GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

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Security Legislation Review
c/- Attorney-Genera's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Chair

**Security Legislation Review**

Thank you for the opportunity to make a late submission to the Security Legislation Review Committee.

The Committee's brief takes in several major pieces of security legislation, the practical effectiveness of which we are not well placed to comment upon. We do, however, make points about some aspects of the legislation under review which either were of concern at the time of their enactment and have remained so or have become problematic due to later amendment which has broadened their scope.

In doing so, we acknowledge that although the Committee's terms of reference derived from section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (as amended by Sch 2 of *Criminal Code Amendment (Terrorism) Act* 2003) invite comment only upon the amendments contained in the six Acts stipulated, it is highly artificial to respond without taking note of subsequent changes to the core provisions in question. In particular, many of the offences introduced to the *Criminal Code 1995* by the *Security Legislation Amendment (Terrorism) Act 2002* no longer exist in that form, having been amended by the two *Anti-Terrorism Acts* of 2005. We have sought to direct our comments to the legislation under review, but have noted the impact of later amendments where applicable.

## A Definition of 'terrorist act' in the *Criminal Code 1995*, s.100.1 inserted by *Security Legislation Amendment (Terrorism) Act 2002* and re-enacted by *Criminal Code Amendment (Terrorism) Act 2003*

Under s 100.1 of the Security Legislation Amendment (Terrorism) Bill 2002, a 'terrorist act' was an act or threat done 'with the intention of advancing a political, religious or ideological cause' that:

(a) involves serious harm to a person;

SYDNEY 2052 AUSTRALIA
Telephone: +61 (2) 9385 2259
Facsimile: +61 (2) 9385 1175
Web: www.gtcentre.unsw.edu.au

(b) involves serious damage to property;
(c) endangers a person's life, other than the life of the person taking the action;
(d) creates a serious risk to the health or safety of the public or a section of the public; or
(e) seriously interferes with, seriously disrupts, or destroys, an electronic system.

The section provided an exception only for industrial action and *lawful* advocacy, protest or dissent.

In this form, the definition lacked a focus on the intent associated with a terrorist act that distinguishes such violence from other non-terrorist acts. The reference to 'with the intention of advancing a political, religious or ideological cause' was so wide that it would have criminalised many forms of unlawful civil protest (unlawful perhaps only due to a trespass onto land) in which people, property or electronic systems were harmed or damaged.

Fortunately, the Bill failed to pass in this form and the definition as amended contains the following additional element:

(c) the action is done or the threat is made with the intention of:
(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
(ii) intimidating the public or a section of the public.

In addition, advocacy, protest, dissent or industrial action (whether lawful or not) is excluded so long as it is not intended to, among other things, cause serious physical harm to a person or create a serious risk to the health or safety of the public.

The definition of terrorist act is obviously crucial to the operation of a number of provisions. After comparing the definition to other definitions in national legal systems such as the United States and Canada, it has been concluded that the Australian definition is one of the best in the common law world in capturing the elusive qualities that make terrorism distinctive from other forms of violence.[1] Indeed, the problems (such as being over-inclusive) that often arise with those other definitions have been removed in Australia through the amendments made to the original definition. In the absence of being aware of any other problems with the definition, we do not believe it requires further amendment.

**Recommendation:**

**The definition of 'terrorist act' in s 100.1 of the *Criminal Code* is one of the best in the common law world and no further amendment of it is necessary.**

## B Offences relating to terrorist organisations in the *Criminal Code 1995,* Pt 5.3, Div 102 inserted by *Security Legislation Amendment (Terrorism) Act 2002* and re-enacted by *Criminal Code Amendment (Terrorism) Act 2003*

It is difficult to make substantial comment on these offences since, at the time of writing, criminal prosecutions under them are being prepared for trial against persons arrested in

[1] Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270.

Melbourne in November 2005. As these provisions have not been considered by the courts yet it remains to be seen whether that experience will shed light on their effectiveness. Certainly the Committee should attend closely to any developments in respect of those arrests.

Absent judicial interpretation of those provisions, we remain concerned at the width of some of the offences in this Division. The core problem as we see it is the law's attempt to attach criminal liability to persons not on the basis of any activity committed by the individual beyond simply their membership (including 'informal') or other connection with a particular group which engages in terrorist activities about which they may not have actual knowledge.

In some ways this problem was not as pronounced in the Acts presently under review, as it has become through later amendment. For example, Sch 1 of the *Security Legislation Amendment (Terrorism) Act 2002* inserted the original offence of membership of a terrorist organisation in the following form:

> *102.3 Membership of a terrorist organisation*
>
> *(1) A person commits an offence if:*
>
> *(a) the person intentionally is a member of an organisation; and*
> *(b) the organisation is a terrorist organisation because of paragraph (c) of the definition of terrorist organisation in this Division (whether or not the organisation is a terrorist organisation because of another paragraph of that definition also); and*
> *(c) the person knows the organisation is a terrorist organisation.*[2]

The reference in 102.3(1)(b) to paragraph (c) of the definition of terrorist organisation meant, at that time, 'an organisation that is specified by the regulations for the purposes of this paragraph' ie. one which the Attorney-General had specified by regulation after identification of the body by the UN Security Council as one engaged in terrorism. That was a clearly ascertainable criterion.

That restriction on the identification of a 'terrorist organisation' for the purpose of this offence has since been removed so that the effect is far wider and consequently far less certain for the individual. Listing of the organisation is no longer a precondition to the operation of most of Division 102. It is now enough that persons belong to an organisation which is not listed under the regulations but which is subsequently shown to have been 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)'[3] – and they knew or were reckless as to that character.

In this context, it is interesting to note that the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* 1995 (which was not introduced by any of the laws under review) is only infringed by a person when the organisation in question is one specified by the Regulations. Although the proscription process now enables organisations to be listed by the Attorney-General which have not been so identified by the UN Security Council (providing a not unsuitable level of flexibility at a domestic level), the requirement for a listing of the organisation before a person can be charged with the offence of association ensures a much higher degree of certainty than if the organisation need only be classified as 'terrorist' at

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2 The provision was re-enacted in this form (albeit with altered numbering) by *Criminal Code Amendment (Terrorism) Act 2003.*

3 *Criminal Code 1995*, s.102.1 (as amended up to *Anti-Terrorism Act (No 2) 2005*.

the time of or after arrest. While association involves perhaps a lower level of familiarity with an organisation than being a member of it or providing it with services, that distinction need not always hold true.

Of course terrorist organisations will not always oblige us with neat categories and clear identification – indeed the signs are that modern terrorism is going to be far less regimented than in the past – but even so we must recognise that criminalisation of membership of a terrorist group is likely to be very cumbersome as a matter of evidence in a criminal prosecution when the law seeks to extend to 'organisations' which are so loosely defined (though again, this is something which will be better appreciated after the trials of Melbourne's alleged terrorists). It also risks injustice to persons attached to groups about whose every activity they are not as aware as perhaps they should be. This was emphatically *not* a danger under the original form of the offence which thus was preferable to its present version.

**Recommendation:**

**The offences relating to terrorist organisations in Div 102 of the *Criminal Code* should be confined to only those organisations which have been specified under the regulations made by the Minister.**

Following on from this point, some comment upon the expanded grounds which the Attorney-General may rely in proscribing terrorist organisations under s 102.1(2) of the *Criminal Code* is warranted. As recently amended by the *Anti-Terrorism Act (No 2) 2005*, before the regulation specifying an organisation can be made, the Minister must be satisfied on reasonable grounds that the organisation:

> *(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or*
> *(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).*

'Advocates' is defined in s 102.1(1A) as occurring if:

> *(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*
> *(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or*
> *(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.*

Although, following recommendations by the Senate Legal and Constitutional Legislation Committee, this is a significant improvement upon the original proposal legitimate concerns persist about this new ground for proscription.

In particular, s 102.1(1A)(c) indicates an intention to cover *indirect* incitement of terrorism, or statements which, in a very generalised or abstract way, somehow support, justify or condone terrorism. The effect of proscribing an organisation on this basis has serious consequences

under the accompanying criminal provisions. Individuals, be they either a member (*Criminal Code*, s 102.3) or an associate ((*Criminal Code*, s 102.8), could be prosecuted merely because someone in their organisation praised terrorism – even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the person praising terrorism did not intend to cause terrorism.

This is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of their associates beyond their control. While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism. It is well-accepted that speech which directly incites a specific crime may be prosecuted as incitement. It is quite another matter to prosecute a third person for the statements of another, even more so when such statements need not be directly and specifically connected to any actual offence.

**Recommendation:**

**The definition of 'advocates' in s 102.1(1A) of the *Criminal Code*, which affects the operation of the proscription process and consequential offence provisions introduced by the legislation under review, should be amended by the deletion of subsection (c).**

## C Width of certain preparatory offences in the *Criminal Code 1995*, Pt 5.3, Divs 101, 102 and 103

Many of the terrorism offences introduced to the *Criminal Code* by the *Security Legislation Amendment (Terrorism) Act 2002* (and re-enacted by *Criminal Code Amendment (Terrorism) Act 2003*) and the *Suppression of Financing of Terrorism Act 2002* were subject to a minor textual amendment by the *Anti-Terrorism Acts* of 2005. This was popularly referred to as the '"the" to "a" change' and was motivated by concern that preparatory acts could only be prosecuted under the offences as originally drafted if they pointed to some specific planned terrorist act. This interpretation of the provisions was expressly excluded by amendments to subsections 101.2(3); 101.4(3); 101.5(3); 101.6(2) and 103.1(2) made by *Anti-Terrorism Act (No 1) 2005*; and subsections 102.1(1)(a) and (2) made by *Anti-Terrorism Act (No 2) 2005*.

Assuming that change was necessary in order to have such an effect, these provisions now expressly have the effect of criminalising people for conduct committed before any specific criminal intent has formed. While preparatory conduct should certainly constitute an offence, two key objections may be raised to an attempt to provide for this in the absence of an intention to pursue a sufficiently detailed plan.

First, this is contrary to ordinary principles of criminal responsibility, since people who think in a preliminary or provisional way about committing crimes may always change their mind and not implement their plans. This amendment allows a person to be prosecuted before a genuine criminal intention has taken shape.

Second (and once more, we acknowledge that this assertion will benefit from seeing what transpires in the courts in respect of recent arrests), as a matter of the practicality of securing a criminal conviction, the width of the offences as amended seems hardly helpful. Indeed it might be said to encourage authorities to act precipitately. Of course, with delay may lie danger, but to arrest persons on the basis of activities or possessions which cannot, at that point in time, be

connected to any specific terrorist act risks failure in convincing the courts that a crime was in fact being prepared. It also, by corollary, might be said to expose a range of innocent activities to criminal sanction by casting the net so very wide.

**Recommendation:**

**The usefulness of the amendments to the provisions outlined above which relate to preparatory offences should be further considered.**

Yours sincerely,

**Dr Andrew Lynch**
Director
Terrorism and Law Project

**Professor George Williams**
Anthony Mason Professor
and Centre Director