

Anti-Terrorism Laws in Australia: The Security Legislation Amendment 2002

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1. TERRORISM IN AUSTRALIA

1.1. 1979 Hilton Bombings

At the Commonwealth Heads of Government Meeting (CHOGM) in Sydney in 1978 a bomb exploded outside the Hilton Hotel and three people were killed. The explosion at CHOGM is generally regarded as the first terrorist attack to occur in Australia, leading officials to accept “without question the assumption that there was a real and present [terrorist] threat in Australia.”

The government under then Prime Minister Malcolm Fraser reacted with an unprecedented show of military force. For the first time since Federation in 1901, the Commonwealth Government called out its armed forces to maintain public order within Australia in peacetime. The military was given responsibility for the security of the remainder of CHOGM.

That bombing led to inquiries, the establishment of a Royal Commission and, ultimately, to new legislation. Justice Hope, the Royal Commissioner, found that there was little evidence that Australia’s security organisations had the qualities of mind necessary for what he called the “skilled and subtle task” of intelligence assessment. The Australian Security and Intelligence Organisation (ASIO), Australia’s key intelligence agency, established in the 1950s, had little powers to investigate terrorist threats and gather intelligence about terrorist organisation. ASIO’s powers and activities were primarily concerned with counter-espionage. ASIO’s operational powers increased significantly by the 1979 *ASIO Act* and much of the justification for passing the Act concerned the threat of terrorism, as evidenced by the Hilton bombing.

1.2. 1980s Sydney Bombings

Sydney was also the site of two further incidents which have been attributed to Middle Eastern terrorism. In December 1980, the Turkish consul-general and his bodyguards were assassinated by the so-called Justice Commandos of the Armenian Genocide. It was a professional killing and the assailants escaped, possibly to leave the country.

A more enigmatic incident occurred in December 1982, when two bombs were detonated in Sydney without causing any casualties. One, a powerful explosive device, was set in the stairwell of the Westfield Towers building in Sydney, which also houses the Israeli Consulate. A far less dangerous bomb, an amateurish device made of gas cylinders, exploded in the car park of the Hakoah Club the same evening. As the Hakoah Club is a Jewish organisation, the two bombings were thought to be a terrorist campaign against Zionism, however, no group ever claimed responsibility.

In 1984 the Australian Family Court was subjected to a series of bomb threats and attacks which included bombings of the homes of judges and of the Court’s buildings. The 1984 bombings left one person dead and

several injured. During an earlier incident, in 1980, a judge was shot dead. While at the time these incidents were thought of to be terrorist attacks, later evidence suggested that these events were the actions of an individual who sought revenge against certain judges.

1.3 Bali Bombings, October 12th 2002

2. The 2001/2002 Security Legislation Amendment

2.1. Anti-Terrorism Legislation pre-2002

Up until the year 2002, Australia had no specific anti-terrorism laws. Despite the law reforms that occurred after the Hilton bombing in 1979, Australia's counter-terrorism laws comprised only some law enforcement and intelligence arrangements, international obligations that had been ratified domestically, and some 'subversive' offences under the *Crimes Act 1914* (Cth).

While New South Wales enacted some specific legislation to deal with potential threats and attacks aimed at the 2000 Sydney Olympiad,¹ there was no comprehensive body of law at either State or Commonwealth level. Instead, a diverse range of Commonwealth laws addressed in a rather rudimentary manner issues relating to law enforcement and intelligence, criminal procedure, offences against the Commonwealth Government, immigration, and money laundering. For example, at the Commonwealth level alone, this legislation included:

- Laws dealing with investigation and enforcement: *Australian Federal Police Act 1979*; *National Crime Authority Act 1984*; *Telecommunications Act 1977*; *Australian Security Intelligence Organisation Act 1979*; *Measures to Combat Serious and Organised Crime Act 2001*;
- laws dealing with criminal procedure and international cooperation: *Extradition Act 1988*; *Mutual Assistance in Criminal Matters Act 1987*; *International Transfer of Prisoners Act 1977*;
- laws creating specific offences: *Crimes Act 1914* (including treason, treachery, sabotage, sedition, unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, taking unlawful soundings, computer related acts, postal and telecommunications offences); *Air Navigation Act 1921*; *Public Order (Protection of Persons and Property) Act 1971*; *Crimes (Biological Weapons) Act 1976*; *Crimes (Foreign Incursions and Recruitment) Act 1978*; *Nuclear Non-Proliferation (Safeguards) Act 1984*; *Crimes (Hostages) Act 1989*; *Crimes (Aviation) Act 1991*; *Crimes (Ships and Fixed Platforms Act) Act 1992*; *Chemical Weapons (Prohibition) Act 1994*; *Weapons of Mass Destruction (prevention of Proliferation) Act 1994*;
- laws dealing with the proscribing of organisation: *Crimes Act 1914* (Part 11A concerning unlawful associations); *Charter of the United Nations Act 1945*;
- laws regulating the entry and deportation of aliens: *Migration Act 1958*;
- laws concerning intelligence services agencies: *Intelligence Services Act 2001*; *Australian Security Intelligence Organisation Act 1979*; and
- laws concerning suspect transactions (*Proceeds of Crime Act 1987*; *Financial Transaction Reports Act 1988*; *Charter of the United Nations Act 1945*).

2.2. The Security Legislation Amendment Bills 2001

The events of September 11th, which were witnessed by Prime Minister Howard during a visit to Washington DC, resulted in an unprecedented call for more appropriate counter-terrorism offences and new, centralised law

¹ Cf Nicole Rogers & Aidan Ricketts, "Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy" [2002] *Singapore Journal of Legal Studies* 149 at 150.

enforcement arrangements. The lack of specific anti-terrorism laws and law enforcement arrangements in Australia pre-9/11 led to calls fill this void to reinstall community confidence and fulfil Australia's international obligations.

In particular, it was found that State emergency services and law enforcement agencies, who would bear the key responsibility in case of a terrorist incident, would not have the ability to adequately deal with an event of 9/11-scale. Further, it was held that existing Commonwealth intelligence agencies did not have adequate powers to act on any information on possible terrorist attacks and suspects, and that the existing offences under the *Crimes Act 1914* did not, or not adequately, criminalise inchoate stages of terrorism.

On 2 October 2001, the Government announced proposed amendments to legislation to:

- ◆ permit, under warrant, the formal questioning by ASIO of people “who may have information that may be relevant to ASIO’s investigations into politically motivated violence” and the arrest by State or Federal police of people “in order to protect the public from politically motivated violence”;
- ◆ introduce new general offences based on the *Terrorist Act 1994* (UK) covering “violent attacks and threats of violent attacks intended to advance a political, religious or ideological cause which are directed against or endanger Commonwealth interests”; and
- ◆ increase Australian Federal Police’s powers “to search for and seize property of any kind that is used or intended to be used for terrorism or is the proceeds of terrorism”.

During the General Election, on 16 October 2001 the Coalition Government under Prime Minister Howard announced that, if re-elected, it would also introduce a retrospective criminal hoax offence “to specifically target those who seek to terrorise others by exploiting their fear of terrorism”. The strong stand on national security has been regarded as one of the principal reasons why the Coalition Government won the November 2001 elections.

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

On 18 December 2001, the Attorney-General announced that, following an inter-agency review established in September 2001, Cabinet had agreed that new counter-terrorism legislation and enhanced Commonwealth powers were needed to combat terrorism.

The first Bill of the counter-terrorism package was introduced into Parliament on 13 February 2002. The *Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002* introduced new offences to criminalise false threats, in particular to retrospectively sanction a range of hoax anthrax scares that occurred in late 2002. The Bill subsequently passed both Houses of Parliament and received Royal Assent on 4 April 2002.

The implementation of the remaining parts of the proposed counter-terrorism package posed much greater difficulties as it initially did not find bipartisan support and caused severe concern by constitutional law and human rights experts.

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

The [Bill] is part of a package of important counter-terrorism legislation designed to strengthen Australia's counter-terrorism capabilities. Since 11 September there has been a profound shift in the international security environment. This has meant that Australia's profile as a terrorist target has risen and our interests abroad face a higher level of terrorist threat.

This package, and other measures taken by the Government, are designed to bolster our armoury in the war against terrorism and deliver on our commitment to enhance our ability to meet the challenges of the new terrorist environment.

On 12 March 2002, the *Suppression of the Financing of Terrorism Bill 2002*, the *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002*, the *Border Security Legislation Amendment Bill 2002*, and the

Telecommunications Interception Legislation Amendment Bill 2002 were introduced into the House of Representatives, together with the *Security Legislation Amendment (Terrorism) Bill 2002*.

Since none of the specific heads of power which are conferred on the Commonwealth Government under the Australian Constitution refer directly to criminal matters, the States have traditionally power over this area. To centralise the power over terrorism related matters, the leaders of all Australian States and Territories formally referred their powers over terrorism to the Commonwealth Government on 5 April 2002.

The 2002 anti-terrorism legislates focuses specifically on intelligence, prevention, crisis management and investigation (which includes laws dealing with law enforcement agencies and methods, offences and international cooperation).

Amendments on these topics are canvassed in the legislative package as follows:

Intelligence	
Questioning	<i>ASIO Legislation Amendment (Terrorism) Bill 2002</i>
Interception	<i>Telecommunications Interception Legislation Amendment Bill 2002</i>
Financial transactions	<i>Suppression of the Financing of Terrorism Bill 2002</i>
Prevention	
Border control	<i>Border Security Legislation Amendment Bill 2002</i>
Proscription of terrorist organisations	<i>Security Legislation Amendment (Terrorism) Bill 2002 [No 2]</i> <i>Suppression of the Financing of Terrorism Bill 2002</i>
Offences	
Terrorism offence	<i>Security Legislation Amendment (Terrorism) Bill 2002 [No 2]</i>
Financing of terrorism	<i>Suppression of the Financing of Terrorism Bill 2002</i>
Terrorist bombings	<i>Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002</i>
Hoaxes	<i>Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002</i>

The House of Representatives passed five of the seven Bills on 13 March 2002: *Suppression of the Financing of Terrorism Bill 2002*, *Suppression of the Financing of Terrorism Bill 2002*, *Border Security Legislation Amendment Bill 2002*, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]*, and the *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002*. On 14 March 2002, the Bills were introduced into the Senate and the second reading debate was adjourned.

The Bills did not pass the Senate. The Selection of Bills Committee Report No 2 of 2002 (which was adopted by the Senate on 20 March 2002) recommended that the Bills be referred to the Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002

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

The subsequent review of the counter-terrorism package generated unprecedented public debate of the proposed legislation, in particular with a view to its constitutional legitimacy and the implication on civil right, especially those of minority groups. The main points of critique focused on the need for new legislation in the first place, the proposed powers of the Attorney-General to proscribe specific groups as terrorist organisation and criminalise membership, and increased interception and enforcement powers for ASIO.

2.2. The need for legislation

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

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

In response, the Director-General of Security Mr Dennis Richardson stated that current criminal laws did not provide an effective legislative framework for prevention. He explained why he considered the proposed legislation necessary and why existing laws were inadequate:

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

The Attorney-General's Department gave several reasons why the existing legislative framework was inadequate:

Specific laws are needed to address legislative gaps, particularly in relation to providing or receiving training, directing an organisation that fosters preparation for a terrorist act and possessing things connected with a terrorist act;

The laws concerning conspiracy, attempt, incitement and aiding and abetting are problematic, in that many ancillary offences can only be proven if they attach to a specific primary offence. The nature of terrorism is such that many persons involved in terrorist activity may not know the specific details of the act or offence that will be committed;

Existing provisions relating to the proscription of unlawful associations under Part IIA of the *Crimes Act* 1914 are primarily directed at politically-motivated organisations rather than those inspired by religious or ideological motivations. In addition, the penalties for those offences (maximum two years imprisonment) are clearly inadequate.

"Under existing criminal law, in order to be guilty of attempting, aiding and abetting or conspiring in relation to murder or property damage, the accused must be aware of the specific murder or property damage. Under the proposed legislation, those who assist or fund terrorist activity are liable even if they are not aware of the specific activity."²

The new legislation expands criminal responsibility into inchoate stages by criminalising membership in a terrorist organisation without requiring that a terrorist attack occur or that specific threats are made. In doing so, this new offences goes well beyond the scope of inchoate offences such as conspiracy, attempt or incitement which, to the most part, require physical proximity or the commission of an "overt act".

Further, the Security Legislation Amendment package introduces a comprehensive range of offences that build on the commission or threat of "terrorist acts", and membership or financing of "terrorist organisations". These offences are complemented by new law enforcement arrangements at Commonwealth level and far reaching investigative powers for the central intelligence and law enforcement agencies.

3. Terrorist Offences under the Criminal Code

Prior to 2002, there were no terrorism offences in Federal criminal law in Australia. Instead, a wide range of Federal laws created specific offences: *Crimes Act* 1914 (including treason, treachery, sabotage, sedition, unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, taking unlawful soundings, computer related acts, postal and telecommunications offences); *Air Navigation Act* 1921; *Public Order (Protection of Persons and Property) Act* 1971; *Crimes (Biological Weapons) Act* 1976; *Crimes (Foreign Incursions and Recruitment) Act* 1978; *Nuclear Non-Proliferation (Safeguards) Act* 1984; *Crimes (Hostages) Act*

² Nicole Rogers & Aidan Ricketts, "Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy" [2002] *Singapore Journal of Legal Studies* 149 at 153-154.

1989; *Crimes (Aviation) Act* 1991; *Crimes (Ships and Fixed Platforms Act) Act* 1992; *Chemical Weapons (Prohibition) Act* 1994; *Weapons of Mass Destruction (Prevention of Proliferation) Act* 1994.

As mentioned earlier, a key feature of the 2002 amendment is the introduction of new terrorism offences into the *Criminal Code*, the centrepiece of Australian Federal Criminal Law. The new offences include (1) the introduction of general terrorism offences in the *Security Legislation Amendment (Terrorism) Bill* 2002 [No 2], (2) offences of financing terrorist organisations and their activities (*Suppression of the Financing of Terrorism Act* 2002), and (3) offences related to terrorist bombings (*Criminal Code Amendment (Suppression of Terrorist Bombings) Act* 2002).

3.1. New Offences

3.1.1. Security Legislation Amendment (Terrorism) Act

Schedule 1 of the *Security Legislation Amendment (Terrorism) Act* 2002 [No 2] inserts into the *Criminal Code* a new Chapter 5, titled “The integrity and security of the Commonwealth”. The new provisions transfer the treason offence from the *Crimes Act* 1914 and update its terms to recognise that treason may include not only assisting in regular war against the state but also assisting in irregular armed hostilities against the armed forces; introduce a statutory definition of terrorism (“terrorist act”) and specific terrorist offences; and introduce an administrative power to proscribe terrorist and other organisations.

The new offences are:

- engaging in a terrorist act: s 101.1 *Criminal Code* (Cth);
- providing or receiving training for a terrorist act: s 101.2 *Criminal Code* (Cth);
- possessing things connected with a terrorist act: s 101.4 *Criminal Code* (Cth);
- collecting documents likely to facilitate a terrorist act 2 101.5 *Criminal Code* (Cth); and
- acts in preparation for a terrorist act: s 101.6 *Criminal Code* (Cth).

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

3.1.2. Suppression of the Financing of Terrorism Act

The *Suppression of the Financing of Terrorism Act* 2002 implements obligations under UN Security Council Resolution 1373 to criminalise the provision of funds for terrorism and allow the freezing of assets and the *International Convention for the Suppression of Financing of Terrorism*. The Act creates an offence directed at those who provide or collect funds with the intention that they be used to facilitate terrorist activities; requires cash dealers to report transactions that are suspected to relate to terrorist activities; enables the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Commissioner of the Australian Federal Police (AFP) and the Director-General of Security to disclose financial transaction reports directly to foreign countries, foreign law enforcement agencies and foreign intelligence agencies; and supersedes the *Charter of the United Nations (Anti-terrorism Measures) Regulations* 2001 by incorporating those matters in the Act and creating higher penalty offences for providing assets to, or dealing in assets of, those engaged in terrorist activities.

The Act includes provisions identical to those in the *Security Legislation Amendment (Terrorism) Act* 2002 [No 2] in relation to the definition of terrorist act and other relevant terms, and the constitutional basis for offences (sections 100.1 and 100.2 *Criminal Code* (Cth) respectively).

The Bill makes it an offence to provide or collect funds where the person is reckless as to whether those funds will be used to facilitate or carry out a ‘terrorist act’ (s 103.1 *Criminal Code* (Cth)). The penalty is life imprisonment.

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

3.1.3. Criminal Code Amendment (Suppression of Terrorist Bombings) Act

The *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* gives effect to the *International Convention for the Suppression of Terrorist Bombings*; and creates offences of international terrorist activities using explosive or lethal devices.

Section 72.3 *Criminal Code* (Cth) creates new offences of placing or detonating explosive or other lethal devices in prescribed places with the intention of causing death or serious harm; or extensive destruction to the place, where the person is reckless as to whether that destruction results or is likely to result in major economic loss. The prescribed places are: a place of public use; a government facility; a public transportation system; or an infrastructure facility (that is, a facility that distributes services for public benefit, including water, sewage, energy, fuel or communications). The penalty for the proposed offences is life imprisonment.

The offences apply in a broad range of circumstances where there is some nexus to Australia, defined to include not only offences by Australian citizens and conduct occurring in Australia, but also where the offence is committed against an Australian citizen or body corporate, or the offender is in Australia and is subject to another country's jurisdiction under the Convention. The offences do not apply where the circumstances are exclusively internal to Australia (as explained in more detail in s 72.4: the conduct occurred wholly within Australia, was committed by an Australian citizen who is in Australia, all victims were Australian citizens or bodies corporate incorporated in Australia, and no other country which is party to the Convention can exercise jurisdiction).

3.2. Definition of Terrorism

Central to the new counter-terrorism legislation is the introduction of a statutory definition of the term 'terrorism'. Early proposals of the legislation sought to legislate the term 'terrorism' but due to severe criticism it later refrained from doing so, instead introducing definitions of "terrorist act" and "terrorist organisations".

3.2.1. Defining Terrorism

A large number of definitions have been proposed domestically and internationally to describe terrorism but no comprehensive working definition has emerged. On the one hand, they may reflect differences in precision, emphasis or perspective. On the other hand, they may reflect differences in the underlying phenomena. Across the various definitions listed above, there appear to be four core elements: (a) acts or threats of violence or criminality that are (b) significant in seriousness or magnitude which are (c) motivated by political, social or ideological objectives and/or (d) intended to influence a government or intimidate or coerce the public or a section of the public.

In Australia, up until 2001 the Australian Defence Force was the only Government agency to have a working definition of terrorism, as "[t]he use or threatened use of violence for political ends, or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear".

The 1979 protective security review defined it as "acts of small groups of persons who use criminal violence to obtain publicity for their political views, or to achieve or to break down resistance to their political aims, by the intimidation of governments or of people". A 1993 counter-terrorist review defined it as "acts or threats of violence of national concern, calculated to evoke extreme fear for the purpose of achieving a political objective in Australia or in a foreign country".

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

In reviewing the definition under the *Criminal Code*, the Senate Legal and Constitutional Committee found that

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

Moreover, 'terrorism' is subjective. It is a label which is 'both political and perjorative'. The classic statement is that '[w]hat might appear as an evil act of terrorism to people in an affluent Western society may seem like a reasonable and legitimate political action to a liberation or rebel movement operating in the poverty-stricken and desperate conditions in the Third World'.

Having canvassed some of these issues, an official Australian report on counter-terrorist capability noted in 1993 that: '[w]e suspect that the nature of terrorism and its relationship to politically motivated violence probably means that no one 'definition' would be satisfactory, or widely accepted in the Australian community'. For this reason, it is argued, 'defining the term itself creates more problems than it solves'.

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

3.2.2. The Criminal Code definition of Terrorism

Central to the 2002 Security Legislation Amendment is the conceptualization of terrorism in the definition of 'terrorist act', now contained in s 100.1 *Criminal Code* (Cth). Initially, the proposed concept of this term was very broad and lacked a focus on the ultimate intent of terrorism; exceptions were only made for industrial action and lawful advocacy, protest or dissent. "The definition was so wide that it would have criminalised many forms of unlawful civil protest (unlawful perhaps only due to a trespass) in which people, property or electronic systems are harmed or damaged. The section could have extended to protest by farmers, unionists, students, environmentalists and online protesters engaged in hacktivism."³

Other concern about the width of the definition of the action required in s 100.1 for a terrorist act to be committed includes:

- the width of 'serious' harm or 'serious' property damage. The meaning of this term is potentially very broad. It has been argued that serious damage to property could include putting something on the wall of a building, damage by protesters to the walls or fences of embassies, immigration and other detention centres, or damage to logging trucks, chicken sheds or fishing nets. It has been suggested to restrict 'harm' should be restricted to physical harm, and that damage to property should be restricted to 'destruction of property that threatens life or serious injury'.
- the width of "creating a serious risk to the health or safety of the public", which could arguably include industrial action by police officers, nurses or other emergency services personnel resulting in reduced essential services; and
- the width of "serious interference" or "serious disruption" of electronic communications systems. It has been stated that this could include flooding a system with emails as part of a protest, air traffic controllers taking industrial action, or the destruction of traffic lights.

Under s 100.1 *Criminal Code* 1995 (Cth)

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (2A); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

³ George Williams, "One Year On: Australia's Legal Response to September 11th" (2002) 27(5) *Alternative Law Journal* 212 at 213.

- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it:
 - (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (ba) causes a person's death; or
 - (c) endangers a person's life, other than the life of the person taking the action; or
 - (d) creates a serious risk to the health or safety of the public or a section of the public; or
 - (e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.
- (2A) Action falls within this subsection if it:
 - (a) is advocacy, protest, dissent or industrial action; and
 - (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

Paragraphs (1)(i) and (ii) were introduced to limit the definition to act or threats done with “the intention” to intimidate the Government or the public. In addition, under new subsection (2A) advocacy, protest, dissent or industrial action (whether lawful or not) is now excluded so long as it is not intended to cause harm or danger.

3.3. Proscription of Organisations

Another “controversial element of the *Security Legislation Amendment (Terrorism)* Bill was the proposal to empower the [Commonwealth] Attorney-General to proscribe (or ban) an organization, followed thereafter by criminal offences, including 25 years gaol, for members and supporters of banned organizations.” A new Division 102 of the *Criminal Code* was proposed to authorise the Commonwealth Attorney-General to declare an organisation to be a proscribed organisation if satisfied on reasonable grounds that:

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

The Attorney-General must publish a declaration of proscription in the Gazette and a newspaper in each State and Territory. The declaration comes into force on publication and stays in force until the expiry date specified in the declaration or revocation (s 102.2). Under section 102.3, the Attorney-General must revoke the declaration if

satisfied on reasonable grounds that none of the grounds apply. The Attorney-General may delegate his or her powers and functions to another Minister.

Proposed s 102.2 was so broad that it would have allowed the Attorney-General to ban, for instance, any organisation “likely to endanger the security or integrity of the Commonwealth or another country”, thus authorising the Attorney-General to prohibit organisations of the kind of the African National Congress, or any organisation supporting the independence of East Timor or Palestine and ultimately criminalise those supporting these organisations. Others have compared the proscription powers to the attempted ban of the Communist Party in the 1950s and as providing a general power for the government to outlaw political parties.⁴

Moreover, the power to ban organisations could have been exercised unilaterally by the Attorney-General and not as part of a fair, transparent and accountable process as the legislation did not provide for a meaningful review process.⁵

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

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

The Bill, however, was silent on this issue.

Following the Senate Legal and Constitutional Committee's review, the proposed legislation was amended to remove the proscription element. “The legislation enacted does not vest any general power in the Attorney-General to proscribe organizations and to criminalise their members. Instead it contains criminal sanctions for involvement with a terrorist organization, including for recruiting members, providing support or funding, directing their activities or being a member.”⁶

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

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

New s 102.1 *Criminal Code* now defines terrorist organisations as

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

Under a very limited form of proscription, an organization will also be a terrorist organization where (subss (2)-(4)) the Attorney-General is satisfied that the Security Council of the United Nations has made a decision about terrorism identifying the organization, and the organization is a terrorist organization under s 102.1.”⁷

⁴ Michael Head, “Counter-terrorism Laws Threaten Fundamental Democratic Rights” (2002) 27(3) *Alternative Law Journal* 121 at 121; George Williams, “One Year On: Australia's Legal Response to September 11th” (2002) 27(5) *Alternative Law Journal* 212 at 213.

⁵ George Williams, “One Year On: Australia's Legal Response to September 11th” (2002) 27(5) *Alternative Law Journal* 212 at 213.

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⁷ George Williams, “One Year On: Australia's Legal Response to September 11th” (2002) 27(5) *Alternative Law Journal* 212 at 213.

4. Conclusion

“Those societies that have succeeded best against terrorism have refused to play into the terrorists’ hands. [...] ‘Terrorists want a lot of people watching and a lot of people listening and not a lot of people dead.’ They want publicity, the last thing that most perpetrators of non-political violence seek. They form a symbiotic relationship with media. They create media events. Kidnapping, hijacking and suicide bombs introduce elements of high tension, as does indiscriminate brutality.

Free societies must, do and will cover such events in their media – which is itself now particularly well adapted to vivid images and to sites of death and suffering. But keeping such visual horror in perspective is an important clue to defeating terrorists at their game. So is keeping one’s sense of balance and priority. So is analysing the reasons that may lie behind some of the acts of terror, to see if some of them reflect grievances that need to be addressed. [...] The countries that have done best against terrorism are those that have kept their priorities, retained a sense of proportion, questioned and addressed the causes of terrorism, and adhered steadfastly to constitutionalism and the rule of law.”⁸

Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul.”⁹

“To preserve liberty, we must preserve the rule of law. The rule of law is the alternative model to the rule of terror, the rule of money and the rule of brute power. That is our justification as a profession. It is our continuing challenge after 11 September 2002.”¹⁰

⁸ Michael Kirby, “Australian Law – After 11 September 2001” (2001) 21(3) *Australian Bar Review* 253 at 261.

⁹ Michael Kirby, “Australian Law – After 11 September 2001” (2001) 21(3) *Australian Bar Review* 253 at 263.

¹⁰ Michael Kirby, “Australian Law – After 11 September 2001” (2001) 21(3) *Australian Bar Review* 253 at 264.