisation and that decision was in force; or
- the organisation had endangered, or was likely to endanger, the security or integrity of Australia or any country (proposed subsection 102.4(3)).

3.127 Strict liability offences differ from absolute liability offences in that the defence of honest and reasonable mistake of fact is available for strict liability offences but is not available for absolute liability offences.[151]

3.128 It is an additional defence to a prosecution for membership if the defendant proves that he or she took all reasonable steps to cease to be a member 'as soon as practicable' after the organisation was proscribed (proposed subsection 102.4(4)).

3.129 The Attorney-General explained during the Second Reading Speech that:

> Placing the onus on the defendant is justified by the need for strong measures to combat organisations of this kind, and the fact that a declaration that an organisation is a proscribed organisation will not be made lightly.[152]

Membership and 'informal' membership

3.130 A member of an organisation is defined to mean a person who is an 'informal member'; a person who has 'taken steps to become a member'; and a director or officer of the body corporate (proposed section 102.1). 'Informal member' is not further defined.

3.131 Several submissions and witnesses referred to concerns about the width of this definition, particularly in light of the strict liability that applies to the element that an organisation is proscribed. Ms Eva Cox noted:

> You can be declared a member of an organisation where you have done no more than having been rung up and then making a donation, and your name then appears on some list somewhere, particularly these days when you seem to get onto email lists with incredible ease. Given the fact that one could easily offer donations or —as someone said earlier — you have gone to a concert in support of Palestinian refugees or to a fundraiser for

151 *Criminal Code*, s. 6.1. This means that a person is not criminally responsible if he or she considered whether certain facts existed and was under a mistaken but reasonable belief about those facts, and had those facts existed, the conduct would not have constituted an offence (s. 9.2).

152 House of Representatives *Hansard*, Second Reading Speech, *Security Legislation Amendment (Terrorism) Bill 2002,* 12 March 2002, p. 1042.

> some particular group, you may well find that you are suddenly part of a proscribed organisation.[153]

3.132 The Law Council of Australia noted that the provisions 'would potentially render persons only remotely connected with an organisation' liable to imprisonment for up to 25 years, and that:

> The more remote a person is from a proscribed organisation and its activities, the more difficult it will be to discharge the onus of disproving recklessness.[154]

3.133 Dr Hocking asked on what basis it would be alleged that a person was an informal member and who would make this claim:

> The Communist Party Dissolution Act notion of affiliation included people who 'shared policy concerns' with that proscribed organisation, who attended meetings or who are claimed by others 'to have been associated with'. So, clearly it seems to me, it is one of the areas where both an open-ended aspect comes into the bill and where an element of arbitrary decision making can come in through the proscription power.[155]

3.134 However, the Attorney-General's Department explained that the rationale for the definition was to ensure that a person could not evade liability by a technical argument about their lack of formal membership status and to ensure the provisions could not be avoided by a terrorist group that avoids a formal membership structure.[156]

3.135 On another point, Justice Dowd criticised as 'absurd' the defence in proposed subsection 102.4(4):

> … all the defendant has to do is prove that he got out as soon as he knew. So if there is a bomb and the person leaves the organisation after the bombing — files his resignation the next day — he does not commit an offence, which is absurd.[157]

'Assisting' a proscribed organisation

3.136 The width of this term also attracted criticism. Mr Joo-Cheong Tham pointed out that this could include those who provide legal advice and representation to organisations that have been proscribed and seek to challenge that proscription.[158] In response, representatives from the Attorney-General's Department noted that because the intention was clear that a declaration of proscription could be subject to judicial

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153 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 28.

154 *Submission 251*, p. 48.

155 Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 72.

156 *Submission 383*, p. 29.

157 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 5.

158 *Submission 61*, p. 21. This concern was echoed by Justice Elizabeth Evatt (*Submission 170*, p.3).

review, there would be a 'good argument' that the provision could not have been intended to include legal advice and representation.[159]

3.137 The Committee also asked the Attorney-General's Department why the offence could not be limited to the more specific definition adopted in the USA legislation, namely, providing 'material support or resources'. The Department responded that the US definition, which lists specific examples such as the provision of financial services, expert advice, safehouses, false documentation or identification, transport and personnel, 'creates a risk that some types of support may not be covered'.[160]

Review of the Attorney-General's decision

3.138 The Explanatory Memorandum states that the lawfulness of the Attorney-General's decision making process and reasoning is subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act),[161] although there is no mention of this in the Bill.[162]

3.139 Many submissions criticised the adequacy of such a review on several grounds.[163] First, such a review is not a review of the merits of the decision. Second, review under the ADJR Act is only available on narrow grounds. Section 5 of the ADJR Act provides that a person who is aggrieved by a decision may apply for an order for review in respect of nominated grounds, including: that a breach of the rules of natural justice occurred; that procedures required by law to be observed were not observed; that the decision was not authorised by the relevant legislation; that the making of the decision was an improper exercise of power; that the decision involved an error of law or was induced or affected by fraud; or that there was no evidence to justify the making of the decision. Third, it was queried how meaningful a review could be where the basis for the Attorney-General's decision was national security considerations or highly political matters, as courts have traditionally been reluctant to review such matters.

3.140 During public hearings Professor Williams told the Committee:

> … where a decision is made where reasons do not need to be given, where someone can be proscribed under any one of four criteria, the onus resting upon the organisation to disprove that the decision was properly made is too high a burden. It is very hard to ever marshal evidence to show that there were not adequate national security grounds for making such a decision. It is stacked against the organisation and against the courts in such a way that there is unlikely to be adequate review.

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159 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 19.

160 *Submission 383*, p. 13.

161 Security Legislation Amendment (Terrorism) Bill 2002 *Explanatory Memorandum*, p. 16.

162 The Attorney-General's Department discussed the application of the provisions of the ADJR Act in *Submission 383*, pp. 11-12.

163 See, for example, Justice Dowd, Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 7; Law Council of Australia *Submission 251*, pp. 45-46; ACTU, Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 49.

> … even if you overcome the national security problem, even if you overcome the evidence problem, there is simply no scope under the Administrative Decisions (Judicial Review) Act for any review of the merits of the decision. There are very narrow, well-tailored grounds for review that relate to the legalities of the decision but they do not relate to the merits of the decision. So, indeed, the Attorney could make a decision that might be wrong on the merits but there will not be any review of that ... I think what that means is that, where we have a decision where the power is vested solely in a member of the executive, without any meaningful possibility of review, we simply cannot rely upon retrospective judicial review to cure this decision making process of its obvious problems. Not only would it take a lot of time but the likelihood is that an organisation would be damned by the process by the time the courts could look at it.[164]

3.141 Professor Williams also argued that a 'serious limitation' in the scope of the proposed review was that :

> … even though it is possible to ask whether the Act itself is constitutionally valid by applying a proportionality text, no such test would be applicable in reviewing decisions actually made under the Act. In other words, it could not be argued that a decision was wrongly made because it was not 'reasonably appropriate and adapted' to the relevant purpose or object.[165]

3.142 Submissions from Professor Kinley[166] and the Law Council of Australia[167] supported those concerns.

Alternatives to the current model

3.143 During the inquiry, various alternatives to the proscription provisions were suggested. They were:

- determination by the courts, possibly by use of the existing unlawful association provisions in the *Crimes Act 1914*;
- review of the merits of the Attorney-General's decision by the courts; or
- parliamentary involvement, either by disallowance of the Attorney-General's declarations or by determining proscription itself.

Determination by the courts

3.144 Professor Williams suggested that a preferable approach would be determination by the courts of whether an organisation should be proscribed, because of his belief that no form of subsequent judicial review could ever be effective in this context:

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164 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 42.

165 *Submission 8*, p.3.

166 *Submission 136*, p. 3.

167 *Submission 251*, p. 46.

> Any form of independent involvement must be at the decision making stage because, once an Attorney makes a decision on national security or other grounds, a court simply is not well equipped to review such a decision, even if you gave it the power to do so on the merits. That means that, if you want a power to proscribe organisations, ideally it would work in such a way that the decision would be made only by an independent and open tribunal—or perhaps in camera, in very limited circumstances. It would be a tribunal that might be required to exercise a decision at extremely short notice, and courts have often proved able to do that.[168]

3.145 The Association of Criminal Defence Lawyers also supported a full court hearing to determine proscription, giving affected parties the opportunity to be heard.[169]

3.146 A precedent for declaration of proscription of 'unlawful organisations' by the courts currently exists under Part IIA of the *Crimes Act 1914*. Those provisions apply to bodies which advocate the overthrow of the Commonwealth Constitution or the government of any country, or the destruction of Commonwealth property, or the carrying out of a seditious intention.[170]

3.147 The provisions specify that:

- the Attorney-General must apply to the Federal Court for an order to show cause why the organisation should not be declared to be an unlawful association;
- any officer or member of the body may appear on behalf of the body;
- if the court is not satisfied of cause to the contrary, it may declare the body to be an unlawful association; and
- any interested person may apply to the Federal Court within 14 days to have the order set aside, with such application to be heard by the Full Court.[171]

3.148 Some witnesses queried why the existing provisions, which at least provide for judicial determination, could not be used. For example, Professor Williams told the Committee that he supported this model on the basis that there would be

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168 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 43.

169 *Submission 173*, p.3. The ACTU, while not supporting proscription of organisations, argued that if it were introduced, the matter should be decided by a court (Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p. 49).

170 *Crimes Act 1914*, s. 30A. The Committee notes that the Gibbs Committee's review of federal criminal law recommended the repeal of the unlawful association provisions on the basis that 'activities at which these provisions are aimed can best be dealt with by existing laws creating such offences as murder, assault, abduction, damage to property and conspiracy' (Attorney-General 's Department, Review of Commonwealth Criminal Law *Fifth Interim Report*, AGPS, 1991, p. 314).

171 *Crimes Act 1914*, s. 30AA. The Attorney-General is also empowered to require a person to answer questions or furnish information relating to the financial records of the association (s. 30AB).

'community confidence in the process' and issues concerning the separation of powers would be avoided.[172]

3.149 The Attorney-General's Department commented that as far as they were aware, there had been no prosecutions under the unlawful association provisions. The Department also noted that the maximum penalties for the relevant offences under Part IIA, ranging from six months to two years, were 'clearly insufficient' for acts of terrorism.[173]

Merits of the decision reviewable by the courts

3.150 Another option suggested by Amnesty International was that proscribed organisations should be entitled to appeal against a proscription decision and to have an external review of the merits of the Attorney-General's decision.[174]

Parliamentary involvement

3.151 A further option that was explored at public hearings was the option of parliamentary review of Attorney-General's decision through disallowance.

3.152 The Committee notes that the Scrutiny of Bills Committee drew attention to the exercise of the proscription powers as 'being more of a legislative function than an administrative one' and queried why the function should not be subject to Parliamentary scrutiny.[175]

3.153 Justice Dowd went even further in arguing that proscription of an organisation should be a decision by Parliament:

> Let the parliament go over the whole issue and say why or why not. Let the people's parliament decide and not, in effect, an official in the Attorney-General's Department with the approval of the Attorney-General. Remember: governments are very quick to come to Australia to get their enemies in their own countries proscribed …Those things will happen very quickly and are going to be very difficult with the comity between nations.[176]

3.154 A final alternative was to have a sunset clause on proscription of any organisation. Ms Eva Cox suggested that proscription should have an initial period of 30 days and the proscription should then be reviewed.[177]

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172 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 43. The Law Council of Australia expressed similar views in *Submission 251*, p. 45.

173 *Submission 383A*, pp. 3, 9.

174 *Submission 169*, p. 12.

175 Senate Standing Committee for the Scrutiny of Bills *Alert Digest No. 3 of 2002*, 20 March 2002, p. 51.

176 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 7.

177 Legal and Constitutional Legislation Committee *Hansard*, 8 April 2002, p. 25.

Committee conclusion

3.155 The Attorney-General's proposed proscription power in the Security Bill was clearly one of the most significant issues of concern during this inquiry and aroused the most vehement opposition.

3.156 The Committee is particularly mindful of the history of proscription in Australia. Based on the submissions made to and the evidence received by the Committee, the Committee believes that the proposed provisions are not acceptable to a large proportion of the Australian community and contain significant omissions. In particular:

- the broad discretion given to a member of the Executive to proscribe organisations is inappropriate, particularly by reference to a perceived threat to the 'integrity' of any country and in light of the fact that this power may be delegated by the Attorney-General to any other minister;
- the decisions on proscription are effectively unreviewable, because of the limited scope of the available review under the ADJR Act and the traditional reluctance of the courts to examine issues relating to national security;
- although the Bill provides for revocation, it contains no procedures under which a proscribed organisation may apply for consideration of that option; and
- the proposed offences in relation to proscribed organisations are excessively broad, particularly in relation to the offence of 'assisting' such an organisation and in light of the strict liability element.

3.157 During the inquiry, while many submissions opposed the proscription powers completely, the Committee heard various suggestions as to how the provisions might be improved if some means of declaring organisations to be 'terrorist' were to be included in the legislation. These suggestions included allowing the courts to conduct a review of the merits of the Attorney-General's decision; making use of the existing unlawful association provisions under the *Crimes Act 1914*; and giving the Parliament power to decide these matters or at the very least to disallow the Attorney-General's declarations.

3.158 The Committee recommends that the proscription provisions in proposed Division 102 should not be enacted. The Committee urges the Attorney-General to reconsider the proposed proscription powers and to develop a procedure which:

- does not vest a broad and effectively unreviewable discretion in a member of the Executive;
- restricts the ground under which an organisation may be proscribed if it has endangered or is likely to endanger the 'security or integrity' of the Commonwealth or any country, by defining 'integrity' as meaning 'territorial integrity';
- provides detailed procedures for revocation, including giving the right of a proscribed organisation to apply for review of that decision;
- more narrowly defines the proposed offences in relation to proscribed organisations, particularly in relation to the offence of 'assisting' such an organisation and the broad notion of 'membership'; and

- does not create offences with elements of strict liability, given the very high proposed penalties.

Recommendation 4

The Committee recommends:

(i) that proposed Division 102 in the Bill in relation to the proscription of organisations with a terrorist connection not be agreed to; and

(ii) that the Attorney-General review the proscription provisions with a view to developing a statutory procedure which:

- **does not vest a broad and effectively unreviewable discretion in a member of the Executive;**
- **restricts the proposed ground under which an organisation may be proscribed if it has endangered or is likely to endanger the 'security or integrity' of the Commonwealth or any country, by defining 'integrity' as meaning 'territorial integrity';**
- **provides detailed procedures for revocation, including giving a proscribed organisation the right to apply for review of that decision;**
- **provides for adequate judicial review of the grounds for declarations of proscription;**
- **more appropriately identifies and defines the proposed offences in relation to proscribed organisations, particularly in relation to the offence of 'assisting' such an organisation; and**
- **does not create offences with elements of strict liability, given the very high proposed penalties.**

CHAPTER 4

OTHER BILLS

Introduction

4.1 In this chapter, the Committee examines the remaining four Bills in the Security Legislation package that was referred by the Senate, namely:

- the Telecommunications Interception Legislation Amendment Bill 2002;
- the Suppression of the Financing of Terrorism Bill 2002;
- the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; and
- the Border Security Legislation Amendment Bill 2002.

4.2 The Committee notes that the definition of 'terrorist act' in the Telecommunications Interception Legislation Amendment Bill 2002 and the Border Security Legislation Amendment Bill 2002 is the same as that in the Security Bill. The Committee has addressed this issue in Chapter 3 and has recommended that the definitions in the other two Bills be amended in the same way.

Telecommunications Interception Legislation Amendment Bill 2002

4.3 Evidence during the inquiry indicated that there were two main issues relating to the Telecommunications Interception Legislation Amendment Bill 2002 (TI Bill). These are:

- the reduction in privacy protection of communications by way of e-mail and short message services (SMS); and

- whether stored communications, such as e-mails and SMS, can be accessed by law enforcement officers under a search warrant on the premises of an Internet Service Provider (ISP) or whether an interception warrant is required.

4.4 In his second reading speech, the Attorney-General stated that the TI Bill addresses the need for the use of interception by law enforcement agencies investigating terrorism, serious arson and child pornography offences.

4.5 The Attorney further noted that the proposed amendments clarify the application of the act to modern means of telecommunication, such as e-mail services, SMS messaging and voicemail services.[1]

4.6 The Explanatory Memorandum states that the proposed amendments to section 6 of the *Telecommunications (Interception) Act 1979* (Interception Act) are intended to legislatively clarify the application of the Interception Act to modern means of

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1 House of Representatives *Hansard*, Second Reading Speech, *Telecommunications Interception Legislation Amendment Bill 2002,* 12 March 2002, p.1

telecommunications, specifically those means of telecommunication in which there may be a delay between the initiation of the communication and its ultimate receipt by the intended recipient.[2]

4.7 The Explanatory Memorandum goes on to state that the proposed amendment to section 6 of the Interception Act makes specific provision for the application of the definition of interception to delayed access message services. The amendments have the effect of providing that a stored communication is taken to be no longer passing over the telecommunications system when it can be accessed in the way set out in proposed paragraph 6(4)(c). The effect of the amendments is to exclude such access from the scope of interception. This means that a telecommunication interception warrant will not be required to access the communication so stored, but rather another applicable form of lawful access, such as a search warrant or seizure order would be appropriate.[3]

4.8 Oz Netlaw considered that it was unclear from the definition of 'stored communications' in proposed subsection 6(4) of the Interception Act whether it is intended that access to communications at the premises of Internet Service Providers (ISP) can be accessed by means other than a telecommunications interception warrant. They said:

> The Attorney-General's second reading speech and the explanatory memorandum suggests that a communication will be accessible by means of an interception warrant until such time as it is downloaded by the recipient onto equipment and can be accessed without using a line. However, a literal reading of the bill does not give this meaning. The definition of 'stored communication' makes no reference to the communication's receipt by its intended recipient. Therefore an email sitting on an ISP server which has not yet been accessed by the recipient may be considered a stored communication under the amendments. Consequently a law enforcement agency would be able to access the communication at the ISP's premises using an ordinary search warrant. It is not clear whether this is the intended meaning of the bill.
>
> The confusion increases when one looks at the case of voice mail. A note to the bill specifically states that a voice mail which can only be accessed by dialling a number is not a stored communication. However, although the intended recipient can only access the message by dialling a number, the service provider which stores the message can access the message without further use of a line. A literal reading of the bill in relation to voice mail messages would result in the situation that a voice mail message can be accessed using a search warrant at the premises of the service provider or using an interception warrant at the time the recipient phones in to collect his or her messages. It is our submission that the legislative situation in relation to service providers or email or telephone services ought to be clarified by the bill, not obscured.[4]

4.9 The Federal Privacy Commissioner also expressed the view that proposed subsection 6(4) of the Interception Act is ambiguous:

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2 Explanatory Memorandum, *Telecommunications Interception Legislation Amendment Bill 2002,* p. 6

3 Explanatory Memorandum, *Telecommunications Interception Legislation Amendment Bill 2002,* pp. 6-7

4 Legal and Constitutional Legislation Committee *Hansard*, 1 May 2002, p. 223

> particularly in relation to whether emails that are in transit and stored on an ISP's server can be accessed only after having obtained a warrant issued under the Interception Act.[5]

4.10 The Attorney-General's Department stated that the law needed to be amended to remove uncertainty about whether access to the stored communications by ISP required a telecommunications interception warrant or merely some other lawful authority, such as a search warrant.

> Currently, under the Telecommunications Interception Act, the Act protects all communications that are in their passage over a telecommunications system, which includes everything, including e-mail. When a communication is prior to its passage, or once it has completed its passage, it is accessible under other forms of legislation, like in states' Crimes Acts and the Commonwealth under normal search warrants. There is a difficulty in that we have received advice that, once an e-mail is downloaded onto a person's computer, it has ceased passage over the telecommunications system.
>
> …the point of this (amendment) is to clarify…that, if it is a delayed access message and if it is stored, it becomes stored data. If you can access it without actually having to go into the telecommunications system, thereby grabbing it in its path over the telecommunications system, it can be accessed under some other lawful authority like a search warrant.[6]

4.11 The uncertainty surrounding the basis on which access to stored data could be obtained has resulted in some ISPs refusing access to this data in the absence of a telecommunications interception warrant.[7]

4.12 The Australian Securities and Investment Commission (ASIC) supported the amendments. The Commission advised that it does not have standing to apply for a telecommunications interception warrant and this has impacted on its ability to carry out investigations. This had been recently brought home to the Commission when a large Australian based ISP had refused to provide stored e-mail in the absence of a telecommunications interception warrant instead of the statutory notice issued by the Commission. The Commission considered that delayed access message services are akin to a letter and the mere fact that a letter is delivered electronically rather than by postal mail should not alter the position at law. ASIC considered the proposed amendments would clarify existing practice and prevent the dilution of its investigative capability.[8]

4.13 Electronic Frontiers Australia also maintained that the proposed amendments were ambiguous and confusing. Ms Irene Graham, appearing on behalf of the company maintained:

> All of the protections that come with the interception legislation go out the door in relation to messages in transit. Instead of, in effect, a warrant only able to be issued by the AAT, you are going to have a situation where police officers can get a

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5 *Submission 246*, p. 14

6 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, pp. 210-211

7 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p. 211

8 *Submission 171*, p. 2

> search warrant to go into ISP premises and check what e-mails are being sent to you, before you have even received them, and so on.[9]

4.14 Electronic Frontiers Australia also expressed a view that allowing access to stored communications on an ISP's premises by way of a search warrant, where the intended recipient of the e-mail is unaware that this is being done, will create:

> a whole secret surveillance society where there is absolutely no chance of review of any abuse of power.[10]

4.15 The privacy aspects of the proposed amendments were addressed by the New South Wales Privacy Commissioner who advised the Committee that:

> excluding an indeterminate range of digitally based communications from any protection under the Interception Act represents a major reversal for the protection of the privacy of such communications. Rather than excluding delayed access message services from the Interception Act, on the grounds that it is difficult for law enforcement agencies to obtain access to them using the existing machinery for interception of messages, there is a need to up-date the definition of interception so that it provides equal protection for the new forms of communication.[11]

4.16 The Federal Privacy Commissioner stated that:

> There seems to be little justification for reducing the privacy protection of a communication as intimate as a voice mail message or SMS, in comparison with a 'live communication' simply because the transmission of the former is temporarily delayed.[12]

4.17 The Committee agrees that the proposed amendments will clarify the current law in relation to accessing stored communication of delayed messages services. However, the Committee is concerned about the ease by which access can be obtained without the need for a telecommunications interception warrant under current law. The Committee considers that this issue needs to be further examined.

Recommendation 5

The Committee recommends that the Attorney-General review the current law on access to stored communications of delayed messages services with a view to amending the Telecommunications Interception Legislation Amendment Bill 2002 so that the accessing of such data requires a telecommunication interception warrant.

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9 Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p.58

10 Legal and Constitutional Legislation Committee *Hansard*, 17 April 2002, p.61

11 *Submission 148*, p.4

12 *Submission 246*, p.14

Suppression of the Financing of Terrorism Bill 2002

4.18 Evidence on the Suppression of the Financing of Terrorism Bill 2002 (FT Bill) raised the following issues :

- whether the offence of financing terrorism should contain an element of intent;
- whether the requirement that cash dealers are only required to report suspected terrorist related transactions after the commencement of the amendments limit the ability of law enforcement agencies to investigate possible terrorist activities which have an historical aspect;
- whether the limits and conditions placed on the disclosure of financial transaction reports information to overseas countries are sufficient to ensure the privacy and confidentiality of the information is protected; and
- whether there is a need to provide for the unfreezing of assets.

Element of intent

4.19 Proposed section 103.1 of the Criminal Code provides that a person commits an offence if they provide or collect funds in connection with a terrorist act. The offence applies where the person is reckless as to whether those funds will be used to facilitate a terrorist act.

4.20 The Explanatory Memorandum states that the offence of financing terrorism implements Article 2 of the Convention for the Suppression of the Financing of Terrorism and paragraph 1(b) of United Nations Security Council Resolution 1373, and draws on the language used in those international instruments.[13]

4.21 Both the Association of Criminal Defence Lawyers[14] and the Law Council of Australia[15] considered that the proposed offence of financing terrorism should include the element of specific intent.

4.22 In its submission and in evidence before the Committee, the Law Council referred to the Explanatory Memorandum and noted that both Article 2 of the Convention for the Suppression of the Financing of Terrorism and paragraph 1(b) of United Nations Security Council Resolution 1373 contain a requirement of specific intent. As the proposed offence of financing terrorism has been based on these United Nations instruments, the Council considered that there should be a requirement of specific intent.

4.23 The Attorney-General's Department, in response to a Question on Notice on why it is appropriate that the fault element in the financing of terrorism should be recklessness, advised:

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13 Explanatory Memorandum, *Suppression of the Financing of Terrorism Bill 2002*, p.5

14 *Submission 173,* p.3

15 *Submission 251*, p.50

> It is appropriate that the recklessness apply to the circumstances that the funds will be used to facilitate or engage in a terrorist act. The fault elements for an offence against section 103.1 accord with the default element set out in section 5.6 of the Criminal Code.
>
> Section 5.6 provides that, where a law creating an offence does not specify a fault element for physical element of the offence, intention applies to physical elements consisting of conduct and recklessness applies to physical elements consisting of a circumstance or result. Therefore, in accordance with section 5.6, *intention* applies by default to the conduct of providing or collecting funds (paragraph 103.1(1)(a)) and *recklessness* expressly applies to the circumstance that those funds will be used to facilitate or engage in a terrorist act.
>
> It was decided in framing the offence that it was preferable to apply fault elements that accord with the general principles of the Criminal Code than to adopt the precise terms of the Convention.[16]

4.24 In his second reading speech, the Attorney-General stated that the Bill implements a range of obligations under international law and in particular obligations under the International Convention for the Suppression of the Financing of Terrorism and obligations under United Nations Security Council Resolution 1373.[17]

4.25 In that context and in light of the evidence received by the Committee, the Committee does consider that the offence of financing terrorism should include the element of specific intent. The Committee does not consider that sufficient reasons have been put forward to justify the exclusion of specific intent from the proposed offence of financing terrorism, particularly as it is based on United Nations instruments which contain the element of specific intent.

Recommendation 6

The Committee recommends that proposed section 103.1 in the Suppression of the Financing of Terrorism Bill 2002 be amended so that the financing of terrorism offence includes an element of intent.

Obligation to reporting suspected terrorist transactions only after the commencement of the amendments

4.26 Item 21 of the FT Bill provides that cash dealers are not required to report on suspected transactions associated with financing a terrorism offence if the transaction has been finalised before the amendments commence.

16 *Submission 383*, p.21

17 House of Representative' *Hansard*, Second Reading Speech, *Suppression of the Financing of Terrorism Bill 2002,* 12 March 2002, p.1

4.27 The AFP advised that this provision imposes unnecessary restrictions on investigations that have an historical aspect.[18] The AFP also stated that this restriction:

> is inconsistent with the Proceeds Bill which has explicitly removed the time frame associated with terrorist activity.[19]

4.28 The Attorney-General's Department, in support of the proposed provision, advised:

> It is difficult to see how cash dealers can be required to have recorded something that happened before the requirement was imposed.[20]

4.29 The Committee does not consider that cash dealers could have been expected to record information in respect of what would, under the proposed FT Bill, be regarded as suspected terrorist financial transactions, prior to the proposed amendments coming into force. All that proposed item 21 of the FT Bill does is to relieve a cash dealer from any obligation to re-examine suspected past financial transactions that have been completed prior to the proposed amendments coming into force and communicating that information to the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC).

4.30 Further, the Committee does not consider that the proposed provision will prevent the AFP from accessing any records, including past records, of a cash dealer in relation to an investigation they may be undertaking in relation to terrorism or terrorist financing. Accordingly, the Committee does not agree that item 21 of the FT Bill should be deleted.

Protection of privacy and confidentiality in reporting of financial transactions

4.31 The Explanatory Memorandum states that Part 1 of Schedule 2 introduces amendments to the *Financial Transaction Report Act 1988* (FTR Act) and *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) to require cash dealers to report suspected terrorist-related transactions and streamline the procedures for the disclosure of financial transaction reports information to foreign countries.

4.32 These amendments will permit the Commissioner of the AFP, the Director of AUSTRAC and the Director-General of Security to communicate financial transaction information to foreign law enforcement and intelligence agencies. The amendments will remove the current requirement for foreign country requests for financial transaction reports information to be dealt with by the Attorney-General in accordance with the Mutual Assistance Act.

4.33 The AFP stated that the amendments will greatly assist them at the operational and tactical level, in that it will allow information to be exchanged spontaneously.[21] A similar view was expressed by AUSTRAC in its evidence to the Committee.[22]

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18 *Submission 189A*, pp.10-11

19 *Submission 189A*, p.11

20 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p.210

21 *Submission 189A*, p.10

22 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p.179

4.34 Questions arose in relation to the safeguarding of privacy and confidentiality of financial transaction reports information and the use to which that information may be put by overseas countries. For example, the Federal Privacy Commissioner submitted that there is the potential for misuse by foreign recipients of transferred information and that affected individuals, as well as the Commonwealth Government, are limited in their ability to take action in response to such misuse.

4.35 The Commissioner suggested that such misuse may be limited if disclosure of personal information were provided to:

> a) countries with similar privacy protections as Australia, or b) situations where the disclosing agency has entered into an enforceable agreement with the foreign government, to ensure that the information is used only for the purpose for which it was released from Australia. An Agreement in the latter case should also ensure that the overseas entity takes all reasonable steps to protect the information from unauthorised access, modification and disclosure.[23]

4.36 The Committee notes that the provisions in proposed subsections 27(11A), (11B), 27AA(4)(a)(iv) and 27AA(5A) of the FT Bill set out the conditions under which financial transaction reports information may be communicated to overseas agencies. These include the requirement that appropriate undertakings are given by the overseas agencies to protect the confidentiality of the information and, in the case of the Commissioner of the AFP and the Director-General of Security, that it is used only in relation to the performance of the overseas agency's functions or, in the case of the Director of AUSTRAC, that the use of the information is controlled. AUSTRAC advised that:

> Before considering exchange of financial information with a foreign country the Director will enter into a memorandum of understanding or similar form of agreement with the foreign country. The agreement will include undertakings for the protection of the confidentiality of any information and the use that will be made of the information. Financial information provided by the director would be used for intelligence purposes and will not be able to be used as evidence in any legal proceedings.[24]

4.37 The Committee further notes that under proposed subsection 23(1) of Part 2 of Schedule 2 of the FT Bill, provision has been made for a review to be carried out two years after commencement of the amendments to consider, among other matters, the privacy of persons identified in information provided to overseas countries is adequately protected.

4.38 The Committee is satisfied that the proposed amendments will ensure that the privacy of persons identified in financial transaction reports information provided to overseas countries is adequately protected.

Freezing of Assets

4.39 Under the proposed amendment to the *Charter of the United Nations Act 1945* there will be a specific framework for listing persons, entities or assets that are to be frozen. Under proposed section 20 of the FT Bill, a person commits an offence if they hold a freezable asset

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23 *Submission 246*, p.8

24 *Submission 137*, p.6

and either uses or deals with the asset, allows the asset to be used or dealt with, or facilitates the use of the asset or dealing with the asset.

4.40 The Federation of Community Legal Centres (Victoria) Inc drew the Committee's attention to a case of a Melbourne business trading under the name of 'Shining Path'. The Committee was told that the Commonwealth Bank had frozen the business' accounts following the gazettal by the Minister for Foreign Affairs of a Peruvian group with a similar English name, as being a 'terrorist organisation'. The gazettal was made by regulation under the *Charter of the United Nations Act 1945*. Notwithstanding denial from the owner of the business that it was a terrorist organisation, it was alleged that the bank refused to unfreeze the accounts. The Committee was told that the matter had been reported in a newspaper[25] and following advice from the AFP that the signatories on the frozen accounts were not identical matches to the gazetted terrorist organisation that the bank accounts were unfrozen.

4.41 The AFP advised the Committee that they do not instigate nor request the freezing of bank accounts. This is the responsibility of the financial institution concerned under the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001.[26]

4.42 The Committee sought Commonwealth Bank comment on this matter. The Commonwealth Bank advised that after receiving a copy of the Regulation in December 2001:

> The Bank complied with these obligations after conducting a search of its records and after locating an account in the name of Shining Path (a known terrorist organisation) placed a freeze on the account on 27 December 2001 and reported the account to AUSTRAC.
>
> During January 2002, the Bank made several attempts to raise this matter with the Australian Federal Police to determine the position with the accounts. On 13 February 2002, the Bank received confirmation from the Australian Federal Police that no connection had been established between the company and the known terrorist organisation. On receipt of this advice, the Bank removed the freeze on the account.[27]

4.43 This response from the Commonwealth Bank confirms the Committee's serious concerns about the matter and the lack of appropriate practices and procedure.

4.44 While proposed section 25 of the FT Bill makes provision for compensation to the owner of an asset who has been wrongly affected by the freezing of assets, the Committee considers that procedures must be put into place to ensure that any wrongful freezing of assets is corrected at the earliest possible opportunity. The AFP have suggested that they:

> would welcome consideration of an arrangement whereby at the time the freeze occurs, banks could seek and be provided with information to confirm that a possible match is appropriate based on more than just a name. If a match is

25 Brian Toohey, 'A-G's war swings from tragedy to farce' *Australian Financial Review*, 9 March 2002

26 *Submission 189B*, p.1

27 *Correspondence,* Commonwealth Bank of Australia, 8 May 2002

> confirmed between a suspect account and a proscribed entity further action can be taken by the bank to continue to deny access to the accounts.[28]

4.45 The AFP advised that current regulations do not prohibit banks from providing a pro-forma letter advising the account holder of the action taken to freeze their account and informing the holder of their rights and obligations under the Regulations. They also advised that current arrangements for freezing accounts were devised in a Working Group comprised of representatives from Department of Foreign Affairs and Trade, Commonwealth Director of Public Prosecutions, AUSTRAC, Treasury, ASIO, Reserve Bank of Australia and the Attorney-General's Department.[29]

4.46 The Committee has serious concerns about the impact on individuals and businesses whose assets may be incorrectly frozen merely because their name is similar to one that is gazetted by the Minister for Foreign Affairs as being a 'terrorist organisation'. The Committee concerns are reinforced by the fact that the proposed legislation does not contain provisions that address the unfortunate situation that occurred with the Shining Path business in Melbourne.

4.47 The Committee considers that provision must be made, either by way of an amendment to the Bill or under Regulations, whereby the AFP are contacted before action is taken to freeze an asset, to ascertain if there is a possible match between the proscribed person or entity and the owner of the asset. The Committee also considers that where assets are frozen, the holders of those assets must be advised, in writing, as soon as possible and their rights and obligations explained.

Recommendation 7

The Committee recommends that:

(a) provision be made, either by way of an amendment to the Suppression of the Financing of Terrorism Bill 2002 or under regulations, that before any decision is taken to freeze assets in respect of a proscribed person or entity, the Australian Federal Police set an appropriate course of action in consultation with the relevant financial institution or institutions before any asset is frozen; and

(b) once action has been taken to freeze an asset, the owner of assets must be advised in writing as soon as possible and their rights and obligations explained.

Proceeds of Crime

4.48 The AFP advised that:

> For the first time, law enforcement will be able to target the base of terrorist organisations – that is, their funding. In this regard it is important that the

28 *Submission 189B*, p. 2

29 *Submission 189B*, p. 2

> provisions of the Suppression of the Financing of Terrorism Bill 2002 align with the provisions of the Proceeds of Crime Bill 2002

They went on to say that:

> If the (telecommunications information) material cannot be used to pursue terrorist funds, the overall effectiveness of the suppression of terrorist funding bill and the Proceeds of Crime Bill will be seriously undermined. [30]

4.49 In its recent Inquiry into the Provisions of the Proceeds of Crime Bill 2002, the Committee was advised that amendments to the *Telecommunications (Interception) Act 1979* through the cognate Bill will not allow information obtained through telephone interception to be used in civil forfeiture cases. This is despite the fact that telephone interception material and listening device material are currently admissible in civil forfeiture cases under the *Customs Act 1901* and the *Australian Federal Police Act 1979.* Law enforcement agencies and the DPP all opposed this amendment.

4.50 In its Report the Committee noted that the Attorney-General had advised that 'the matters raised by the law enforcement agencies in their submissions will be considered in the context of the ongoing review of the *Telecommunications (Interception) Act 1979'*. The Committee requested that it be provided with the terms of reference and timeframe for finalisation of the 'ongoing review' of the Telecommunication Act.[31]

Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002

4.51 The Explanatory Memorandum states that the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (STB Bill) creates offences relating to international terrorist activities using explosive or lethal devices and gives effect to the *International Convention for the Suppression of Terrorist Bombings* (the Convention).

4.52 The Convention came into effect on 23 May 2001. The passage of the STB Bill will enable Australia to become a party to the Convention.

4.53 The Association of Criminal Defence Lawyers, while expressing approval for the requirement that the prosecution must prove that the person "intends to cause death or serious harm" under proposed paragraph 72.3(1)(d), considered that the element of specific intent should also apply to proposed subsection 72.3(2) given that the offence carries life imprisonment.[32]

4.54 The Law Council of Australia considered that proposed paragraphs 72.3(1)(d) and 73.2(2)(d) were consistent with article 2 of the Convention and that the language was capable of being considered appropriate in these circumstances.[33]

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30 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p.191

31 Inquiry into the Provision of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 (April 2002), pp. 38-39

32 *Submission 173*, p. 4

33 *Submission 251*, pp. 52-53

4.55 The Attorney-General's Department advised that:

> Given that the element in proposed paragraph 72.3(2)(e) was expressed as a result, and to ensure consistency with the Criminal Code and to give a more accurate effect to the meaning of the Convention, it was decided that the appropriate fault element should be recklessness. That is the person was aware of a substantial risk that their conduct would result, or was likely to result, in major economic loss.[34]

Conclusion

4.56 The Committee is satisfied that the proposed STB Bill accords with the terms of the Convention and considers that the Bill should proceed.

Border Security Legislation Amendment Bill 2002

4.57 The Border Security Legislation Amendment Bill 2002 (BSL Bill) raised several issues which are of concern to the Committee and these have been reflected in the submissions received and during the hearings. The major issues concern:

- the privacy of information collected;
- the increased powers in relation to search and seizure; and
- whether the proposed amendments should contain a sunset clause.

Privacy issues

4.58 The Federal Privacy Commissioner[35], Customs Brokers & Forwarders Council of Australia Inc (Customers Brokers)[36] and the Customs and International Transactions Committee, Business Law Section of the Law Council of Australia (Law Council)[37] expressed concern that the provisions relating to the handling of personal information for individuals entering Australian borders, as well as people working in restricted areas or issued with security identification cards, diminish the privacy protection that normally applies to such information. The Committee expressed its concern that the Australian Customs Service (Customs), rather than contacting the Federal Privacy Commissioner to ascertain if the proposed amendments were in accordance with the *Privacy Act 1988,* had, instead, relied on advice from the Information Law Branch of the Attorney-General's Department.

4.59 As a result of the Committee's concerns, Customs agreed to discuss the various issues with the Federal Privacy Commissioner and provided a detailed response to the Committee. The Committee notes that, following these discussions, Customs did provide a further submission that addressed the various privacy issues.[38] In providing this submission, Customs advised that the Federal Privacy Commissioner had indicated that he believed the

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34 *Submission 383*, p.24

35 Sub*mission 246*

36 *Submission 175*

37 *Submission 251A*

38 *Submission 176A*

explanation provided to him by the Customs, along with certain undertakings given, addressed the concerns he had expressed about the legislation.[39]

Information on people working in restricted areas or issued with Aviation Security Identification Cards

4.60 Customs advised that the purpose for collecting this information is to:

> firstly enable Customs, as a primary agency responsible for border security, to know who is working in restricted areas of airports and secondly to enable Customs to assess the risk that those individuals may pose to border security. At present, Customs can only use informal means to find out the names of people working in these secure areas of airports.
>
> The information Customs is seeking is no more than is necessary to establish the identity of the person, that is, their name address and their date and place of birth. Any information required by Customs will have to be prescribed by regulation, thus allowing parliamentary scrutiny of any expansion.
>
> While Customs will use the information it receives to assess risk it will not have any role in vetting applications for positions, nor will Customs have any ability to limit a person's employment.
>
> These provisions are needed because people working in restricted areas of airports could create a substantial risk to border security.[40]

4.61 The Federal Privacy Commissioner expressed concern that as the *Privacy Act 1988* does not place an obligation on employers to advise employees that their personal information is being collected and disclosed, this could leave employees unaware that their personal information is being passed to Customs.

4.62 Customs advised that applicants for Aviation Security Identification Cards are already advised that the information they submit in applying for the card will be provided to the AFP for the purpose of background checks. Customs advised that they consider they have an obligation to ensure all employees are informed of their employer's disclosure requirement and that the most straightforward way of doing this would be to include a statement about disclosure on the application form.[41]

4.63 In relation to existing holders of Aviation Security Identification Cards and people already working in a restricted area of an airport prior to the legislation coming into force, their personal information will not have to be provided to Customs, except in the following circumstances:

- when an individual's Aviation Security Identification Card has expired and they apply for a new one; and

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39 *Submission 176A*, p.4

40 *Submission 176A*, pp.4-5

41 *Submission 176A*, p.5

- an authorised officer suspects on reasonable grounds that the existing Aviation Security Identification Card holder or restricted area employee has committed or is likely to commit an offence against the law of the Commonwealth.

4.64 In the first exception, Customs advised that the applicant will be informed that the personal information they provide will be passed onto Customs.[42]

4.65 In relation to the second exception, the Federal Privacy Commissioner commented that the disclosure of an individual's personal information on the basis that an authorised officer 'suspects on reasonable grounds':

> introduces a degree of subjective interpretation that is inconsistent with….good privacy practice. The notion of reasonable grounds, here, may be abused if interpreted too loosely and with inadequate justification, scrutiny or backing.[43]

4.66 Customs advised that:

> The nature of (its) role at the border requires that many Customs investigations or examinations are initiated because an officer has formed a suspicion on reasonable grounds (through intelligence, investigation or observation) that a person may be committing an offence. The threshold of a "suspicion on reasonable grounds" appears in a number of areas in the *Customs Act* (notably the detention and search provisions in section 219). Actions undertaken pursuant to these provisions are subject to judicial review and are the subject of strict operational guidelines.
>
> Customs will introduce operating procedures that record all instances where information is requested under these provisions of the Act. As with the operation of other parts of the Customs Act, the operational procedures will require officers to justify their reasonable grounds for suspicion to a senior officer before they are able to make the request for information. These records will be made available for the privacy audit, as agreed with the Federal Privacy Commissioner.[44]

4.67 The Committee is of the view that these operating procedures should be subject to parliamentary scrutiny.

Reporting of passengers and crew

4.68 In relation to reporting of passenger and crew, Customs advised that:

> When a passenger arrives in Australia he or she is obliged to go through an immigration process which is performed by Customs. Part of that process involves the passenger's travel document (passport) being scanned and certain information being captured. That information includes the person's name, date of birth, sex, travel document number and nationality. The proposed provisions will enable Customs and Immigration to receive this information prior to the passenger's arrival in Australia.

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42 *Submission 176A*, p.6

43 Sub*mission 246*, pp.10-11

44 *Submission 176A*, p.6

> The proposed provisions are fully compliant with the joint World Customs Organisation and International Air Transport Association Guidelines on Advanced Passenger Information.[45]

4.69 Customs advised that currently, this information is provided to them and the Department of Immigration in relation to more than 50 per cent of passengers arriving in Australia. This is done by a computer system administered by Immigration called Advance Passenger Processing. Under this system passengers are made aware that the information is provided to Customs and Immigration when they purchase a ticket. While this system presently operates on a voluntary basis, the proposed amendments will make it mandatory for all commercial airlines and shipping cruise lines to provide advance passenger information.

4.70 Customs also advised that because there will be circumstances where advance passenger information is not possible or appropriate, it is necessary for other options to be available. According to Customs this is reflected in proposed amendments to both the *Migration Act* and *Customs Act* which provide for some flexibility.[46]

4.71 The Federal Privacy Commissioner expressed concern that:

> There are …various provisions contained in the Bill that would appear to grant considerable discretion to *authorised officers* of government agencies to make decisions that may progressively expand the acts and practices related to the Bill. For example, *Schedule 6, section 64ACA(2)* provides for the CEO to approve various methods for the transmission of personal information. Similarly, *Schedule 6, section 64ACA(9) and 64ACB(7)* grant the CEO with unilateral authority to change the forms with which personal information is provided to Customs, and accordingly the type of personal information that will be collected for inclusion in these forms. Accordingly, this provision could facilitate the broadening of the types of personal information collected – it leaves an agency with the discretion that might accompany a blank cheque.
>
> A further example of the provision of unilateral authority is contained in *Schedule7, section 64AF(1)(a)*, whereby the CEO can request that an operator provide Customs with access to that operator's customer information on an on-going basis. This section effectively seems to provide an instrument for on-going surveillance of an operator's database in a form that may not be compatible with the above framework or good privacy practice. Such extreme measures should only be enacted where appropriate safeguards and accountability procedures are in place.[47]

4.72 In answer to the Federal Privacy Commissioner's comments in respect to proposed sections 64ACA(2), 64ACA(9) and 64ACB(7), Customs agreed that these provisions do provide the CEO with considerable discretion to change the forms or manner by which personal information is provided to Custom. Customs advised:

> These provisions have been included to reflect the commercial reality that some operators may not be able to use the preferred APP [Advance Passenger Processing] system. In these situations Customs would consult with the relevant

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45 *Submission 176A*, pp.6-7

46 *Submission 176A*, p.7

47 Sub*mission 246*, p.11

> operator so that an appropriate system could be nominated so that the operator could comply with the requirement to provide advance passenger information. The aim is only to provide options to the operators; other systems or forms will not require more information than the five data elements…
>
> The instruments by which the CEO approves electronic systems are disallowable instruments, thus allowing appropriate parliamentary scrutiny of any inappropriate expansion.[48]

4.73 In respect of the Federal Privacy Commissioner's concern about the exchange of information between third parties and government agencies required by proposed sections 64ACA, 64ACB and 64ACE of the *Customs Act 1901* and proposed section 245J of the *Migration Act 1958*, Customs advised that the information is provided in advance of arrival and is limited to the passenger's name, date of birth, sex, travel document number and nationality. Customs also stated:

> This information comprises just part of what passengers must provide to immigration upon arrival in Australia.
>
> The Incoming Passenger Card (on which passengers provide additional information) advises that the information is being collected, what it is being collected for and to whom it will be disclosed. It also advises passengers that a leaflet Safeguarding your Privacy is available at Australian ports and airports. Under the APP system, the Incoming Passenger Card is generally provided to passengers at check-in.[49]

4.74 Customs advised that under the existing voluntary arrangements for the provision of advance passenger information, they, and the Department of Immigration, Multicultural and Indigenous Affairs, enter into a Memorandum of Understanding with individual airlines. It is proposed to continue with these formal agreements with airlines, even if Advance Passenger Processing becomes mandatory. Any such agreement will contain clauses advising passengers about the advance provision of information.[50]

4.75 Both the Law Council[51]and Customs Brokers[52] expressed the view that the proposed provision in the BSL Bill may not be sufficient to satisfy the requirements of the European Union Directive Number 95/46/EC. This Directive states that companies affected by the European Union privacy obligations should only disclose information outside of the European Union where the legislative provisions regarding the protection of privacy in the recipient country are adequate compared with protections of the European Union. The Law Council considered that it was relevant that the European Data Protection Commissioners had recently expressed the view that the privacy protections afforded by the *Privacy Amendment (Private Sector) Act 2000* do not comply with the adequacy test of European Union requirements.[53]

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48 *Submission 176A*, p.7

49 *Submission 176A*, p.8

50 *Submission 176A*, p.8

51 *Submission 251A*, p.7

52 *Submission 175*, p.3

53 *Submission 251A*, p.7

4.76 Customs advised that it considers the proposed legislation will satisfy the requirements of the European Union Directive No 95/46/EC and that this view:

> has been supported by European airlines. In addition, the obligations imposed on Customs by the Privacy Act will safeguard the privacy interests of those individuals travelling on all airlines including European airlines.[54]

4.77 The Law Council submitted that:

> the Explanatory Memorandum does not address the provisions of Article 8 of the European Council Directive which states that member states shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and the processing of data concerning health or sex life. The exceptions to this prohibition in paragraph 2 of Article 8 of the European Council Directive do not provide for the same exception where disclosure is required to comply with a legal obligation. Given that the definition of "Terrorist Act" contemplates that the action is done or the threat is made with the intention of advancing a political, religious or ideological cause, it is conceivable that the category of information which the Government may legislate to be provided by operators to Government could, in the future, require operators to provide such information. Such an action may place those operators in breach of Article 8 of the European Council Directive for which no such "legal obligation" exception applies as it applies in relation to the obligations in Article 7 of the European Council Directive.[55]

4.78 In response to this claim, Customs advised that the definition of 'passenger information' contained in proposed subsection 64AF(6) of the BSL Bill does not include information referred to by the Law Council. Customs explained that the proposed legislation will require airlines to allow access to data they already collect. Except perhaps for dietary requirements, the Computer Reservation System does not contain the type of information referred to by the Law Council's submission and the legislation does not provide Customs with the power to direct what information should be collected.

4.79 In relation to concerns expressed about the handling of personal information received under the Advance Passenger Processing arrangements or by a passenger presenting at an immigration line at the border, Customs advised that all such information is subject to the *Privacy Act 1988*. In addition, section 16 of the *Customs Administration Act 1985* limits the recording and disclosure of information collected by an officer.[56]

Access to airline passenger information

4.80 In relation to access to airline passenger information, Customs advised that they have had access, on a voluntary basis, to the Computer Reservation System of major airlines for several years. The Computer Reservation System contains information related to passengers' travel (eg name, date of booking, travel agent, method of payment, itinerary and changes to itinerary, seating preference etc). This is known as Passenger Name Record (PNR). Under existing arrangements, passengers are advised that airlines collect PNR information and that that information may be made available to Customs.

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54 *Submission 176A*, p.11

55 *Submission 251A*, pp.7-8

56 *Submission 176A*, p.8

4.81 Customs advised that it had discussed the access to airline Computer Reservation System with the Federal Privacy Commissioner in December 1998 because:

> there were concerns that the access would not be consistent with the *Privacy Amendment (Private Sector) Act.* Section 273GAB was inserted in the *Customs Act* as a consequential amendment to the *Privacy Amendment (Private Sector) Ac*t to ensure that Customs access to the CRS [Computer Reservation System] was lawful. The protocols that apply to ensure that the existing voluntary arrangements are not inconsistent with the *Privacy Ac*t will continue with any access that Customs has to other airlines' CRSs. The proposed legislation goes beyond the existing voluntary arrangements only in so far that it will be mandatory for all airlines to provide Customs with access to their CRS. [57]

4.82 In their submission, Customs provided the Committee with the following details of protocols that have been established to protect personal information gained by accessing airlines' Computer Reservation System:

- only a limited number of specialised staff have access to Computer Reservation System.
- these staff are all security cleared and work in one restricted access secure area in Canberra.
- staff are required to sign Standard Operating Procedures that prescribe the requirements for handling airline information.
- all staff are briefed and provided with airlines' security documentation and must sign and abide by each airlines' security procedures for protection of the information.
- the computers that access the airlines' Computer Reservation System are physically and electronically isolated from Customs' computer network.
- PNR data is not disclosed to any other agency unless required or authorised by law. Where there is a joint agency task force or operation that includes Customs and the investigation reveals a potential breach of law affecting border security then PNR information may be passed to an authorised Customs officer involved in the task force or operation.
- all such requests for information are recorded on a data base.
- single agency requests from the AFP, ASIO or NCA for PNR information are treated on a case-by-case basis with only broad travel details ever made available. Disclosure may only be made in accordance with section 16 of the Customs Administration Act. Likewise, full PNR details are not provided to any Customs officers working outside the dedicated area.
- PNR data is not directed to other databases. Where a seizure has occurred then limited details from the particular PNR are retained for further research.
- PNR information automatically drops off the airlines' Computer Reservation System 48 hours after a flight's arrival.

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57 *Submission 176A*, p.9

- in addition to the *Privacy Act*, Customs must comply with the provisions of section 16 of the *Customs Administration Act*. This imposes strict limitations on the use and dissemination of information gathered or held by Customs. [58]

4.83 The Committee considers that these protocols, properly observed, should provide the necessary protection of personal information accessed from Computer Reservation System.

4.84 The Law Council expressed concern that the definition of 'required identity information', which includes, 'any other information prescribed by the regulations', could result in the categories of information being extended.[59] However, Customs advised that this provision was inserted:

> to cover contingencies such as changes to the process of issuing identity or security cards. If Customs does seek to include additional information through regulation, that additional information will be able to be scrutinised by the parliament.[60]

4.85 The Committee considers that the provision of any additional information on airline passengers should be authorised by regulation, and therefore subject to parliamentary scrutiny. The Committee notes the statements of Customs to this effect.[61]

4.86 The Committee considers that the particular concerns expressed in submissions in relation to privacy issues have been adequately addressed by Customs following their discussions with the Federal Privacy Commissioner.

4.87 The Committee raised issues relating to the need for a Regulatory Impact Statement (RIS), given its concerns about the impact of these measures on business. Customs advised the Committee that 'a regulatory impact statement was prepared in relation to the access to the airlines' computer reservation systems'. However, in relation to the need for business to provide information in relation to cargo, the Productivity Commission, which administers RIS, advised that 'a regulatory impact statement was not required'.[62] The Committee is nevertheless concerned that measures contained in the Bill have the potential to significantly impact on business more than is acknowledged by Customs and therefore should be kept under review.

Power to search and seize

4.88 The Law Council considered that Customs, in exercising its powers to search and seize goods in transit under proposed Subdivision DA of the BSL Bill, should comply with the types of obligations set out in section 214ACA of the *Customs Act 1901* in relation to the exercise of their monitoring powers. They also considered that an owner of goods that have been seized should not have to prove that the goods seized are not of the kind contemplated by proposed subsection 203DA(1) in an application for their return.[63]

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58 *Submission 176A*, pp.9-10

59 *Submission 251A*, p.8

60 *Submission 176A*, p.12

61 *Submission 176A*, p.12

62 Legal and Constitutional Legislation Committee *Hansard*, 19 April 2002, p.186

63 *Submission 251A*, p.10

4.89 Customs advised that:

> The examination of suspicious in-transit cargo will occur in a Customs place such as a wharf, that is, places that have been appointed under the Customs Act for the administration of the Act. Customs officers have right of access to such places. The situation is not comparable to the exercise of monitoring powers.
>
> Section 209F of the Act has been drafted to be consistent with the existing search and seizure provisions of the Act.
>
> The reversal of onus on the owner in section 209F on an application for compensation for seized goods would be inconsistent with the general seizure provisions already contained in the customs Act. If there is a legitimate use for the goods in-transit then this would be easy to demonstrate to a court, eg. invoices, contract of sale etc.[64]

4.90 The Committee notes the Report of the Senate Scrutiny Bills Committee on search and entry entitled *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*.

Sunset clause

4.91 Customs advised that they had discussed with the Federal Privacy Commissioner his recommendation that the legislation include a sunset clause of four years.[65] Following advice from Customs that they believe the increase in the level of threat to the border was likely to be long term, Customs and the Federal Privacy Commissioner agreed that such a clause was not warranted and that:

> regular monitoring arrangement would be able to evaluate whether "function creep" was occurring and reassure the community that the measures remain suitable and appropriate.[66]

Conclusion

4.92 The Committee recognises that there has to be a balance between protecting a person's privacy and the need to increase national security by enhancing border protection. The Committee is of the view that the proposed amendments achieve this balance and considers that the Bill should proceed.

Senator Marise Payne
Chair

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64 *Submission 176A*, pp.13-14

65 Sub*mission 246*, p.13

66 *Submission 176A*, p.4

ADDITIONAL COMMENTS AND POINTS OF DISSENT, BY SENATOR BRIAN GREIG ON BEHALF OF THE AUSTRALIAN DEMOCRATS

The Australian Democrats oppose these Bills.

Principally because of the haste with which they were formed, the very limited public and parliamentary scrutiny to which they were subjected, the failure of the government to demonstrate any urgency or critical need for them, and the dangers all this presents to good governance and civil liberties.

This is hugely important, given the extraordinary scope and powers contained within the legislation.

This process should begin again, with the starting point being authorities, such as ASIO, the NCA, the Federal Police and the Attorney General's Department, first identifying those areas of existing law that are inadequate to address terrorism.

We acknowledge that the Committee mostly agrees on the need for substantial amendments to these Bills and to their form and purpose.

Key concerns raised by the Australian Democrats in relation to these Bills is generally reflected in the comments and advocacy by all parties on the Committee.

If however, these current Bills are to proceed, then it is essential that key amendments must be accepted, and these Bills should not become law without such amendments.

This package of bills generated profound objections from the many organisations and individuals that made submissions to the Committee. The Australian Democrats believe that these objections reflect strong and well-founded community opposition to the draconian measures proposed by the legislation.

The Australian Democrats abhor terrorism and would enthusiastically support balanced legislative measures to address any demonstrated deficiencies in Australian law in relation to terrorism.

These bills are not balanced and, on the whole, do not address demonstrated deficiencies in Australian law. They are fundamentally flawed and represent a poorly targeted response to the tragic events of September 11.

Many organisations and individuals who made submissions to the Committee argued that Australian law is adequately equipped to deal with terrorism, that there are no identified gaps in our criminal law that require filling.

It seems highly likely that any terrorist acts perpetrated in Australia could be prosecuted under existing law. Terrorist acts normally involve serious violence or damage to property. Such acts are covered by a range of existing offences.

There remains a question as to whether legislation is required to enhance our preventative ability. It may be necessary, for example, to ensure that it is unlawful for people to undertake training with an identified terrorist network.

What has become clear is that the legislation referred to the Committee goes far beyond a necessary legislative response to address identified shortcomings in existing law. It is an ambit claim for arbitrary executive power at the expense of civil rights and fundamental principles of law.

The Australian Democrats do not believe that the Federal Parliament should entertain such a claim. We believe the Government should withdraw its legislation and, if necessary, develop legislation which is carefully targeted at identified problems posed by terrorism. Such legislation should recognise Australia's status as a free and democratic nation and should not unduly detract from those rights that are essential to maintaining that status.

In many areas, the Committee has rightly identified the shortcomings of the bills and recommended that certain provisions be amended or reconsidered by the Government. While the Australian Democrats are strongly opposed to this legislation, we consider that a number of amendments are vital if the legislation is to pass.

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

The Definition of Terrorism

A great many submissions discussed the exceptionally broad definition of 'terrorism' and the very narrow scope of the exceptions for industrial action and lawful advocacy, protest and dissent.

Many submissions gave examples of situations where the definition of terrorism could be met but where the conduct in question would fall well short of accepted notions of terrorism. Joo Cheong Tham from Victoria University Law School argued that the legislation could be used to prosecute those involved in public demonstrations designed to further political, religious or ideological causes. He also argued that certain forms of industrial action, such as picketing, could be prosecuted as terrorism.[1]

One of the reasons for the broadness of the offence is that it is not limited by any notion of intention to terrorise. The offence turns on the occurrence of 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.

[1] Submission 61

The act or threat must be done or made 'with the intention of advancing a political, religious or ideological cause.'

The majority report pointed to a number of definitions of terrorism which do involve an intention to cause terror or fear (expressed in various ways). Including such an element of intent would significantly reduce the prospect of this legislation being improperly used to stifle dissent.

All sorts of protests and otherwise normal expressions of political opinion can result in damage to property or harm to individuals. That in itself should not make participating in them a terrorist activity. Any reasonable definition of terrorism would include an element of intent to ensure that situations where otherwise lawful expressions of opinion involving incidental damage to property or harm to individuals are not covered by the offence.

It is important to note that terrorism carries a maximum penalty of life imprisonment. Acts that would be regarded by the community as terrorism would, with few and possibly no exceptions, already be classified as serious offences. The real impact of the definition may be to make a range of lawful conduct and minor offences subject to life imprisonment.

The political nature of the offence gives it the clear potential to be used to stifle opposition and dissent. It is vital to establish a sound definition of terrorism that does not extend to political activity unconnected to terrorism.

We consider the revised definition of 'terrorist act' in the Chair's report as being far better than proposed in the legislation. If the legislation is to proceed, the definition of terrorism should be redrafted to ensure that it contains an appropriate element of intent and that it does not extend to political, religious or industrial activity unconnected to terrorism.

The Treason Offence

The Australian Democrats share the concerns raised in the majority report in relation to the definition of treason. In particular, the possibility of people providing humanitarian aid during armed conflicts being convicted of treason is unacceptable. We concur with the Committee's recommendation to amend the definition of treason.

The Proposed Proscription Power of the Attorney-General

The legislation allows the Attorney-General to proscribe an organisation if he or she is satisfied on reasonable grounds that certain criteria are met.

The power is excessively broad and not adequately subject to review. One of the grounds on which the Attorney-General may proscribe an organisation is if it poses a danger to the security or integrity of the Commonwealth or another country (proposed s 102.2). Professor George Williams, Director of the Gilbert & Tobin Centre of Public Law, argued that:

"While the reference, in section 102.2(d), to the 'security of the Commonwealth or another country' is broad, the reference to the 'integrity of the Commonwealth or another country' is almost meaningless."[2]

[2] Submission 8

The New South Wales Council for Civil Liberties made the point that:

"Many respectable organisations regularly threaten the security of other countries in their legitimate activities to achieve democracy or the preservation of the rule of law. For example this provision would apply if you were to endanger an enemy country or if you were a support of Fretelin, the ANC, Falun Gong, Dalai Lama, Amnesty International, Freedom for West Papua, or even if you threatened the security of the illegal military regime in Burma."[3]

Under the legislation it is an offence, punishable by 25 years imprisonment, to:

- be a member of;
- direct the activities of;
- provide or receive training to or from;
- receive funds from or make funds available to; or
- otherwise provide assistance to a proscribed organisation.

Given that a range of perfectly legitimate organisations are open to proscription under this legislation, it follows that those who continue to support those organisations through membership, donations or other means could be convicted of a very serious offence. The illegality of 'providing assistance' to a proscribed organisation is incredibly vague and imposes potential criminal liability on an indeterminate set of people many of whom would not know they were doing anything wrong.

It is inappropriate in the extreme that the power to proscribe organisations should rest solely in the hands of one member of the Executive Government. It is an arbitrary power with very significant potential for abuse. Many submissions drew parallels between this legislation and the *Communist Party Dissolution Act 1950*.

Furthermore, it is of great concern that the legislation does not adequately provide for review of the Attorney-General's decision to proscribe an organisation. Wherever there is a concentration of arbitrary power it ought to be checked. There is no mechanism for reviewing the merits of a decision to proscribe an organisation.

At the very least, the legislation should provide an avenue of merits review. However, it would be far preferable if the power to declare an organisation to be a proscribed organisation were vested in the Federal Court. This would provide parties with an opportunity to be heard before an independent and impartial decision-maker. Part IIA of the Crimes Act 1914 currently contains such a procedure in relation to the proscription of 'unlawful associations'.

The proscription power in its current form is utterly inappropriate. The Law Council of Australia rightly characterised the power as 'a serious departure from the principle of proportionality, unnecessary in a democratic society, subject to arbitrary application, and contrary to a raft of international human rights standards including the right to personal

[3] Submission 58

liberty, the right to a fair trial, protection against arbitrary interference with privacy, freedom of expression, freedom of association and rights of participation.'[4]

Recommendation 1

The Australian Democrats strongly recommend that this power be completely removed from the legislation.

Strict and Absolute Liability Provisions

There are a number of provisions in these bills that impose strict and absolute liability.[5]

The traditional rule is that the prosecution in a criminal trial bears the onus of proving all matters relevant to the defendant's guilt beyond a reasonable doubt. It has always been considered crucial that certain safeguards, such as the presumption of innocence, be in place to protect the accused.

The problem with imposing strict and absolute liability to offences is that it creates circumstances in which a person must be convicted under the law even though the tribunal of fact has reasonable doubt as to his or her guilt. It is remarkably dangerous to impose strict and absolute liability in relation to offences that carry a sentence of life imprisonment.

We agree with the view of the Committee that amendments are necessary to address the excessive and unjustified use of strict and absolute liability in this legislation.

Telecommunications Interception Legislation Amendment Bill 2002

The Australian Democrats are extremely concerned about the proposed changes to the Telecommunications (Interception) Act 1979 ('the TI Act). These changes would ensure that delayed messages, such as e-mail SMS messages and voicemail, are not protected under the TI Act.

The Federal Privacy Commissioner argued that:

"There seems to be little justification for reducing the privacy protection of a communication as intimate as a voice mail message of SMS, in comparison with a 'live communication' simply because the transmission of the former is temporarily delayed."[6]

The likely effect of this provision is that access to the contents of such communications will be made available to authorities without a warrant of any kind under the Telecommunications Act. It was recently disclosed that:

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[4] Submission 251

[5] For example, providing or receiving training (s 101.2), possessing things (s 101.4) and collecting or making documents likely to facilitate terrorist acts (s 101.5)

[6] Submission 246

"A total of 733,485 disclosures of information or documents by carriers, carriage service providers or number database operators were made under the provisions of Part 13 of the Telecommunication Act 1997 and reported to the ACA in 2000-2001"[7]

It is likely that e-mails, SMS messages and voicemails falling under the new provisions would be dealt with in a similar fashion to the nearly 750 000 disclosures made last year. They would be disclosed without the need for a warrant.

The general principle is that employees or agents of a telecommunications carrier or carriage service provider may not disclose any information that relates to the contents or substance of a communication that is being or has been carried by the carrier or carriage service provider (*Telecommunications Act 1997*, s. 276). Also, no person is permitted to 'intercept … a communication passing over a telecommunications system' (*Telecommunications (Interception) Act 1979*, s. 7).

However under the Telecommunications Act, information may be disclosed under various provisions including:

- *authorisation by or under law*: disclosure is lawful if 'required or authorised under law' (s. 280); or
- *law enforcement and protection of public revenue*: disclosure is lawful if 'reasonably necessary for the enforcement of the criminal law', or 'the enforcement of a law imposing a pecuniary penalty', or 'the protection of public revenue' (subs. 282(1)–(2)). Various agencies may issue certificates and these may be relied upon to answer questions about 'reasonable necessity' (subs. 282(3)–(5)). However, these certificates may not be relied upon to permit disclosure of the contents or substance of a communication that is being or has been carried (subs. 282(6)).

Provided a communication is not 'passing over a telecommunications system', disclosure of its contents or substance by a carrier or carriage service provider is lawful if 'required or authorised under law' or if 'reasonably necessary for the enforcement of the criminal law'.

The key question is what constitutes 'passing over a telecommunications system'. Under the *Telecommunications (Interception) Act 1979*, 'passing over' means 'being carried'. Proposed subsection 6(5) will deem e-mail and like communications to be communications that are not being carried for the purposes of this Act. This means that they will be able to be disclosed on request if they are necessary for law enforcement purposes.

In passing, it is worth noting that this amendment has been introduced in the context of present doubt as to what it means for a communication to be 'being carried'. This doubt would seem to reflect an argument that communications which have been stored, perhaps at any point in a telecommunications system, are not being carried and may therefore be disclosed without an ordinary warrant or an intercept warrant under the *Telecommunications (Interception) Act 1979*.

Recommendation 2

That this Bill be amended to require that a warrant be necessary to obtain access to the contents of e-mails, SMS messages, voicemail messages and like communications.

[7] Question on Notice No. 150, 19 March 2002

Conclusion

The Australian Democrats oppose this legislation.

The proposed definition of terrorism is incredibly broad, and could catch a range of political activities not remotely connected to terrorism.

The exceptions for advocacy, protest, dissent and industrial action are totally inadequate. It is dangerous to assume that no future government will use these excessively broad powers to suppress opposition and dissent.

The very broad proposed power of the Attorney-General to ban organisations is entirely inappropriate. It is reminiscent of the failed Communist Party Dissolution Act and has no place in a democratic nation.

The bills also take the unprecedented and unjustified step of imposing absolute liability in relation to offences carrying life imprisonment.

The proposed changes to the privacy of e-mail and other forms of digital communication are deeply concerning.

These bills are an attack on some fundamental democratic principles and should not be enacted. It is vital that in defending democracy, we do not compromise the very ideals we are seeking to preserve.

Senator Brian Greig
Australian Democrats

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1	Mr Dallas Fraser
2	Dr Valerie Yule
3	Ms Tessalie Parker, Southern Cross University
4	Kendall Lovett and Mannie De Saxe
4A	Kendall Lovett and Mannie De Saxe
5	Ms Beverley Inshaw & Mr John Inshaw
6	Dr Tim Anderson, University of Sydney
7	Executive Council of Australian Jewry
8	Prof George Williams & Mr Iain Gentle
9	Anna Couani
10	People Against Repressive Legislation
11	The Greens NSW
12	Rev. David Pargeter, Uniting Church in Australia
13	Friends of the Earth Northern Rivers
14	Social Education and Research Concerning Humanity Foundation
15	Women's International League for Peace and Freedom (WILPF) Australia
16	Mr Philip Reynolds
17	Ms Michelle D Richards
18	Mr John Terry
19	Ms Alison Sexton-Green
20	Mr David Smith
21	Victorian Tafe Students and Apprentices Network
22	Mr Ken Shiell

23 Maria and Tony Fifield

24 Ms Bev Walters

25 Mr Stuart McConville

26 Mr Tim Thorncraft

27 Ms Anastasia Guise

28 Ms Susie Russell & Mr Greg Hall

29 Mr Daniel Moss

30 Mr Aidan Ricketts

31 Ms Lisa Callinicos

32 Mr/s Alex Clarke

33 Mr Jou Smith

34 Nightcap Conservation Society

35 Mr Donovan Simpson-Neilands

36 Mr Andy Gough

37 Ms Rebecca Scholfield

38 Ms Therese Elliott

39 Mr Neil Gorter

40 Mr Ian Dixon

41 Ms Georgie Woods

42 Mr Sean O'Shannessy

43 Mr Cameron Shilton

44 Ms Catrina Whan

45 Mr Max Whisson

46 Mr Robert Webb

47 Mr Ken Grundy

48 Ruairi Gallagher

49 Mr & Mrs MacDonald

50 Mr Peter Westheimer

51 Mr & Mrs Armstrong

52 Mr Graeme Batterbury

53 Ms Janet Clark

54 Ms Rebecca Stewart

55 Ms Kay Sawatzky

56 W Benstead

57 Mr Ted Green

58 NSW Council for Civil Liberties Inc

59 Mr Bob Phillips

60 Dr Jude McCulloch, Police Studies - School of Social Inquiry Deakin University

61 Mr Joo Cheong Tham, Law School Victoria University

62 Ms Eva Cox, Faculty of Humanities and Social Science University of Technology Sydney

63 Mr John Watson

64 Mr & Mrs Roberts

65 Mr Maurice Shaya

66 Mr Bryce Kavanagh

67 Ms Ruth Rosenhek

68 Mr & Mrs Chew

69 Ms Helen Carnaby

70 Ms Margaret Nelson

71 Ms Vicky Chandler

72 Jon Croft

73 Ms Lisa Bartholomew

74 Mr Mark Glaser

75 Ms Kelly Dick

76 Daniel Kuster

77 Mr Harold Allen

78 Mr Steve Barrie

79 R F Price, La Trobe University

80 Ms Kathryn McCloughry

81 Manninder Sekhon

82 Ms Michelle Tumino

83 Mr Glenn Humphreys, School of Education & Early Childhood Studies College of Arts Education & Social Sciences - University Western Sydney

84 Ms Julie Graeme

85 Mr Hugh Nicholson

86 Ms Susan Nash

87 Ms Shirley Hosking

88 Ms Roslyn Irwin

89 Ms Virginia Snape

90 Mr Mark Stevens

91 Ms Bernadine Kelly & Ms Mary Griffiths

92 Mr & Mrs Hartnett

93 Freya Higgins-Desbiolles

94 Ms Jannine Barron

95 Mr Martin Oliver

96 Mr & Mrs Kuhn

97 Federation of Community Legal Centres (VIC)

97A Federation of Community Legal Centres (VIC)

98 Mr Mervyn Murchie

99 Mr Augustus Gloop

100 Ms Justine Keon

101 Mr Clive Nicholls

102 New South Wales Bar Association

103 Mr Paul Wilson

104 Aina Ranke

105 Mr John Mackenzie

106 Mr John Hill

107 Mr Geoffrey Brown

108 Francis & Jennifer Cole

109 Ms Val Hodgson

110 Mr Paul Condon

111 Ms Rebecca Spence, School of Professional Development and Leadership University of New England

112 Mr Mark Gambera

113 Donella Peters

114 Ms Sue Bushell

115 Ms Tracey Bretag

116 Ms Gabrielle Peut

117 Mr Don McMaster, Politics Department Adelaide University

118 Ms Roanna Gonsalves

119 Terri Coates

120 Mr Dan Bray

121 Jesse Wynhausen

122 Mr Paul Norton

123 Chris Diamond

124 Cr Rob Hamilton

125 Ms Marie-Clarie O'Sullivan

126 Mr Peter Bill

127 Mr Michael Connon

128 Ms Kate Durrant, Australian School of Environmental Studies

129 Mehmet Sevimli

130 Ms Ingrid Neilson

131 Mr Karl Wolfenden

132 Mr Simon Cox

133 Australian Arabic Council

134 Electronic Frontiers Australia

134A Electronic Frontiers Australia

135 Ethnic Communities' Council of Victoria Inc

136 Professor David Kinley, Castan Centre for Human Rights Law Monash University

137 Australian Transaction Reports and Analysis Centre

137A Australian Transaction Reports and Analysis Centre

137B CONFIDENTIAL

138 Islamic Council of Victoria

139 Dr Derek Wilding, Communications Law Centre The White House University of NSW

140 Dr Jenny Hocking, Australian Research Council Monash University

141 Rhea Dhillon, Monash Student Association Law Students' Society

142 Young Peoples Legal Rights Centre

143 NSW Law Reform Commission

144 Dr Hannah Middleton

145 Victorian Council of Social Services

145A Victorian Council of Social Services

146 Radical Women and the Freedom Socialist Party

147 ACTU

148 NSW Privacy Commission

149 Liberty Victoria – Victorian Council for Civil Liberties

149A Liberty Victoria – Victorian Council for Civil Liberties

150 Rev Elenie Poulos, Social Responsibility and Justice Uniting Church in Australia

151 Fitzroy Legal Centre

152 Australasian Centre for Policing Research

153 Australian Education Union

154 Mr Daniel Edwards

155 Mr Andrew Waterfall & Ms Rose Clyne

156 Working Womens Health

157 Festival of Light

158 Rail Tram and Bus Union

159 NOWAR (Adelaide)

160 Ms Barbara Baker

161 National Association of Community Legal Centres

162 Redfern Legal Centre

163 Mr Dennis Doherty

164 Women's Rights Action Network Association

165 Adults Advisory Council Tasmanian Commission for Children

166 Mr Tim Tolhurst

167 Ms Joan Coxsedge

168 Law Institute of Victoria – Young Lawyers Section

169 Amnesty International Australia

170 Justice Elizabeth Evatt

171 Australian Securities and Investment Commission

172 Australian Privacy Charter Council

173 Association of Criminal Defence Lawyers

174 Human Rights Council of Australia

175 Customs Brokers & Forwarders Council of Australia Inc.

176 Australian Customs Service

176A Australian Customs Service

176B CONFIDENTIAL

176C Australian Customs Service

177 The Supreme Islamic Council of NSW Inc.

178 People for Nuclear Disarmament NSW

179 Greenpeace Australia Pacific

180 Western Australia Police Service

181 74th Students Representative Council

182 Public Interest Advocacy Centre

183 Australian Catholic Social Justice Council

184 Queensland Teachers' Union of Employees

185 National Union of Students NSW Branch

186 National Union of Students

187 Australian Council for Civil Liberties

188 Victorian Trades Hall Council

189 Australian Federal Police

189A Australian Federal Police

189B Australian Federal Police

189C Australian Federal Police

189D CONFIDENTIAL

190 Ms Genevieve O'Connell

191 Mr & Mrs Hans Kuhn

192 Mr G.L Shields

193 Mr Valiant Halborg

193A Mr Valiant Halborg

194 G.W Dunn

195 B.V Atkins

196 Ms Karen Barker

197 Mr Tom Kecskemeti

198 Ms Jean McClung

199 Mr John Porter

200 Mr Ben Ashley

201 Mr & Mrs Peter Ackland

202 Mr Simon Hall

203 Mr Rod Evans

204 Ms Elizabeth Wilson

205 Reta D Bell

206 Australian Photobiology Testing Facility

207 Mr Philip Cross

208 Ms Carole De Silva

209 Ms Ann Lawler

210 Mr Russell Neill

211 Mr Steve Turner

212 Ms Alison Lyssa

213 Ms Jan Pukallus

214 Ms Tanya McColl

215 Mr Brian Jenkins, Stop MAI (WA) Coalition

216 Port Adelaide Branch of the Australian Greens SA

217 Ms Susie Bunn

218 Ms Kathryn Kang

219 Wtowatch ACT

220 People for Peace through Justice Beyond September 11

221 Mr Jay Tyrer

222 Ms Valerie Thompson

223 Ms Natalie Wasley

224 Mr Kris Schmah

225 Reverend Judy Redman

226 Mr Chris Pepper

227 Mr Peter Bridge

228 J.T Carmody

229 Mr/s L Smith

230 Ms Angela Griffiths

231 Mr Jeremy Beck

232 Ms Matilda Bawden

233 G & D Harriott

234 Mr Liam Cranley

235 Ms Julienne van Loon

236 Mr Dominik Jalocha

237 Ms Martha R Hills

238 Mr Julian Littler

239 Mrs Sandra Bloodworth

240 Ms Julie Ann Robinson

241 Mr John Davis

242 Mr Denis Evans

243 Ms Jan Bartlett

244 Mr Marcel Maeder

245 Mr Jim, Helen & Ann Martin

246 Office of the Federal Privacy Commissioner

247 Ms Claire & Brigid Aird

248 Ms Sue Dekker

249 Dr Adrian Ryan

250 New South Wales Minister for Police

251 Law Council of Australia

251A Law Council of Australia

252 Media Liasion

253 Mr D.W Ringland

254 Ms Joanne Lawler

255 Mr Garry R Brell

256 Gold Coast Greens

257 Ms Nancy Atkin

258 Mr Stuart Skabo

259 Australian Manufacturing Workers Union

260 Mr Ben Stevenson

261 Ms Joanne Clapcott

262 Majdolin Yohann

263 Mr Simon Yohanna

264 Mr John Flitcroft

265 Ms Yvonne Francis

266 Mr Robert & Mrs Caroline Larner

267 Mr Colin Campbell

268 Mr Graeme Muldoon

269 Mr Wayne Barwick

270 Ms Leonie M Ebert

271 Mr Des Ritchie

272 Mr Daniel Hope

273 Mr Jeremy Dixon

274 Mr Mick Hender

275 Ms Heidi van Schaik

276 Mr Eric Miller

277 Mr Brian Miller & Ms Jennifer Teece

278 Leiv Bornecrantz

279 WT & JA Harris

280 Mr Malcolm Teggins

281 Mr Simon Fane

282 Ms Alice Aird & Mr Bruce Hedge

283 Mr Joe Bryant

284 Mr Philip Johnson

285 Australian Peace Committee (SA Branch) Inc.

286 Mr James Arnold

287 KG Browne

288 Ms Jayne Wrigley

289 Ms Sheryl Jarecki

290 Mr John Hadden

291 Ms Robyn Ford

292 Mr Ken Martin

293 Ms Ruth Martin

294 Mr Manninder Sekhon

295 Ms Rosemary Dunlop

296 Mr R Chapman

297 Ms Barbara Hurley

298 Mr Gary Land & Ms Paula Kelly

299 Ms Cristina Carcia

300 Dr F D Young

301 Mr Ross Daniels

302 Mr Justin Smirk

303 Mr Alan Outhred

304 Ms Sarah Moles

305 Ms Debbie Ferrier

306 Mr Dominic W YKanak

307 Mr Jim Hazzard

308 Ms Leanne Minshull

309 Mr Ray Hopkins

310 Ms Gayle Johnson

311 Ms Sarah Di Giglio

312 Mr Rob Mulholland

313 Australian Muslim News

314 Mr Colin Smith

315 Mr/s W.R. Chipperfield

316 Mr Alan Greenfield

317 Mr John Marshall

318 Publishing & Printing Services UNSW

319 Ms Jane Louise

320 Ms Ros Shute

321 Mr Michael Wardman

322 Ms Amanda Burchell

323 Ms Margarita Goumas

324 Mr Gareth Smith & Ms Maxine Caron

325 Mr Peter Collard

326 Mr Fred Kohl

327 Mr Blair & Mrs Lyndett Speirs

328 Ms Beth Boorer

329 Mr Bill Hartley

330 Mr Dennis Pukallus

331 Mr John Waller

332 Ms Catherine Farmer

333 Mr Greg Crocetti

334 Mr Donald Humphries

335 Mr Time Beckenham

336 Mr/s G Bertoli

337 Ms Leila W Huebner

338 Mr/s G Burgess

339 Mr Mars Drum

340 Mr R W Varney

341 Ms Mary R Yates

342 Ms Vicki Tzortzis

343 Mr Neil Lawry

344 Mr Jack Desbiolles, University of South Australia

345 Ms Marianne Muir

346 Mr/s M Cottrell

347 Mr Glenn Pipe

348 Mr Kevin Bracken

349 Citizens Electoral Council of Australia

350 Ms Sue McDonald

351 Australian Civil Liberties Union

352 Progressive Labour Party

353 CEPU

354 Mr Keith Morris

355 Mrs Roberta Van Oeveren

356 Mr Arthur Veno

357 Ms Ruth Russell

358 Mr/s KJ Clancy & Others

359 Ms Clare Rudkin

360 Mr Jason Anderson

361 Mr Richard Simpson

362 Mr Martin Bibby

363 Mr Martin Fitzsimons

364 Ms Carmel Flint

365 Mr Matt Meir

366 Mr Glenn Pure

367 MsFrances O'Halloran

368 Mr Darren Boyle

369 Mr Thomas Bardon

370 Mr Roy Jackson

371 Mr Shane Boyle

372 Ms Debbie Eastwell

373 Mr Keith Willey

374 Mr/s V Boyle

375 Mr Jay Tyrer

376 Ms Barb Tyrer

377 Mr/s Samiro Douglas

378 Ms Joclyn McLean

379 Mr Ron McLean

380 Northern Territory Police Commissioner's Office

381 Police Commissioners' Electronic Crime Steering Committee

382 Australian Security Intelligence Organisation

383 Attorney-General's Department

383A Attorney-General's Department

384 Mr Alan Griffiths

385 Dr John Tomlinson Queensland University of Technology

386 Mr Doug Mitchell

387 Mr Frank Williams

388 Ms Maureen King

389 Mr Allan Quire

390 Mr John Weiley

391 Mr Andrew Migot & Ms Anna Parker

392 Mr Arne Larsen

393 Ms Jean Robinson

394 Ms Caroline Le Couteur

395 Mr H Nichols

396 Mr Hans & Ms Colette Jakobi

397 Mr Kelvin Heslop

398 Mr Jon & Mrs Gillian Kaub

399 Swinbourne Student Radio Committee

400 Mr David McKelvey

401 Mr Laurence Knight

402 Quaker Peace and Justice NSW

403 Ms Elisa Barwick

404 Mr Terry Dwyer

405 Ms Sue King

406 Mr Patrick Coleman

407 Mr/s H R Gillham

408 Mr Grahan Reid

409 Mr Andrew Bailey

410 Mr Alan Bell

411 Ms Trudy Campbell

412 Mr Gerard Hutchinson

413 Mr W Love

414 Mr Robert Stephen

415 Mr Shaun McKenzie

416 Mr Dean McKenzie

417 Mr Malcolm McKenzie

418 Mr Albert Anderson

419 Mr/s K Anderson

420 Ms Lorraine McKenzie

421 Anarchist Media Institute

422 Ms Sue King

423 United Nations Association of Australia Inc

424 Australian Lawyers for Human Rights

425 Minister for Police & Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province

426 Franciscan Missionaries of Mary

427 MSC Peace and Justice

428 Dominican Sisters of North Adelaide

429 Mr RF Price & Others

430 Sleiman Yohanna

431 Duncan Kerr MP, Federal Member for Denison

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Monday, 8 April 2002 (Sydney)

Mr Karl Alderson, Principal Legal Officer, Criminal Justice Division, Attorney-General's Department

Mr David Bernie, Vice President, New South Wales Council for Civil Liberties

The Hon. Justice John Dowd, Commissioner; and President, Australian Section, and Member, International Executive Committee, International Commission of Jurists

Mr Peter Ford, First Assistant Secretary, Information and Security Law Division, Attorney-General's Department

Ms Susan McIntosh, Principal Legal Officer, Security Law and Justice Branch, Information and Security Law Division, Attorney-General's Department

Mr Cameron Murphy, President, New South Wales Council for Civil Liberties

Professor George Williams

Public Hearing, Wednesday 17 April 2002 (Melbourne)

Mr Laurence Aboukhater, Deputy Chair, Ethnic Communities Council of Victoria

Mr Victor Borg, Member of Executive Council and Past Chairman, Ethnic Communities Council of Victoria

Ms Catharine Bowtell, Australian Council of Trade Unions

Mr Julian Burnside, Committee Member, Liberty Victoria

Ms Sharan Burrow, President, Australian Council of Trade Unions

Mr Bilal Cleland, Secretary, Islamic Council of Victoria

Mr Robert Durbridge, Executive Member, Australian Council of Trade Unions

Ms Irene Graham, Executive Director, Electronic Frontiers Australia

Dr Jenny Hocking

Ms Judith Klepner, Policy and Regional Officer, Ethnic Communities Council of Victoria

Ms Anne O'Rourke, Assistant Secretary, Liberty Victoria

Public Hearing, Thursday 18 April 2002 (Melbourne)

Mr Anthony Abbott, President, Law Council of Australia

Ms Nicole Bieske, Convenor, National Legal Group, Amnesty International

Ms Dimity Fifer, CEO, Victorian Council of Social Service

Mr Anthony Glynn, Member, Law Council of Australia, Member, National Criminal Law Liaison Committee

Ms Christine Harvey, Deputy secretary-General, Law Council of Australia

Ms Sarah Joseph, Associate Director, Castan Centre for Human Rights Law, Faculty of Law, Monash University

Professor David Kinley, Director, Castan Centre for Human Rights Law, Faculty of Law Monash University

Mr Damien Lawson, Spokesperson, Federation of Community Legal Centres (Victoria) Inc

Mrs Margaret MacDonald, Delegate, People Against Repressive Legislation

Ms Claire Mahon, Member, Amnesty International

Ms Anne McCasland-Pexton, Research Assistant, Castan Centre for Human Rights Law, Faculty of Law, Monash University

Rev. David Pargeter, Director, Justice and International Mission Unit, Uniting Church in Australia

Ms Annie Pettitt, Policy Analyst, Victorian Council of Social Service

Mr Joo-Cheong Tham

Dr Joseph Toscano, Delegate, People Against Repressive Legislation

Dr Mark Zirnsak, Social Justice Development Officer, Justice and International Mission Unit, synod of Victoria, Uniting Church in Australia

Public Hearing, Friday 19 April 2002 (Canberra)

Mr Karl Alderson, Pricipal Legal Officer, Criminal Law Branch, Attorney-General's Department

Mr Michael Atkins, Senior Adviser - Law Reform, Australian Federal Police

Ms Liz Atkins, Deputy Director, Money Laundering Deterrence, Australian Transaction Reports and Analysis Centre

Mr Timothy Chapman, National Manager, Passenger Processing, Australian Customs Service

Ms Sarah Chidgey, Senior Legal Officer, Criminal Law Branch, Attorney General's Department

Federal Agent Andrew Colvin, Team Leader, Financial Investigations Sydney, Australian Federal Police

Mr Morgan Croll, National Financial Coordinator, Australian Federal Police

Ms Annie Davis, Director, Legislation Program, Australian Federal Police

Mr John Hawksworth, National Director (Border), Australian Customs Service

Mr Keith Holland, Assistant Secretary, Security Law and Justice Branch, Attorney-General's Department

Mr Neil Jensen, Acting Director, Australian Transaction Reports and Analysis Centre

Mr Steven Marshall, Legal Adviser, Australian Security Intelligence Organisation

Federal Agent Brendan McDevitt, General Manager, National Operations, Australian Federal Police

Ms Susan McIntosh, Principal Legal Officer, Security Law and Justice Division, Attorney-General's Department

Mr Dennis Richardson, Director-General, Australian Security Intelligence Organisation

Ms Catherine Smith, Principal Legal Officer, Information Security Law Division, Attorney-General's Department

Mr Martin Studdert, Director, Australian Protective Service, Attorney-General's Department

Mr Terry Walker, Acting Assistant Secretary, Entry Branch, Department of Immigration and Multicultural and Indigenous Affairs

Mr Mark Walters, Acting Director, International Operations, Australian Federal Police

Public Forum, Wednesday 1 May 2002 (Sydney)

Ms Isabella Alexander, Solicitor, Oz Netlaw, Communications Law Centre

Mr Phillip Boulten, Convenor, Criminal Defence Lawyers Association

Mr James Campbell, Education Research Officer, Students Representative Council, University of Sydney

The Hon. Ian Cohen, MLA, New South Wales Greens, Parliament of New South Wales

Ms Sandra Cornish, National Executive Officer, Australian Catholic Social Justice Council

Mr Denis Doherty, National Coordinator, Australia Anti-Bases Campaign Coalition

Justice Elizabeth Evatt

Mr Gavin Greenoak

Mr Daniel Kuriacou, President, Students Representative Council, University of Sydney

Mr Andrew Naylor, Member, Human Rights Council of Australia

Dr Patricia Ranald, Principal Policy Officer, Public Interest Advocacy Centre

Mr Nigel Waters, Convenor, Australian Privacy Charter Council

Dr Derek Wilding, Director, Oz Netlaw, Communications Law Centre

APPENDIX 3

UNITED NATIONS SECURITY COUNCIL RESOLUTION 1373

United Nations S/RES/1373 (2001)

Security Council Distr.: General

28 September 2001

Resolution 1373 (2001)

Adopted by the Security Council at its 4385th meeting, on 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) 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;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls* upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;.

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.