National Security Legislation Discussion Paper

Attorney-General's Department

October 2009

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Introduction

The Law Council welcomes the opportunity to provide the following submission in response to the Discussion Paper on Proposed Amendments to National Security Legislation ("the Discussion Paper").

The Law Council particularly welcomes the approach adopted by the Attorney-General's Department in seeking comment on the development of these important laws before their introduction to Parliament. The Law Council is hopeful that this consultative approach to law reform in the area of national security will result in more balanced and considered legislation.

Many of the reforms proposed in the Discussion Paper reflect the recommendations of earlier reviews and inquiries to which the Law Council made submissions, including:

- Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008);
- Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the PJCIS (September 2007);
- Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (December 2006); and
- Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006).

While in several cases, the Law Council is disappointed about which recommendations have been adopted or the extent to which they have been adopted in the Discussion Paper, the Law Council is nonetheless pleased that this valuable earlier work has not been overlooked and may, in due course, result in constructive law reform.

Notwithstanding these positive observations, the Law Council also notes that the Discussion Paper is by no means a comprehensive review of Australia's anti-terror laws. The amendments it proposes certainly do not equate to the complete overhaul of those laws, which the Law Council has long advocated is required.

For example, the Discussion Paper does not address in any way some of the most controversial and concerning aspects of Australia's anti-terror regime such as:

- the terrorist organisation proscription process;
- the majority of the terrorist organisation offences;
- the preparatory terrorism offences;
- the preventative detention regime;
- the control orders regime;
- ASIO's questioning and detention powers, and
- telecommunication interception powers, such as B-Party warrants.

Further, the Discussion Paper in no way attempts to audit the compliance of existing or proposed anti-terror provisions with Australia's international human rights obligations.

For those reasons, the Law Council is hopeful that the Discussion Paper represents the first step in a more extensive consultation and review process. The Law Council looks forward, for example, to the appointment of a National Security Legislation Monitor who will be able to provide independent and robust advice to government on an ongoing basis. The Law Council also looks forward to the 2010 Council of Australian Governments'

review of certain key provisions of the anti-terror laws and expects that this process too will provide the opportunity for further discussion and for meaningful reform.

The Law Council's detailed response to the specific amendments proposed in the Discussion Paper is set out below.

Proposed Amendments to the Criminal Code

Amendments to Treason Offences (section 80.1 and proposed section 80.1AA)

It is proposed to narrow and clarify the scope of the treason offences. In that regard, the Law Council supports the following proposals:

1. The insertion of a new requirement that the assistance provided to an enemy at war with the Commonwealth or to a country or organisation engaged in armed hostilities with Commonwealth must be *material* assistance.

2. The insertion of a new requirement that the assistance provided must both be intended to assist the enemy to engage in war or hostilities with Australia and must in fact assist the enemy to engage in war or hostilities with Australia.

3. The insertion of a new requirement that the person charged with the offence must owe an allegiance to the Commonwealth – that is that he or she must be a citizen, resident or have voluntarily put him or herself under the protection of the Commonwealth.

4. The insertion of an express prohibition on the retrospective proclamation of an "enemy at war with the Commonwealth" or the retrospective proclamation of a country /organisation engaged in armed hostilities with the Commonwealth for the purposes of the section.

5. The repeal of section 80.5 which provides that a prosecution cannot be commenced without the consent of the Attorney-General.

The Law Council has the following concerns with the proposed amendments to the treason offences:

1. The Law Council submits that current section 80.1(2) should be repealed. This section makes it an offence to allow another person who has committed treason '*to escape punishment or apprehension'* or to fail to prevent the commission of an offence of treason by informing a constable or by using other reasonable endeavours. The offence carries a maximum penalty of life imprisonment.

   The Law Council submits that this type of ancillary conduct should not be dealt with in specific offence provisions but rather ought to be left to:

   - Part 2.4, Division 11 of the Criminal Code which covers ancillary offences under the Code more generally; and

- Section 6 of the *Crimes Act 1914* ("the Crimes Act") which makes it an offence to be an accessory after the fact to any Commonwealth offence and which carries the significantly lower maximum penalty of two years imprisonment, as is appropriate.

2. The Law Council submits that current section 80.1(1)(h) should be repealed. This section makes it an offence to "*form an intention to [commit treason] and to manifest that intention by an overt act."* The Australian Law Reform Commission (ALRC) found that this provision "*appears redundant and should have been deleted*" when the treason offences were transferred from the *Crimes Act 1914*.[1] The earlier Gibbs Committee review of the relevant provisions concluded likewise.[2]

Amendments to Sedition Offence (section 80.2 and proposed section 80.2A and 80.2B)

It is the Law Council's view that the sedition offences in the Criminal Code are unnecessary and should be repealed rather than reformed. The type of conduct sought to be targeted is already adequately covered by the ancillary offences set out in Part 2.4, Division 11 of the Criminal Code which deals with inciting, conspiring, aiding, abetting, counselling and procuring an offence.

To date no one has been prosecuted for sedition under Division 80 of the Criminal Code. This supports the assertion that the offence provisions serve no useful purpose.

The Law Council is also concerned that, in addition to being unnecessary, the sedition offences, by their very nature, have the potential to unduly burden freedom of expression and may have the effect of chilling legitimate political debate.

However, if the provisions are to remain in the Criminal Code, the Law Council supports the following proposals to narrow the offences:

1. The insertion of a new requirement that in order to trigger the offence provision a person must have *intentionally* urged the relevant conduct – e.g. the overthrow of the Government by force/violence; the interference with elections by force/violence; or the use of force/violence against a targeted group or member of that group.

2. The insertion of a new requirement that the person *must have intended that force or violence would occur*.

3. The repeal of sections 80.2(7) and 80.2(8) which make it an offence to urge a person to engage in conduct which would assist an enemy at war with Australia or a country or organisation engaged in hostilities with Australia. The Law Council submits that these provisions lack appropriate precision and are redundant in view of the treason provisions.

[1] "*Fighting Words – A Review of Sedition Law in Australia*", ALRC 104 (2006) at 11.40
[2] *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), H Gibbs, R Watson and A Menzies, [31.38].

4. The repeal of section 80.2(5) - the urging violence within the community offence. (With respect to the four new offences which are slated to replace this offence (proposed sections 80.2A and 80.2B) see Law Council concerns below.)

5. The repeal of section 80.5 which provides that a prosecution cannot be commenced without the consent of the Attorney-General.

As part of the reform of the sedition offences it is further proposed to introduce four new offences into Division 80 of the Criminal Code as follows:

- Section 80.2A(1) would make it an offence to intentionally urge a person or group to use force or violence *against another group*, which is distinguished by race, religion, nationality, national origin or political opinion, with the intention that force or violence will occur and in circumstances where the use of force or violence would threaten the peace, order and good government of the Commonwealth.

- Section 80.2A(2) would mirror section 80.2A(1) but without the requirement that the use of force or violence would threaten the peace, order and good government of the Commonwealth.

- Section 80.2B(1) would make it an offence to intentionally urge a person or group to use force or violence *against another person* , because of a belief that he or she is a member of a group distinguished by race, religion, nationality, national origin or political opinion, with the intention that force or violence will occur and in circumstances where the use of force or violence would threaten the peace, order and good government of the Commonwealth.

- Section 80.2B(2) would mirror section 80.2B(1) but without the requirement that the force or violence would threaten the peace, order and good government of the Commonwealth.

These sections are intended to replace section 80.2(5) which makes it an offence to urge a group or groups distinguished by race, religion, nationality or political opinion to use force or violence against another group or groups distinguished by race, religion, nationality or political opinion in circumstances, where the use of force or violence would threaten the peace, order and good government of the Commonwealth.

The Law Council has the following concerns with these proposed new offences:

1. The Law Council submits that these offences should not be co-located in the Criminal Code with the treason and sedition offences.

   These offences are of a different character and do not relate to political dissent or acts of violence directed towards the government and its institutions. Unlike the offence they replace, the new offences are not even focused on intergroup violence but may involve the urging of violence by one individual against another. Further, two of the new offences do not require that "the use of force or violence would threaten the peace, order and good government of the

Commonwealth". In those respects, the new offences are even harder to categorise as "public order offences" than the offence they replace.

On that basis, the Law Council submits that if these offences are to be included in the Criminal Code they should be in a separate Division dealing with anti-vilification laws.

2. The Law Council further submits that a separate and more detailed review of these proposed provisions is required outside of the national security legislation framework. The proper content and scope of federal anti-vilification laws, particularly in light of Australia's international obligations under the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR), is not a matter which can be properly addressed as side issue to the broader anti-terror law debate.

   To date, because these offences have not been directly formulated as anti-vilification laws and have instead been designed to fit, however unsuccessfully, in Division 80, they contain a strange mix of elements, some of which are inappropriate for anti-vilification offences.

   For example, the Law Council submits that the requirement that "the use of force or violence would threaten the peace, order and good government of the Commonwealth" should not be an element of an anti-vilification offence and would create an unnecessary additional hurdle to successful prosecution.

   Further, the Law Council questions whether it is appropriate that the offences should cover the targeting of a group or a member of a group that is distinguished by political opinion. Protection of groups defined by political opinion is beyond the scope of traditional anti-vilification laws.

   Finally, the Law Council questions whether it is appropriate that a good faith defence should be available for these offences. It is difficult to envisage what type of good faith justification could legitimately exist for conduct undertaken with the specific intent of urging a person to use force or violence against another person with the further intention that such force or violence will occur.

Amendments to the definition of 'terrorist act' (section 100.1)

The definition of "terrorist act" in the Criminal Code is central to Australia's anti-terror regime. It is pivotal to the definition of a terrorist organisation and the majority of terrorism offences. As a result, it also determines when a range of investigative and law enforcement powers are enlivened.

Since its introduction, the Law Council has submitted that the definition of 'terrorist act' is overly broad, lacks clarity and requires amendment.

The Law Council's primary concerns with the definition are as follows:

1. The definition goes beyond internationally accepted definitions of terrorism.

   UN Security Council Resolution 1566 provides a neat encapsulation of the internationally accepted definition of the term 'terrorist act'. Resolution 1566 requires members States to cooperate fully in the fight against terrorism and prevent and punish acts that are committed:

   - with the intention of causing death or serious bodily injury or the taking of hostages; and

   - for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organisation to do or to abstain from doing any act (irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature).[9]

   The definition of terrorist act in section 100.1 of the *Criminal Code* is much broader than this internationally accepted definition. For example, the Australian definition encompasses acts that cause serious damage to property and acts that interfere with telecommunications or financial systems, and is not limited to acts done with the intention of causing serious bodily injury or the taking of hostages.

   The fact that the Australian definition departs from the internationally accepted understanding of the term 'terrorist act' has been confirmed by the findings of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism ('UN Special Rapporteur').

   When examining Australia's legislative response to terrorism in 2006, the UN Special Rapporteur took the view that the definition of 'terrorist act' in section 100.1 of the Criminal Code oversteps the Security Council's characterisation of the term.[3] It was observed that the acts defined in subsections 100.1(2), such as acts causing damage to property or to electronic systems, include actions not defined in the international conventions and protocols relating to terrorism.

   Further, earlier this year the UN Human Rights Committee when commenting on Australia's record of compliance with its human rights obligations recommended that Australia "…*should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences*".[4]

[3] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006), [10]-[16]

[44] UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 19 February 2008, CCPR/C/AUS/5, available at: http://www.unhcr.org/refworld/docid/48c7b1062.html para [11].

2. The definition includes *threats* of action, as well as actual acts. This not only inappropriately broadens the definition but, because of the interaction between s100.1(1) and s100.1(2), also renders the definition, in part, unintelligible.

The Law Council's concerns are not addressed by the proposed amendments to the definition of terrorist act. On the contrary, the Law Council submits that the effect of the proposed amendments will be to widen the definition even further such that its precise scope will be impossible to accurately determine.

Specifically, the Law Council's concerns with the proposed amendments are as follows:

1. The Law Council submits that the term "serious harm" which is used in section 100.1(2)(a) and 100.1(3)(b)(i) should remain limited, as it is at present, to harm that is physical. If that limitation is removed and the ordinary Criminal Code definition of serious harm is incorporated instead:

   - the definition of terrorist act will be expanded to include actions or threats of actions which cause significant psychological harm that is or is likely to be significant and longstanding; and

   - acts of advocacy, protest, dissent or industrial actions which are not intended to cause physical harm but which are intended to cause psychological harm will no longer be excluded from the definition of terrorist act.

   The Law Council accepts that it is standard throughout the Criminal Code that the definition of harm encompasses both physical and psychological harm. This reflects a broader policy which recognises that the impact of psychological harm on a person can be serious, debilitating and long-lasting and that, therefore, acts which are intended to cause psychological harm ought to be regarded with the same opprobrium as acts which are calculated to cause physical harm. The Law Council supports this broader policy.

   However, the Law Council submits that the terrorism offences are different from the average offence against the person and that the definition of terrorist act should not be amended simply in the name of consistency and uniformity.

   The definition of "terrorist act" in the Criminal Code is, in effect, the gateway to a series of serious offence provisions and the trigger for a range of exceptional Executive powers which would, in all but emergency circumstances, be regarded as unjustified and unnecessary. Therefore, the definition must be drafted with great care and specificity. It must be possible to precisely determine the type of conduct that it captures, so that an assessment can be made of whether the measures available to prevent, investigate and prosecute that conduct are proportionate to the risk that is sought to be averted. It can not be a catch-all definition.

   The Law Council is concerned that if the term serious harm is no longer limited to harm that is physical – the type of conduct captured by the definition of terrorist act will be even harder to determine. It may, for example, encompass certain types of confronting advocacy and protest such as that employed by animal liberation or anti-abortion groups.

Expanding the definition in this way will also mean that the Criminal Code definition of terrorist act is even more out of sync with internationally accepted definitions of that term.

For those reasons, the Law Council opposes this proposed amendment. Further, the Law Council submits that if the Government wants to pursue this amendment, more detailed information should be provided about the type of conduct not presently covered by the definition that would be covered if the amendment was passed. Given the significance of the terrorist act definition it is not sufficient to base the amendment on a general policy objective of treating physical and psychological harm as equivalent.

2. The Law Council submits that the phrase "or is likely to cause..." should not be inserted into section 100.1(2). The Law Council submits that it will not overcome the problem it is designed to address and that as long as threat of action is included in section 100.1, the definition will remain, in part, unintelligible.

The term "terrorist act" in section 100.1 is defined as an action or a *threat of action* which, amongst other things, causes serious harm, serious damage to property, a person's death etc.

The problem with this definition is that it almost impossible to conceive of how a threat of action on it own could cause serious harm, death, serious property damage etc. It is for this reason that it is proposed to insert the phrase "...or is likely to cause". However, the Law Council submits that just as a threat of action can not on its own cause the prescribed outcomes, so too it can not be said that it "is likely to cause" those outcomes, unless carried out.

The Law Council submits that reference to threat of action should be removed from the definition of terrorist act and threats to commit a terrorist act should be the subject of a separate offence provision. In that way, the peculiar fault elements of a threat offence could be properly addressed and an appropriate penalty set. A threat to commit an act is materially different from actually committing the act. So too, a threat to commit an act is different from an attempt, a conspiracy or an incitement to commit that act. Although it might be reprehensible, it is conduct of a different type that should be addressed separately.

In the Discussion Paper it is argued that removing the threat of action from the definition of terrorist act would dilute the policy focus of criminalising threat of action within the offences in Division 101. It is assumed that what is meant by this is that it would no longer be an offence to possess or make a thing or document or to do any other act in preparation for merely making a threat to commit a terrorist act (rather than in preparation for actually committing a terrorist act). The Law Council submits that this is appropriate and that these sorts of inchoate preparatory offences, which stretch the outer boundaries of criminal liability to new limits, are certainly not required to avert the risk of a mere threat of action.

Introduction of a new hoax offence (proposed s101.7)

The Law Council has some concerns with the proposed introduction of a new hoax offence provision.

The provision would apply to a person who engages in conduct with the intention of inducing a false belief that a terrorist act has occurred, is occurring or is likely to occur. The provision would carry a maximum penalty of ten years, which is consistent with the existing hoax offences in sections 474.16 and 471.10.

The Law Council is satisfied that, because of the fault element of the offence, the section would not capture the conduct of a person who acts or remarks in jest, not intending that he or she be taken seriously.

However, the Law Council is concerned that because of the broad nature of the definition of terrorist act and the fact that it captures conduct engaged in both in Australia and abroad – this hoax offence provision is also very broad.

The existing hoax provisions in the Criminal Code deal with very specific conduct which includes:

- Sending by post something which is designed to appear as though it consists of, encloses or contains an explosive or a dangerous or harmful substance or thing;(see s471.10(1)(b)(i))

- Sending by post a message that a bomb or other dangerous or harmful substance or thing, has been or will be left in a particular place;(see s471.10(1)(b)(ii)) and

- Using the phone, fax or email to communicate a message that a bomb or other dangerous or harmful substance or thing, has been or will be left in any place. (see 474.16)

These existing hoax offences deal with conduct which is likely to induce fear, anxiety and/or panic and which is also likely to cause inconvenience to police and emergency services and may result in a costly waste of time and resources.

The Law Council is concerned that the proposed new hoax offence goes beyond this and would potentially capture the dissemination of misinformation and propaganda about events abroad. For example, it might capture false claims that HAMAS had captured and destroyed an Israeli tank or that the PKK had shot and killed members of the Turkish security forces or that dissident ethnic Uyghers had destroyed a police outpost in Xinjiang province, China.

While the dissemination of inaccurate information of this type ought to be discouraged, it is not the appropriate target of a hoax offence. It is unlikely to cause fear and alarm or to make demands on police or emergency service providers in any way.

For that reason, the Law Council submits that the offence provision should be narrowed by:

1. Limiting the provision to conduct designed to induce a false belief about a terrorist act which has been committed, is being committed or will be committed in Australia; and

2. Adding a further element to the offence which requires that a person must engage in the relevant conduct with the intention of inducing fear in another person or persons or with the intention of inducing a response from police or emergency services.

The Law Council submits that amendments of this kind would focus the provision on the type of conduct sought to be discouraged, prevented and punished.

Amendment to the definition of the phrase "advocates the doing of a terrorist act" (s102.1(1A))

Subsection 102.1(2)(b) of the Criminal Code permits the Attorney-General to list an organisation as a terrorist organisation if he or she is satisfied that the organisation "*advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur*)."

Section 102.1(1A) explains that an organisation 'advocates' the doing of a terrorist act if:

a) The organisation directly or indirectly counsels or urges the doing of a terrorist act; or

b) The organisation directly or indirectly provides instructions 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 s 7.3) that the person might suffer) to engage in a terrorist act).

The Law Council supports the proposal to amend section 102.1(1A)(c) in order to clarify that an organisation may only be listed as a terrorist organisation if it directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that it might have the effect of leading a person (regardless of his or her age or any mental impairment that he or she might suffer) to engage in a terrorist act.

However, the Law Council submits that this very minor amendment does not address in any meaningful way the significant problems with section 102.1(1A).

The Law Council submits that the power to proscribe an organisation on the basis of advocacy alone is unjustified and unnecessary and that section 102.1(2)(b) and 102.1(1A) should be repealed rather than amended.

The Law Council is not opposed to laws which criminalise incitement to violence or other criminal acts. However, the Law Council submits that s102.1(2)(b) and s102.1(1A) extend well beyond criminalising incitement.

Without s 102.1(2)(b), the Executive is already empowered to proscribe any organisation which 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).

If it can not be demonstrated that an organisation's activities fall under this very broad umbrella then the organisation should not be outlawed as a terrorist organisation and its members exposed to serious criminal penalties.

The Government has agued that the provision allowing advocacy as a basis for proscription is aimed at "early intervention and prevention of terrorism."[5]

The Law Council submits that disproportionate restraints on freedom of association and speech will not achieve this aim and, in fact, are likely to prove counter-productive. The members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members.

A further problem with subsection 102.1(1A) is that it does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole. According to the explanatory memorandum 'advocacy' may include "all types of communications, commentary and conduct'. The Law Council is concerned that the listing provisions fail to precisely identify:

- The form in which the 'advocacy' must be published;
- The extent to which the 'advocacy' must be publicly distributed;
- Whether or not an individual who 'advocates' must be specifically identified as a member of the organisation; or
- Whether or not the relevant individual must be the group's leader.

If the provision is to remain, the Law Council submits that the uncertainty over when responsibility for 'advocacy' is transferred from an individual to an organisation for the purposes of listing must be clarified.

However, as noted above the Law Council submits that the provision should be repealed.

Amendment to the terrorist organisation offences (Div 102)

Division 102 of the Criminal Code, which was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* and later amended in 2003[6] and 2004[7], contains a number of what are generally described as 'terrorist organisation offences'.

These offences relate to the conduct of a person who is in some way connected or associated with a terrorist organisation. Under Division 102 it is an offence to:

- direct the activities of a terrorist organisation (102.2)
- be a member of a terrorist organisation (102.3)
- recruit a person to join or participate in the activities of a terrorist organisation (102.4)
- receive or provide training to a terrorist organisation (102.5)
- receive funds from or make funds available to a terrorist organisation (102.6)
- provide support or resources that would help a terrorist organisation engage in, plan, assist or foster the doing of a terrorist act (102.7)

[5] Australian Government submission to the Parliamentary Joint Committee on Intelligence and Security review of security and counter-terrorism legislation, p.6
[6] *Criminal Code Amendment (Terrorism) Act 2003* (Cth).
[7] *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

- on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. (102.8)

At the time the offence provisions in Division 102 were introduced into the Criminal Code, and each time they have been subsequently expanded and refined by amendment, they have attracted considerable criticism, including from the Law Council.

The Law Council is concerned that by shifting the focus of criminal liability from a person's conduct to their associations, the terrorist organisation offences unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the community who, simply because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.

The breadth of the key terms upon which the terrorist organisation offences are based, and the uncertainty this creates as to how they will be applied, can feed ignorance and prejudice within the Australian community and has generated confusion, fear and alienation, particularly among Arab and Islamic Australians.[8]

The Law Council is particularly concerned by three of the organisation offences: membership of a terrorist organization; association with a terrorist organisation; and funding a terrorist organisation.

The Discussion Paper does not propose the repeal or amendment of any of these three offences. The Law Council submits that this is a major oversight and that these provisions require urgent attention.

In particular the Law Council submits that:

- the association offence in section 102.8 of the Criminal Code should be repealed;

- the membership offence in section 102.3 should be repealed or, at the very least, the definition of 'membership' in section 102.1 of the Criminal Code should be amended so as to limit the concept of membership to formal members of the organisation who are directly participating in the activities of the organisation; and

- the receiving or providing funding offence in 102.6 should be amended to require that, where the defendant is a legal practitioner, the prosecution must prove that the relevant funds were not received for the purpose of providing legal representation. Alternatively, at the very least, the section should be amended so that, at most, a defendant legal representative only bears an evidentiary, rather than a legal burden, in relation to that matter.

The Discussion Paper does propose amendments to the offence provisions in 102.5 and 102.7. The Law Council's comments on these proposed amendments are set out below.

[8] Parliamentary Joint Committee on Intelligence and Security. *Review of Security and Counter-Terrorism Legislation* (Tabled 4 December 2006) at [3.13]. See also Wheeler, F, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81 *Australian Law Journal* 743 at 744.

Amendment to the offence of providing support to a terrorist organisation (s102.7)

The Law Council supports the following proposals to narrow and clarify the scope of the offence of providing support to a terrorist organisation:

1. The insertion of a new requirement that the support provided must be *material* support;

2. The insertion of a new requirement that a person must provide the resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.

The Law Council has the following concerns with the proposed amendments:

1. The Law Council submits that, given the seriousness of the offence and the fact that it is intended to target conduct which is deliberately calculated to aid an organisation in the furtherance of its terrorist activities, the section should require that the person *knows* that the organisation he or she is assisting is a terrorist organisation. Recklessness as to this fact, should not suffice to satisfy the fault element. For this reason, the Law Council submits that subsection 102.7(2) should be repealed.

Amendment to the offence of providing training to/receiving training from a terrorist organisation

Under section 102.5 of the Criminal Code it is an offence to provide training to or receive training from a terrorist organisation. The type of training received or provided and whether or not it has any relevance to terrorist activity is not material to establishing the offence. In that way section 102.5 can catch innocent training and the mere teaching of people who may be members of a terrorist organisation.

In order to address this problem, it is proposed to introduce a ministerial authorisation scheme for aid organisations. Under the scheme, on written application by an organisation or on the Minister's own initiative, an organisation may be declared for a specified period to be a "declared aid organisation" or a "declared regional aid organisation". Training provided by such an organisation will not be captured by section 102.5.

The Minister must not make a relevant declaration unless he or she is satisfied on reasonable grounds that:

- The organisation is, or will be, providing humanitarian aid to a community; and

- The benefits to that community of providing the humanitarian aid outweigh, or will outweigh, any benefits that could be received, directly or indirectly, by a terrorist organisation as a result of the organisation providing the aid.

To the extent that the proposed amendments may offer certainty and peace of mind to those organisations which are able to obtain a declaration, the Law Council does not object *per se* to the proposal. However, the Law Council has the following concerns with the proposed amendments:

1. The proposed amendments do not address the fundamental flaw in the provision – that is, that it makes no distinction between training which may assist an organisation in preparing for and carrying out a terrorist act and training which is otherwise benign. Many organisations will, quite legitimately, not want to subject their humanitarian aid activities to the Minister's subjective assessment. Nor will they want to risk the very damaging effects of applying unsuccessfully for a declaration. The Minister's imprimatur should not be required in order to provide humanitarian aid, in the form of training, which is neither designed to, nor is likely to, assist in the commission of a terrorist act. The section should be more carefully drafted so that the provision of this type of humanitarian aid does not attract criminal sanction, regardless of who it might be provided to.

   As recommended by the Sheller Committee and the Parliamentary Joint Committee on Intelligence and Security, the section should be redrafted to make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.

   It is explained in the Discussion Paper[9]that:

   "*The Government has considered various options for addressing these concerns including providing a general exemption to the terrorist organisation offences for the purposes of providing aid of a humanitarian nature. ... However, in the context of the training offence, such an exemption may be subject to abuse, particularly where support for terrorism is being provided under the guise of "aid' or charities."*

   The Law Council takes issue with this explanation. If it is accepted that the provision of humanitarian aid may captured by the terrorist organisation offences, but it is not intended to be and ought not be so captured – then an express exemption should be provided accordingly. In that way, whether or not aid provided in a particular circumstance is humanitarian aid or, in fact, something more sinister masquerading as aid, would become a matter for evidence in each particular case. The Law Council submits that legitimate, even laudable, activities, should not be subject to criminal sanction simply because it is easier for the Government to place a blanket prohibition on certain conduct rather than have to properly investigate and prosecute the specific misconduct it actually seeks to target.

2. If the ministerial authorisation scheme is to be included, the Law Council submits that a further subsection should be added to section 102.5 which clearly states that no inference in relation to a any element of the offence may be drawn either because an organisation has not elected to seek a declaration from the Minister or has sought a declaration and been refused.

3. The Law Council submits that subsection 102.5(2) should be repealed. This subsection creates a specific offence of providing training to or receiving training from a terrorist organisation *which has been listed by regulation.* The fault elements of the offence defy understanding. Strict liability applies to the fact that the organisation is a listed terrorist organisation (see s102.5(3)). However, a person does not commit the offence unless he or she is reckless

[9] Discussion Paper p67

as to the fact that the organisation is a listed terrorist organisation. (see s102.5(4)).

After reviewing this section Sheller Committee concluded:

> *Between them, subsections (3) and (4) are so confused that the operation of section 102.5 and its effectiveness must be in doubt. Yet the potential penalties are imprisonment for twenty-five years.*[10]

The Sheller Committee consequently recommends that the section be redrafted as a matter of urgency and without making the offence or any element of it of strict liability.

In a footnote on page 71 of the Discussion Paper it is foreshadowed that the Government intends to refer the issue of applying strict liability to the terrorist organisation offences to the National Security Legislation Monitor, once appointed.

The Law Council notes that more than three years have now passed since the Sheller Committee recommended that this section be amended as a matter of urgency. The Sheller Committee was concerned with the strict liability element of the offence, but the Committee was more generally concerned that the purpose and intended operation of the offence provision was very unclear.

As noted above, the Law Council submits that the section should be repealed. However, if it is to be retained, an immediate attempt should be made to redraft the section so that the intended elements of the offence are set out with greater clarity. This would not preclude the National Security Legislation Monitor from then reviewing the section. In fact, it may assist him or her by removing the need to second guess how the section is intended to operate before making an assessment about its appropriateness.

Proposed Amendments to the Crimes Act

Unlawful association provisions

The Law Council strongly supports the proposal to repeal the unlawful association provisions and the offence under section 30C of "advocating or inciting to crime".

Amendments to the bail provisions (section 15AA)

Section 15AA of the *Crimes Act* provides that a bail authority must not grant bail to a person charged with or convicted of a terrorism offence[11] unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

In the Discussion Paper it is proposed to amend this section in order to provide for a specific appeal right for both the prosecution and defendants.

[10] Report of the Security Legislation Review Committee (June 2006) at p117
[11] Other than an offence against 102.8 of the Criminal Code.

It is also proposed to insert a new subsection which provides that where a bail authority decides to grant bail to a person charged with a terrorism offence and immediately after the decision is made the prosecution indicates an intention to appeal, the grant of bail will be stayed until:

- a decision is made on appeal; or
- the prosecution notifies the court that it does not intend to proceed with the appeal; or
- 72 hours has passed since the stay came into effect.

The Law Council has the following concerns with the proposed amendments:

1. The Law Council submits that the presumption against bail in section 15AA should be repealed.

The Law Council objected when section 15AA was inserted into the Crimes Act on the basis that the Government had failed to demonstrate why the reversal of the long held presumption in favour of bail was necessary to aid in the investigation or prosecution of terrorist related offences.

No evidence was advanced to suggest that people charged with terrorism offences, which range from the offence of merely being a member of terrorist organisation to actually committing a terrorist act, are more likely to abscond while on bail, re-offend, threaten or intimidate witnesses or otherwise interfere with the investigation.

Prior to the introduction of s15AA, existing bail provisions already provided the court with the discretion to refuse bail on a range of grounds, and to take into account the seriousness of the offence in considering whether those grounds were made out. No reason was given as to why these existing provisions were inadequate to guard against any perceived risk to the community in terrorism cases.

The use of section 15AA to date illustrates the high hurdle applicants must overcome before bail is granted and the manner in which the reversal of the presumption in favour of bail can jeoapardise the fair trial rights of the accused, including the right to be tried without undue delay.

The issue of whether lengthy delay between arrest and trial can amount to exceptional circumstance has attracted judicial consideration. For example, in *R v Vinayagamoorthy & Yathavan*[12] Bongiorno J found that the considerable delay experienced by the accused as a result of the lengthy investigation period, coupled with a number of other factors, can amount to exceptional circumstances. His Honour observed:

> *The investigation process has taken almost two years to date. Neither of the accused have done anything to hinder that process of that investigation. Indeed, the material before the Court would suggest that they have co-operated.*

[12] 3Aruran Vinayagamoorthy and Sivarajah Yathavan were charged with three terrorist organisation offences under the *Criminal Code*. They were granted bail on the grounds that exceptional circumstance were shown. See *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* (2007) 212 FLR 326 at [19]-[20].

> *Taking these considerations together with the evidentiary and other difficulties which the Crown must face in proving some at least of the allegations against them, the inevitable delay which will be incurred in finalising this matter, the ties to the jurisdiction which these men have, the lack of any evidence to support any allegation that they may commit offences or interfere with witnesses (whoever those witnesses might be) and their previous good character, there are exceptional circumstances in this case which justify the making of an order admitting each of them to bail.*[13]

Similarly, in the case of *R v Kent*[14]*,* it was argued that the time Mr Kent had already spent in custody and the delay he faced before re-trial was so considerable that it amounted to exceptional circumstances. Bongiorno J accepted this submission and granted bail.

However, in the case of *Ezzit Raad,* Bongiorno J was not convinced that considerable delay amounted to exceptional circumstances:

> *It has been a long time since Raad was arrested and may still be many months before the case against him is concluded. But having regard to the complexities of it as they have now emerged it cannot be said that that circumstance is, in this case, exceptional. Terrorism cases are going to be, of their nature, long and involved. So much has become clear, even from the relatively little experience of such cases in this country to date. Nor does Mr Raad's health combined with the circumstances of his detention and the delay to which I have referred together make up the exceptional circumstances necessary to overcome the statutory presumption against bail.*[15]

This was the case despite the evidence before the court that the accused (and his co-accused) were being held in particularly harsh conditions of detention. Bongiorno J observed:

> *The court has heard and accepted evidence in other cases that the conditions in the Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.*[16]

A similar result followed an application for bail by co-accused Shoue Hammoud[17] and Amer Haddara.[18]

These cases suggest that significant delays between arrest and trial, even when coupled with particularly harsh conditions of detention, may not be

---

13 *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* (2007) 212 FLR 326 at [19]-[20].

14 *Application for Bail by Shane Kent* [2008] VSC 431 at [13]

15 *Application for Bail by Ezzit Raad* [2007] VSC 330 at [6]

16 *Application for bail by Ezzit Raad* [2007] VSC 330 at [6].

17 *Hammoud v DPP* [2006] VSC 516

18 *Application for Bail by Amer Haddara* [2006] VSC 8.

enough to give rise to exceptional circumstances and justify a grant of bail pursuant to section 15AA.

The Law Council's concerns with section 15AA have been shared by the United Nations Human Rights Committee (UNHRC) in its recent Concluding Observations on Australia's human rights performance. The UNHRC expressed concern that section 15AA operates to reverse the burden of proof contrary to the right to be presumed innocent and fails to define the "exceptional circumstances", required to rebut the presumption against bail. The UNHRC recommended that Australia ensure that its counter-terrorism legislation and practices are in full conformity with the ICCPR and ensure that the notion of 'exceptional circumstances' does not create an automatic obstacle to release on bail.[19]

2. The Law Council submits that section 15AA should not be amended to provide that a grant of bail may be stayed for up to three days pending appeal.

These proposed amendments do not approach the denial of a person's liberty with the requisite degree of seriousness. The Law Council submits that detention should never be the default position.

If a person has successfully satisfied the bail authority that there are exceptional circumstances which warrant his or her release, he or she should not be denied the benefit of that decision, even for a period of three days.

The Law Council submits that if the Government has concerns about the capacity of bail authorities at certain levels to hear and determine bail applications in terrorism cases, the appropriate response would be to amend the legislation to be more prescriptive about the level of judicial officer to whom a bail application may be made. The Government should not confer authority on an officer to make a bail decision, but then reserve the right to itself not only to appeal that decision but to set it aside while it does so.

Introduction of an emergency search power

It is proposed to insert a new section (s 3UEA) into the Crimes Act which would allow a member of the AFP to enter premises without a warrant where he or she reasonably suspects that:

(a) a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred; and

(b) it is necessary to search the premises for the thing and seize it in order to prevent the thing from being used in connection with a terrorism offence; and

(c) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

If the member of the AFP finds any other thing relevant to an indictable or summary offence, he or she must secure the premises and then obtain a search warrant.

[19] UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 19 February 2008, CCPR/C/AUS/5, [11].

It has been suggested by the Attorney-General that the purpose of these provisions is "*to enable police to render a premises safe and specifically to address some explosive device or material or another dangerous substance such as a dangerous chemical.*"[20]

The Law Council has the following concerns with the proposed amendments:

The power to enter and search premises, and seize property without the occupier's consent, is a breach of privacy. For that reason such a power should be carefully confined and subject to strictly enforced conditions. The warrant system ensures that police search and seizure powers are subject to independent and external supervision and may only be exercised where prescribed statutory criteria are satisfied. Allowing police to enter and search premises without a warrant and under their own authority increases the risk that such powers will be misused. Moreover, it increases the risk that individual's privacy rights will be breached in circumstances not justified by the necessary pursuit of a legitimate law enforcement imperative.

Accordingly, the Law Council submits that the onus is on the government to demonstrate why the introduction of this extraordinary power is required. The Law Council further submits that the Government has not discharged that onus and that the necessity for this power has not been demonstrated, particularly given the ability to obtain a warrant by telephone or fax in exigent circumstances.[21] If these existing measures do not operate effectively in emergency situations, the Law Council submits that consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before introducing a warrantless entry power.

If, notwithstanding the ability to obtain a warrant by fax or phone, the need for a narrowly drafted emergency entry power for the AFP can be demonstrated, the Law Council would not oppose it *per se,* provided appropriate safeguards were in place.

In that respect, the Law Council acknowledges that "*the common law has long recognised that any person may justify what would otherwise constitute a trespass to land in cases of necessity to preserve life or property*".[22] However, the proposed provisions currently go beyond a codification of this position, which is already reflected in section 10.3 of the Criminal Code.

In that respect also, the Law Council acknowledges that there is precedent for the proposition that under the common law police are able to enter premises without a warrant in order to prevent (but not investigate) a breach of the peace.[23] However, once again, the proposed provisions go beyond a codification of this position.

If the power is to be introduced in its current form, the Law Council supports the recommendation made by the Gilbert and Tobin Centre for Public Law, that a member of the AFP who conducts a search under this provision should be required to go before a magistrate or judge after the search has been conducted to obtain an ex post facto search warrant.

The Law Council submits that if an ex post facto search warrant is not granted, it should be explicitly provided that any evidence identified by the member of the AFP during the course of the search may be ruled inadmissible in future court proceedings.

---

[20] 7:30 Report, Australian Broadcasting Corporation, 12 August 2009 <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien> (18 September 2009).

[21] Crimes Act 1914 s3R

[22] Kuru v State of New South Wales [2008] HCA 26 (12 June 2008) at [40]

[23] Kuru v State of New South Wales [2008] HCA 26 (12 June 2008) at [40] – [53].

As further submitted by the Gilbert and Tobin Centre for Public Law, the exercise of this power by the AFP should also be reported on annually to the Commonwealth Parliament. In particular, reports should be made of any instances in which an ex post facto search warrant has not been granted.

Amendments to the police arrest, questioning and investigation powers in Part 1C

Clarification of the relationship between section 3W and sections 23C and section 23CA

Under subsection 3W(1) of the Crimes Act, a person may only be arrested for an offence, if the arresting officer *believes on reasonable grounds* that the person has committed the offence. The arresting officer must also *believe on reasonable grounds* that arresting the person is necessary because proceeding by way of summons would not achieve one or more of the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;

(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;

(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(v) preventing the fabrication of evidence in respect of the offence;

(vi) preserving the safety or welfare of the person.

Under subsection 3W(2), if at any time after a person is arrested but before they are charged, the officer in charge of the investigation ceases to believe on reasonable grounds that the person has committed the offence or that holding the person is necessary to achieve one of the purposes listed in (i) to (vi) above – then the person must be released.

This same provision, and therefore these same statutory tests, applies for all offences. There is no special arrest provision and test relating to terrorist offences.

Section 23C of the Crimes Act sets out the purposes for which a person arrested for Commonwealth offence (other than a terrorism offence) may be detained. Section 23CA sets out the purposes for which a person arrested for a terrorism offence may be detained.

Both sections provide that a person arrested for an offence may be detained for the purpose of investigating (a) whether the person committed the offence for which he or she was arrested and/or (b) whether the person committed another offence (in the case of section 23CA another terrorism offence) that an investigating official reasonably suspects the person to have committed.

The terms “arrested” and “under arrest” are defined in section 23B.

The Dr Haneef case drew attention to uncertainty about the relationship between sections 3W(2) and 23C/23CA. Specifically, questions were raised about whether sections 23C and 23CA permitted a person to be detained for the purposes of investigating a second and different offence, even where the officer in charge of the investigation had ceased to believe on reasonable grounds that the person had committed the offence for which he or she was arrested.

To address this uncertainty it is proposed to amend the definition of “arrested” and “under arrest” in section 23B and to insert a note in section 23C and proposed section 23DB (current 23CA) in order to clarify that the effect of section 3W(2) is not displaced by these later sections.

The proposed changes would make clear that the release requirement in section 3W(2) is unaffected by section 23C and proposed section 23DB because these later sections merely set out the purposes for which a person may be detained if he or she is validly under arrest. A person is not “arrested” or “under arrest” if police are required to release him or her pursuant to section 3W(2).

The Law Council supports these proposed changes.

Reasonably suspects v reasonably believes in section 23C and proposed section 23DB

The Discussion Paper invites comment on whether section 23C and proposed section 23DB (current section 23CA) should be amended to provide that a person, arrested for a Commonwealth offence, may only be detained for the purpose of investigating whether he or she:

- committed the offence for which he or she was arrested; or
- committed another offence that an investigating official reasonably *believes* (rather than reasonably *suspects*) the person to have committed.

The Law Council supports this proposal.

Section 23C and proposed section 23DB (current section 23CA) determine the purposes for which an arrested person may be detained and the amount of time available to police to pursue those purposes before the person must be either released or brought before a judicial officer. The allowed time period can be significant. For example, in the Dr Haneef case it extended to 12 days, and even under proposed section 23DB it could extend to up to eight days. (See discussion below.)

As currently drafted sections 23C and 23CA do not only permit police to use the time that a person is already being detained for the purpose of investigating the offence for which he or she was arrested to also investigate a second offence that they reasonably suspect the person has committed. Those sections in fact allow a person to be detained solely for the purpose of investigating the suspected secondary offence, even when police do not require and are not using the detention period to investigate the offence for which the person was arrested.

The Law Council submits that an arrested person’s release or appearance before a judicial officer should not be able to be delayed in order to facilitate the investigation of an offence that police merely suspect the person has committed.

A person's detention, particularly for a period of days, should not be founded on a mere suspicion.

It is immaterial that police must have, and maintain throughout, a reasonable belief that the person committed the offence for which he or she was arrested, if ultimately the reason for a person's ongoing detention without charge is not the investigation of that offence but another offence in relation to which the police have no such belief.

Amending these sections to require that a person may only be detained for the purposes of investigating a secondary offence, that police reasonably believe the person to have committed, would address this problem.

Introduction of a cap on maximum period of allowable dead-time

The maximum period for which a person may be detained under section 23CA is called the "investigation period". A person detained under section 23CA must be released (either unconditionally or on bail) within the investigation period or, if they are not, they must be brought before a judicial officer either within that period or as soon as practicable after its expiry.

Under subsection 23CA(4), the maximum length of the investigation period in terrorism cases is set at four hours[24], unless a magistrate extends the period under section 23DA.

Under section 23DA, the investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours.

The means that the maximum allowable length of the investigation period in relation to terror suspects is 24 hours.

This is considerably longer that the maximum allowable length of the investigation period for ordinary suspects. In the case of ordinary crimes, under section 23D the initial four hour investigation period may only be extended once, and only for a period not exceeding eight hours. This means that the maximum allowable length of the "investigation period" for ordinary suspects is 12 hours.

In either case, the calculation of the investigation period does not take into account so-called "dead time" during which police are unable to, or choose not to, question the suspect they have in detention.

Subsection 23CA(8) lists all the activities which are deemed to be dead time and are thus excluded from the calculation of the investigation period in terrorism cases. This list includes: time taken to transport the suspect to the place of questioning; time taken for the suspect to sleep; time taken for the suspect to talk with his or her lawyer or to await the arrival of his or her lawyer; time taken to conduct an identification parade or conduct a forensic procedure; time taken to make certain applications to the Court and any time during which the suspect can not be questioned because he is intoxicated or receiving medical attention.

All these activities are also regarded as dead time for the purposes of calculating the investigation period in relation to ordinary criminal cases.[25]

[24] Unless the person in custody is a minor or Aboriginal or Torres Straight Islander in which case the maximum period is 2 hours.
[25] See s23C(7) of the *Crimes Act 1914 (Cth).*

However the last item on the subsection 23CA(8) dead time list, at sub-paragraph (m), is unique to terrorism cases.

Sub-paragraph 23CA(8)(m) provides that that the investigation period in terrorism cases does not include any "reasonable time", approved by a magistrate or justice of the peace, during which the questioning of a person is "reasonably suspended or delayed".

To exclude time from the investigation period on this ground, the police must make an application to a magistrate under section 23CB stating the length of time that should be specified as dead time and why it is reasonable that it should be declared as such. Under sub-paragraph 23CB(5)(c), the reasons which may be given include the following:

- the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia);
- the need to allow authorities in or outside Australia (other than authorities in an organisation of which the investigating official is part) time to collect information relevant to the investigation on the request of the investigating official;
- the fact that the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the investigating official's time zone;
- the fact that translation is necessary to allow the investigating official to seek information from a place outside Australia and/or be provided with such information in a language that the official can readily understand.

The magistrate may then issue the certificate specifying a period of allowable dead time if he or she is satisfied that:

- it is appropriate to do so, having regard to the application and the representations (if any) made by the person, or his or her legal representative, about the application, and any other relevant matters; and
- the offence is a terrorism offence; and
- detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and
- the investigation into the offence is being conducted properly and without delay; and
- the person, or his or her legal representative, has been given the opportunity to make representations about the application.

The time taken to make or dispose of such an application under section 23CB is also counted as dead time. This means that the if the judicial officer hearing the dead time application adjourns the matter, even for a period of days, then this adjournment period itself automatically counts as dead time.

At present no cap is placed on the maximum allowable period of dead time. As such, the current dead time provisions in Part 1C of the Crimes Act allow for an indefinite period of detention without charge.

It is proposed to amend these provisions so that:

- a police officer will only be able to make an application to extend the investigation period or an application to exclude certain time from the calculation of the investigation period (i.e. a dead time application) if he or she has the prior approval of a senior officer (Commissioner, Deputy Commissioner or Superintendant);

- an application to have certain time excluded as dead time may only be made to a magistrate, and not to a justice of the peace or a bail justice;

- a maximum cap of seven days is placed on the period of dead time that may be authorised by a magistrate;

- it is specifically provided that an application for an extension of the investigation period or a dead time application is not required to include information which, if disclosed, is likely to prejudice national security, to be protected by public interest immunity, to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community;

- It is specifically provided that, if an application for an extension of the investigation period or a dead time application does contain information which, if disclosed, is likely to prejudice national security, to be protected by public interest immunity, to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, this information may be removed from the copy of the application that is given to the arrested person or his or her legal representative; and

- It is specifically provided that the instrument which sets out a magistrate's reasons for granting an extension of the investigation period or for allowing a period of dead time need not include information relied upon which if disclosed, is likely to prejudice national security, to be protected by public interest immunity, to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community.

The Law Council supports the following proposals to amend the questioning and detention powers in Part IC:

1. The insertion of a new requirement that a police officer can only make a dead time application with the prior approval of a senior officer (Commissioner, Deputy Commissioner or Superintendant). The Law Council agrees that this proposal will deliver a greater degree of oversight and accountability within law enforcement agencies about how and when an extension of the investigation period and/or maximum period of detention is sought.

2. The introduction of a cap on the maximum period of dead-time which may be allowed under proposed section 23DB(9)(m) (current section 23CA(8)(m)). Although with respect to the length of cap (that is, seven days) please see Law Council concerns below.

However, the Law Council has the following concerns with the proposed amendments:

1. The Law Council submits that the proposal to allow for up to seven days dead time to be excluded from the calculation of the investigation period in terrorism cases is unjustified. The proposal could result in a possible period of detention without charge of up to eight days, possibly more.[26] This is considerably

[26] This would allow for a maximum investigation period of 24 hours plus seven days dead-time under proposed section 23DB(9)(m). In fact, the length of permissible detention could be longer if additional periods

longer than the period of pre-charge detention permitted under the Crimes Act in non-terrorism cases.

The Law Council submits that, even if it is accepted that terrorism cases because of their nature and complexity may require the investigation period to be suspended (and thereby extended) for certain periods, no considered justification has been provided for why a period of seven days is reasonable.

The Discussion Paper essentially suggests that a seven day cap is reasonable because it is less than allowed in some overseas jurisdictions and more than in others and because it lies in the middle of the spectrum of time periods suggested in submissions to the Clarke Inquiry.[27] The Discussion Paper also notes that the Clarke Inquiry suggested that a cap of *no more than* seven days might be appropriate.

The Law Council submits that before an extended period of detention without charge is allowed for in terrorism investigations, evidence justifying the operational need for such an extraordinary measure must be presented.

It is not enough to assert that terrorism investigations are more time consuming because they may involve police from several countries. There are many offences, such as people smuggling and the production and distribution of child pornography, which also involve investigations which range across countries and police forces.

Likewise, it is not enough to assert that terrorism investigations are more time consuming because they are inherently complex. There are other offences, such as fraud, which may be equally complex and difficult to unravel.

The Law Council does not oppose *per se* provision for a judicially supervised and capped period of extended pre-charge detention in terrorism cases, if it can be demonstrated that it is required by the unique and challenging circumstances of terrorism investigations. However, the Law Council submits that no attempt has been made to demonstrate such a need in any detail and thus attempting to determine an appropriate dead time cap at this point is an arbitrary exercise.

In the circumstances, the Law Council submits that a cautious approach is warranted and that the dead time cap should be no more that 48 hours unless sufficient justification can be provided by relevant agencies for the cap to be longer. The Law Council further submits that it is preferable that the cap be set low and then reviewed by the National Security Legislation Monitor, rather than being initially set at seven days.

2. The Law Council submits that the provisions which allow a suspect and his or her legal representative to be denied access to information on which an application for dead time or an extended investigation period is based are too broadly drafted and may render meaningless the right to be heard and make submissions in opposition to the application

---

of dead time are taken into account under other sub-paragraphs of 23DB(9) before a successful application is made under section 23DC or after a period of dead time allowed under s23DB(9)(m) has expired.

[27] Discussion Paper p127

The Law Council accepts that in the context of a sensitive, ongoing investigation, an application for dead time or an extended investigation period may require the presiding judicial officer to consider classified information in the absence of the person under a arrest and/or his/her legal representative.

However, as presently drafted the proposed provisions appear to give the investigating official and not the judicial officer the complete discretion to determine what, if any, information contained in the application is disclosed to the arrested person and his or her legal representative.

No provision is made for the judicial officer to order that a summary or redacted version of classified information be disclosed to the arrested person and his or her legal representative.

No provision is made for the judicial officer to order that the relevant information be disclosed to the arrested person's legal representative on the basis of an undertaking that it will not be further disclosed – either to the arrested person or any other third party.

The Law Council accepts that it is a matter for the investigating official to determine what information he or she chooses to rely on in the application for dead time or an extended investigation period. However, the Law Council submits that once a decision is taken to include certain information in the application and to seek to rely on it to the detriment of the arrested person, it should not remain the exclusive prerogative of the investigating official to determine that the information cannot be disclosed because it is likely to be protected by public interest immunity or if disclosed, is likely to prejudice national security, to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community.

The Law Council submits that the relevant provisions should be redrafted to give the judicial officer the discretion to determine what information should be disclosed, to whom and in what form.

Consistent with its submission to the Clarke Inquiry into the case of Dr Mohamed Haneef,[28] the Law Council also submits that the following amendments to the questioning and detention powers in Part IC are required:

- Amendment to proposed section 23DC (current section 23CB) to ensure police only have one opportunity to apply to a judicial officer to declare a specified period as reasonable dead time for the purposes of calculating the investigation period;

- Amendment to proposed section 23DD to preclude a judicial officer from adjourning an application made under proposed section 23DC (current section 23CB) for more than a specified number of hours, or alternatively, amend proposed sub-paragraph 23DB(9)(h) (current section sub-paragraph 23CA(8)(h)) to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must be included in the calculation of the investigation period;

[28] The Law Council' s submission is available on line at: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A0BC784-1C23-CACD-227C-88939D926B22&siteName=lca

- Amendment to proposed sections 23DC and 23DE (current sections 23CB and 23DA) to require that if a suspect is not legally represented when an application is made under proposed sections 23DC and 23DE the police should be required to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application;

- Amendment to proposed sections 23DC (current section 23CB) to require that applications must be made to a Supreme Court Judge, or at the very least a district court judge. (It is at least proposed in the Discussion Paper to remove a justice of the peace or bail justice from the list of persons who can hear an application.)

Proposed Amendments to the National Security Information (Criminal and Civil Proceedings) Act

Extension of Notice Provisions to Cover the Issue of Subpoenas (sections 24)

Under section 24(1) of the *National Security Information (Criminal and Civil Proceedings) Act* ("the NSI Act"), if a prosecutor or defendant knows or believes that:

- he or she will disclose, in a federal criminal proceeding, information that relates to or may effect national security; or
- a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose information in giving evidence or by his or her mere presence that relates to or may affect national security

the prosecutor or defendant must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Failure to give notice is an offence under section 42 which carries a maximum term of imprisonment of two years.

It is proposed to amend section 24(1)[29] so that this notice requirement is also enlivened when the prosecutor or defendant (or the defendant's legal representative) knows or believes that "*on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal court proceeding."*

The Law Council does not support the proposal to extend the notice provisions to cover the issue of subpoenas.

The Law Council submits that this extension places a heavy burden on lawyers engaged in federal criminal proceedings for no obvious purpose.

[29] It is also proposed to amend in the same way section 38D which sets out the notice requirements in civil proceedings. The Law Council's objections to the proposed amendment of section 24 apply equally to section 38D.

The production of information on subpoena is already covered by the NSI Act and the Law Council submits that this is sufficient.

The issue of a subpoena, in and of itself, will not result in the disclosure of information prejudicial to national security. The only third parties who are privy to the contents of the subpoena are the court officials who facilitate its issue and the party to whom it is directed. It can be assumed that this receiving party already has knowledge of any information sought to be captured by the subpoena.

Given the broad definition of "national security" (discussed in further detail below) and the lack of precision with which subpoenas are often drafted, it is likely to be very difficult for lawyers to determine in advance whether national security information will be captured by a particular subpoena.

Nonetheless, if a lawyer drafts a subpoena too widely, without due consideration for the type of information it might yield, he or she faces prosecution and imprisonment of up to two years.

For these reasons the Law Council submits that notice provisions in subsection 24(1) should not be extended to cover the issue of subpoenas.

Definition of National Security Information (Section 7)

It is proposed to amend section 7 of the *NSI Act* by inserting a definition of national security information as follows:

"national security information means information:

- *that relates to national security; or*
- *the disclosure of which may affect national security."*

It is proposed to redraft the notice provisions contained in the *NSI Act*[30] with reference to this new definition.

The Law Council acknowledges that this will merely tighten and clarify the drafting of the notice provisions, without narrowing or broadening their scope.

In that respect the Law Council does not object to the insertion of the definition in and of itself.

However, the Law Council submits that the insertion of the definition serves to highlight that the notice provisions set out in the *NSI Act* are impractically wide and onerous.

In effect, the *NSI Act* requires the parties in civil and criminal proceedings to notify the Commonwealth Attorney-General and/or the court if they know or believe that any information that either relates to or may affect national security may be disclosed in the proceedings.

Having received such notice, the Attorney-General must then determine whether the information falls within a much narrower category of information, that is, information which if disclosed would be likely to prejudice national security. If the information falls within this

[30] Sections 24, 25, 38D and 38E

narrower category the Attorney-General may issue a non-disclosure certificate or a witness exclusion certificate.

The rationale behind the *NSI Act* is to ensure that the Attorney-General is put on notice of any possible disclosure of information which may be prejudicial to national security, by ensuring that he or she has notice of any disclosure at all that relates to or may effect, however remotely, national security.

The problem with this approach is that national security is very broadly defined in section 8 of the Act as follows:

"In this Act, national security means Australia's defence, security, international relations or law enforcement interests."

Security is defined in section 9 of the Act as follows:

"*In this Act, security has the same meaning as in the Australian Security Intelligence Organisation Act 1979"*

Security is defined in section 4 of the ASIO Act as follows:

> *(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:*
> *i. espionage;*
> *ii. sabotage;*
> *iii. politically motivated violence;*
> *iv. promotion of communal violence;*
> *v. attacks on Australia's defence system; or*
> *vi. acts of foreign interference;*
>
> *whether directed from, or committed within, Australia or not; and*
>
> *(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).*

International relations is defined in section 10 of the Act as follows:

"In this Act, international relations means political, military and economic relations with foreign governments and international organisations."

Law enforcement interests is defined in section 12 of the Act as follows:

"In this Act, law enforcement interests includes interests in the following:

> *(c) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;*
> *(d) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;*
> *(e) the protection and safety of informants and of persons associated with informants;*

(f) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies."

Read together, these provisions would mean that lawyers representing a defendant in a terrorism prosecution may well be required and would be wise to put the Attorney-General on notice that their entire case may relate to or affect national security.

Given that a failure to comply with the notice provisions is an offence which carries a maximum penalty of two years, such a cautious approach is advisable.

However, if, in view of the broad definition of national security, parties were to adopt this approach, the regime set out in the *NSI Act* would be unworkable.

It would not be possible for the Attorney-General to personally consider, as is required under sections 26 and 38F, the volume of material referred to him or her for determination.

Thus at present, the workability of the regime is contingent on lawyers exercising their own discretion even though it may expose them to prosecution.

For that reason, the Law Council submits that the notice provisions should be redrafted so that they only relate to a narrower and more directly relevant class of information.

Other Matters Not Addressed by the Discussion Paper

The Law Council has two further concerns with the current *NSI Act*, which are not addressed by the amendments proposed in the Discussion Paper. These concerns are discussed below.

Security Clearances for lawyers (section 39)

The *NSI Act* currently provides that, during a federal criminal proceeding, a legal representative of a defendant may receive written notice from the Secretary of the Attorney General's Department that an issue is likely to arise in the proceedings relating to the disclosure of information that is likely to prejudice national security.[31] A person who receives such a notice must apply to the Secretary for a security clearance.[32] They must do so within 14 days of receiving a notice. If they do not apply for such a clearance, or if they are unsuccessful in obtaining such a clearance, then it is possible that they will not be able to view all the relevant evidence in the case and thus they will not be able to continue to effectively represent their client.[33] In the circumstances the Court may recommend that the defendant retain a different legal representative.[34]

In the view of the Law Council, the security clearance system for lawyers which is prescribed in the Act threatens the right to a fair trial in two ways.

First, it potentially restricts a person's right to a legal representative of his or her choosing by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information. For example, pursuant to the *Commonwealth Legal Aid*

31 s39(1).
32 s39(2)
33 If the person does not obtain the security clearance, anyone who discloses relevant information to the person will, except in limited circumstances, commit an offence. s39(3).
34 s39(5)(b)(ii).

Guidelines (March 2008), a legal representative acting for a legally aided person cannot maintain carriage of a matter (where the Attorney-General has issued a relevant security notification) unless they already have or can quickly apply for a security clearance.[35] If the legal representative does not have or cannot obtain a security clearance, then a Legal Aid Commission can only continue to pay the legal representative for 14 days from the date a security notification was issued or while the security clearance application is being determined. This detracts significantly from the guarantee in article 14(3) of the ICCPR that all persons have access to a legal representative of their choosing, and that such representation be provided by the State in cases where the person does not have sufficient means to pay for it.

Secondly, the security clearance scheme threatens the independence of the legal profession by potentially allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information. By undermining the independence of the legal profession in this way, the right to an impartial and independent trial with legal representation of one's choosing is undermined.

Criminal defence lawyers were well used to dealing with confidential information in a variety of circumstances prior to the emergence of the *NSI Act*. No evidence was provided by the Government to indicate that, in the experience of courts or disciplinary tribunals, lawyers frequently or even infrequently breached requirements of confidentiality imposed either by agreement or by the Courts.

In the absence of a plausible justification for the security clearance system, the perception arises that the primary purpose of the system is to provide the executive arm of government with the ability to select the legal representatives permitted to appear in matters involving classified or security sensitive information.

The Law Council is aware that, notwithstanding the *NSI Act*, to date terrorism prosecutions have, as a result of the use of undertakings, proceeded without the need for defendants' legal representatives to seek security clearances.

Nonetheless, until the security clearance provisions are repealed or amended, defence counsel continue to operate under their shadow, uncertain of when and if they might be invoked.

For that reason, the Law Council recommends the following amendments to the Act:

1. The repeal of the security clearance process contained in section 39 of the Act.

2. If this recommendation is not adopted, the Law Council recommends that section 39 be amended so as to give the Court a greater role in both

---

[35] *Commonwealth Legal Aid Guidelines* (March 2008) available at http://www.ag.gov.au/www/agd/rwpattach.nsf (accessed on 28 August 2008). Guideline No 7 provides:
(2) In a matter relating to Australia's national security, payment in respect of assistance, under or in accordance with a Grant of Legal Assistance, after the date on which national security notification is given in the matter may only be made in respect of assistance provided by a legal representative if the assistance was provided at a time:
(a) no later than 14 days after national security notification was given in the matter; or
(b) when the representative had lodged, and was awaiting the determination of, an application for a security clearance mentioned in:
(i) if the matter is a criminal proceeding — subsection 39 (2) of the NSI Act; or
(ii) if the matter is a civil proceeding — subsection 39A (2) of the NSI Act; or
(c)when the representative had been given a security clearance mentioned in subparagraph (b) (i) or (ii) as the case may be.

determining whether a notice should be issued and in reviewing a decision to refuse a legal representative a security clearance.

One way in which the Law Council has proposed this could be achieved is:

(a) the Secretary should be obliged to apply to a court for leave to give a notice to a legal representative under s.39 of the Act;

(b) the application should be supported by affidavit setting out the basis for the Secretary's contention that before or during a proceeding an issue is likely to arise relating to a disclosure of information in the proceeding that is likely to prejudice national security;

(c) the application by the Secretary should be made *ex parte* and *in camera.* This would allow the court to assess properly the nature of the information which was said to prejudice national security, without that information otherwise being disclosed;

(d) the court should give leave to the Secretary to issue the notice if the Secretary established a *prima facie* case that an issue was likely to arise relating to a disclosure of information in the proceeding that was likely to prejudice national security.

(e) a legal representative who receives an adverse decision with respect to his or her application for a security clearance should have a right of appeal against that adverse decision;

(f) the right of appeal should be expressly set out in the Act and should be distinct from the appeal rights available under the *Administrative Decisions (Judicial Review) Act 1977;*

(g) in the appeal the Attorney-General should have the burden of establishing on the balance of probabilities that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security;

(h) the appeal should be held *in camera*;

(i) the appeal should be conducted, if possible, so as to ensure that, during the hearing, the information concerned is not disclosed;

(j) if it is not possible to conduct the appeal without the information concerned being disclosed, then the court should have the power to make appropriate orders for the conduct of the appeal in order to protect that information;

(k) in the event that the Attorney-General failed to establish that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security, the appeal should be allowed and the legal representative should be entitled to have the information concerned disclosed to him or her in the course of acting for the defendant/client.

Court's discretion to maintain, modify or remove restrictions on disclosure of information (section 31(7) and (8))

As discussed above, under the *NSI Act*, prosecutors and defendants in criminal proceedings must notify the Attorney-General if they know or believe that they will disclose or a witness they intend to call will disclose national security information in the course of the proceedings.[36] Depending on the nature of the information, this may result in the Attorney-General issuing a certificate of non-disclosure, or a witness exclusion certificate preventing, for example, a particular witness from giving evidence on the grounds that it would be prejudicial to national security.[37]

Where a certificate has been issued, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or the calling of witnesses.

The matters which must be considered by the Court in making this determination are set out in section 31, which relevantly provides as follows:

> *"31(7) The Court must, in deciding what order to make under this section, consider the following matters:*
>
> *(a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:*
>
> *(i) where the certificate was given under subsection 26(2) or (3)—the information were disclosed in contravention of the certificate; or*
>
> *(ii) where the certificate was given under subsection 28(2)—the witness were called;*
>
> *(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;*
>
> *(c) any other matter the court considers relevant.*
>
> *(8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).*

The Law Council is concerned that subsection 31(8) of the *NSI Act* unduly restricts the court's discretion to determine how and when certain information may be disclosed in federal criminal proceedings.

The Law Council submits that the *NSI Act* tilts the balance too far in favour of the interests of protecting national security at the expense of the rights of the accused. While this has been found not to be in breach of Chapter III of the *Constitution*,[38] the Law Council

[36] ss24-25.
[37] s26(2) and s 28(2).
[38] In *Lodhi v R* [2007] NSWCCA 360 the constitutionality of Part 3 of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (the NSI Act) was challenged on the grounds that by requiring the Court to give "greatest" weight to the risk of prejudice to national security (pursuant to section 31(8)) the Parliament had usurped the judicial function by directing the judge hearing the case how the case must effectively be decided. The Court of Appeal held that subsection 31(8) was constitutionally valid. The Court found that while the word 'greatest' meant that greater weight must be given to the risk of prejudice to national security than to any other of the circumstances weighed, the subsection did not usurp judicial power because it did not

maintains that it is not a proportionate response to addressing the risk that information prejudicial to national security may be released.

For that reason, the Law Council submits that sub-section 31(8) should be repealed.

require that the balance must always come down in favour of the risk of prejudice to national security. *Lodhi v R* [2007] NSWCCA 360 at [41]-[49], per Spigelman CJ with whom Barr and Price JJ agreed.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.