

THE SECURITY LEGISLATION REVIEW COMMITTEE

The Security Legislation Review Committee (SLRC) was established pursuant to section 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002*, as amended by the *Criminal Code Amendment (Terrorism) Act 2003*. Section 4 is headed 'Public and independent review of the operation of Security Acts relating to terrorism'. Section 4(1) required the Attorney-General to cause a review of the operation, effectiveness and implications of amendments made by the:

- a) Security Legislation Amendment (Terrorism) 2002
- b) Suppression of the Financing of Terrorism Act 2002
- c) Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002
- d) Border Security Legislation Amendment Act 2002
- e) Telecommunications Interception Legislation Amendment Act 2002, and
- f) Criminal Code Amendment (Terrorism) Act 2003.

When the review of this legislation began, the SLRC comprised the Chair, the Hon. Simon Sheller AO, QC, (a retired judge of the NSW Supreme Court) and seven members:

- Attorney-General's Department appointee, Mr John Davies, APM, OAM
- Inspector-General of Intelligence and Security, Mr Ian Carnell
- Privacy Commissioner, Ms Karen Curtis
- Human Rights Commissioner, Mr Graeme Innes
- Commonwealth Ombudsman, Professor John McMillan, and

(two Law Council of Australian nominees:)

- Ms Gillian Braddock, SC, and
- Mr Dan O'Gorman

This review became known as the "Sheller Review" and ran for six months from the date of its first meeting on 21 October 2005.

To view the full report of the "Sheller Review", click [here](#).

This review made 20 formal recommendations and 13 other key findings.

Recommendations

1: Further review

The SLRC recommends that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years. If an independent reviewer, as discussed in this report, has been appointed, the review to be commissioned by the Council of Australian Governments (COAG) in late 2010, could be expanded in its scope to include all of Part 5.3 of the Criminal Code. The SLRC also draws attention to other models of review and urges the government to consider the models discussed in the report. (refer to Chapter 18)

2: Community education

The SLRC recommends that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim and Arab communities, and to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them. (refer to Chapter 10)

3: Reform of the process of proscription

The SLRC recommends that the process of proscription be reformed to meet the requirements of administrative law. The process should be made more transparent and should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition. (refer to chapter 9)

4: Process of proscription

The SLRC recommends that either:

- i. the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General. In this case there should be built into that process a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition. An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. The committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice. The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public. Or
- ii. the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected persons and a hearing in open court. (refer to chapter 9)

5: Publicity of proscription of a terrorist organisation

The SLRC recommends that once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution. (refer to chapter 8)

6: Definition of terrorist act – ‘harm that is physical’

The SLRC recommends that the words ‘harm that is physical’ be deleted from paragraphs 2(a) and 3(b)(i) in the definition of ‘terrorist act’ so that the definition of harm in the Dictionary to the Criminal Code applies, and the paragraphs extend to cover serious harm to a person’s mental health. (refer to chapter 6)

7: Definition of a terrorist act – ‘threat of action’

The SLRC recommends that the reference to ‘threat of action’ and other references to ‘threat’ be removed from the definition of ‘terrorist act’ in section 100.1(1). (refer to chapter 6)

8: Offence of ‘threat of action’ or ‘threat to commit a terrorist act’

The SLRC recommends that an offence of ‘threat of action’ or ‘threat to commit a terrorist act’ be included in Division 101. The description should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur. (refer to chapter 6)

9: Definition of ‘advocates’

The SLRC recommends that paragraph (c) of section 102.1(1A) be omitted from the definition of ‘advocates’. Section 102.1(1A) provides that an organisation advocates the doing of a terrorist act if ‘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 ... to engage in a terrorist act.’ If paragraph (c) is not omitted from the definition, the SLRC recommends that ‘risk’ should be amended to read ‘substantial risk’. (refer to Chapter 8)

10: Definition of ‘terrorist organisation’

If the process of proscription is reformed as suggested in recommendation 3, the SLRC recommends that consideration be given to deleting paragraph (a) of the definition of ‘terrorist organisation’ so that the process of proscription would be the only method by which an organisation would become an unlawful terrorist organisation. Paragraph (a) of the definition of ‘terrorist organisation’ provides that ‘an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act ...’ is a terrorist organisation. (refer to chapter 7)

11: Section 102.3(2) – burden of proof

The SLRC recommends that the burden of proof on the defendant under section 102.3(2) be reduced from a legal burden to an evidential burden. Section 102.3(2) requires the defendant to prove that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation. (refer to chapter 10)

12: Section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation

The SLRC recommends that section 102.5, ‘Training a terrorist organisation or receiving training from a terrorist organisation’, be redrafted as a matter of urgency. The redraft should 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. The SLRC recommends that the scope of the offence should be extended to cover participation in training. The SLRC recommends that neither the offence nor any element of it should be of strict liability. (refer to chapter 10)

13: Section 102.6 – getting funds to, from or for a terrorist organisation

The SLRC recommends that, at most, a defendant legal representative should bear an evidentiary burden, and that subsections (1) and (2) should not apply to the person’s receipt of funds from the organisation if the person received the funds solely for the purpose of the provision of:

- (a) legal representation in proceedings under Part 5.3, or
 - (b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.
- (refer to chapter 10)

14: Section 102.7 – providing support to a terrorist organisation

The SLRC recommends that section 102.7, ‘Providing support to a terrorist organisation’, be amended to ensure that the word ‘support’ cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective. One means of achieving this could be to insert defences of the type contained in section 80.3 of the Criminal Code in relation to treason and sedition. (refer to chapter 10)

Recommendation 15: Section 102.8 – associating with terrorist organisations

The SLRC recommends that in its present form section 102.8 of the Criminal Code, ‘Associating with terrorist organisations’, be repealed. The SLRC recommends that, if section 102.8 is retained, section 102.8(5) be repealed. (refer to chapter 10)

16: Section 103.1 – financing terrorism

The SLRC recommends that section 103.1, 'Financing terrorism', should be amended by inserting 'intentionally' after 'the person' in paragraph (a) and removing the note. (refer to chapter 12)

Recommendation 17: Section 103.2 – financing a terrorist

The SLRC recommends that consideration be given to re-drafting paragraph (b) of section 103.2(1) to make it clear that it is required that the intended recipient of the funds is a terrorist. (refer to chapter 12)

18: Section 80.1(1)(f) – conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force

The SLRC recommends that section 80.1(1)(f), 'Conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force', be amended to require, as an ingredient of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the Australian Defence Force. (refer to chapter 11)

19: Customs' recommendations on border security

The SLRC recommends that the government give consideration to implementation of Customs' eight recommendations on border security. (refer to chapter 13)

20: Hoax offence

The SLRC recommends that a hoax offence be added to Part 5.3 in the terms of Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism to apply to a credible and serious threat to commit a terrorist act, where the evidence does not support a finding that there was such intention as described in the definition of 'terrorist act'. (refer to chapter 17)

Key Findings

- The SLRC considers that amendments such as either the provision of a judicial process for proscription or greater safeguards for the existing process, and the repeal of section 102.8, would play an important role in reducing the concern and fear felt by the Muslim and Arab communities and members of other communities about the security legislation.
- The SLRC concluded that on balance the Passenger Analysis Unit (PAU) appeared to be operating effectively and protecting the personal information it collects appropriately. The system also appears to ensure the smooth transition of passengers through Customs. The SLRC concluded that the audits of the PAU are a valuable monitoring mechanism. The SLRC considers that the government should fund the undertaking of the audits on a regular basis, and at least every two years.
- The SLRC concluded that efforts should be made to obtain an 'adequacy' finding from the European Commission (EC) for the Australian Passenger Name Records (PNR) system. The SLRC recommends that consideration be given by government as to how best to achieve such an 'adequacy' finding.
- The SLRC concluded that the powers of Customs officers are appropriate and that appropriate safeguards and guidelines are in place. • The SLRC recommends that the definition of a member of an organisation to include an informal member should remain.
- The SLRC does not recommend that paragraph (b) of the definition of 'terrorist act', which provides that 'the action is done or the threat is made with the intention of advancing a political, religious or ideological cause', be deleted from the definition.

- The SLRC does not recommend amendment of paragraph (a) of the definition of 'terrorist organisation' in section 102.1(1) and in particular does not recommend the omission of the word 'fostering' from paragraph (a).
- The SLRC does not recommend any change beyond those elsewhere recommended in this report to section 101.2, 'Providing or receiving training connected with terrorist acts'; section 101.4, 'Possessing things connected with terrorist acts'; section 101.5, 'Collecting or making documents likely to facilitate terrorism'; and section 101.6, 'Other acts done in preparation for, or planning, terrorist acts'.
- The SLRC does not recommend any change from the 'the' to 'a' amendments made to sections 101.2(3), 101.4(3), 101.5(3), 101.6(2) and 101.3(2) of the Anti-Terrorism Act (No 1) 2005 and to subsections 102.1(1)(paragraph (a) of the definition of *terrorist organisation*) and (2) by the Anti-Terrorism Act (No 2) 2005, which were apparently driven by concern that preparatory acts could only be prosecuted under the offences as originally drafted if they pointed to some specific planned terrorist act.
- The SLRC does not recommend the application of any less extended geographical jurisdiction than that described in section 15.4 of the Criminal Code as extended geographical jurisdiction (category D). Under s 15.4, an offence applies whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not the result of the conduct constituting the alleged offence occurs in Australia.
- The SLRC does not recommend abolition of the law of treason contained in section 80.1 of the Criminal Code as a whole, or of paragraph (f) of section 80.1(1).
- The SLRC does not recommend amendment to Part 1C of the *Crimes Act 1914* to allow the admissibility of evidence obtained overseas in circumstances where AFP officers had done 'all that they could reasonably be expected to do to comply' with that Part.
- The SLRC does not recommend that there be legislative provisions providing for a statutory right protecting anonymity of ASIO officers in counter-terrorist prosecutions.

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