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Counter-terrorism and national security legislation reviews: a comparative overview

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Executive summary

- Since September 2001, successive Australian governments have enacted a series of significant legislative reforms to update national security laws and bolster Australia's response to potential terrorist threats. These laws have been the subject of several statutory and other reviews since their enactment.
- The Government is in the process of considering and responding to the recommendations of major reviews completed between 2012 and 2014. It introduced a Bill to implement the first part of its response in July 2014, and announced a range of further reforms in August 2014. This Research Paper provides a brief overview of the key legislative reviews, followed by a more detailed comparison of the most recent reviews and, where relevant, some earlier reviews. It also provides information on how governments have responded to review recommendations.
- The reviews of the Independent National Security Legislation Monitor (INSLM) (2012–2014) and the Council of Australian Governments (COAG) Review Committee (2013) have come to several of the same conclusions, the most significant being that preventative detention orders should be abolished. Other areas of agreement are the express inclusion of hostage taking in the definition of a terrorist act, the exclusion from that definition of acts committed during an armed conflict that is governed by international law, repeal of the offence of financing a terrorist, and an amendment to the offence of incursion into a foreign State to engage in hostile activities.
- These two reviews, however, took contrasting views on control orders. The INSLM recommended they be abolished and the COAG Review Committee recommended they be retained but that the legislation be significantly amended to provide additional safeguards and protections. They also made contrasting recommendations in relation to the offence of associating with terrorist organisations.
- Several of the recommendations made by the INSLM and the COAG Review Committee either accord or contrast with those of earlier reviews conducted by the Parliamentary Joint Committee on Intelligence and Security between 2005 and 2013 and the Security Legislation Review Committee, which reported in 2006. Areas of agreement include:
 - introduction of an authorised intelligence operations scheme under which Australian Security Intelligence Organisation (ASIO) officers would be protected from criminal and civil liability for certain conduct
 - amendments to facilitate cooperation between ASIO and other intelligence agencies
 - postponing the commencement of terrorist organisation listings until after the parliamentary disallowance period has expired
 - amendments to the definition of terrorist act and
 - amendments to several of the terrorist organisation offences.

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Introduction

Following the events of 11 September 2001 in the United States and the subsequent United Nations Security Council Resolution 1373 (2001), the Australian Government, in cooperation with the states and territories, embarked on a series of significant legislative reforms to respond to the threat of terrorism.¹ The reforms included special powers for the Australian Security Intelligence Organisation (ASIO), a range of new offences and the introduction of a mechanism for the proscription of terrorist organisations.² The London bombings in July 2005 prompted further reforms, including the introduction of the control order and preventative detention order regimes and additional police powers in relation to suspected terrorism offences.³ Given the extraordinary nature of the new powers granted and the reach of the new offences, which were designed to capture conduct in the early preparatory stages, the relevant legislation required that reviews be undertaken at certain junctures. In addition, the office of Independent National Security Legislation Monitor (INSLM) was established in 2010 to provide ongoing oversight of Commonwealth counter-terrorism and national security laws.⁴

Accordingly, there have been several significant reviews of Australia's counter-terrorism and national security legislation, the most recent and comprehensive being those of the INSLM and the Council of Australian Governments (COAG) Review Committee.

The Government is now embarking on a further series of national security reforms, the first part of which is contained in the [National Security Legislation Amendment Bill \(No. 1\) 2014](#) (the Bill), introduced in the Senate on 16 July 2014.⁵ The Bill responds to [recommendations](#) on legislation governing the Australian Intelligence Community (AIC) made by the Parliamentary Joint Committee on Intelligence and Security in 2013.⁶ The Attorney-General has stated that the Bill is 'just the first step' and indicated that the Government would introduce further legislation to both respond to recent reviews and proactively address any other shortcomings it identified.⁷ On 5 August 2014, the Government announced it would soon be introducing further reforms to, among other things, remove sunset provisions from a range of legislation, expand the criteria for the proscription of terrorist organisations, lower the threshold for arrest without warrant for suspected terrorism offences and enable requests for the suspension of passports in certain circumstances.⁸

This Research Paper provides a brief overview of key reviews of counter-terrorism and national security legislation, followed by a more detailed comparison of the recommendations of the INSLM and COAG reports with each other and, where relevant, those of earlier reviews. It also provides information on how governments have responded to review recommendations.

1. UN Security Council, [Security Council resolution 1373 \(2001\) \[on threats to international peace and security caused by terrorist acts\]](#), 28 September 2001, S/RES/1373 (2001), accessed 21 July 2014.
2. The Government's initial legislative response comprised the [Australian Security Intelligence Organisation Legislation Amendment \(Terrorism\) Act 2003](#), [Border Security Legislation Amendment Act 2002](#), [Criminal Code Amendment \(Anti-hoax and Other Measures\) Act 2002](#), [Criminal Code Amendment \(Suppression of Terrorist Bombings\) Act 2002](#), [Security Legislation Amendment \(Terrorism\) Act 2002](#) and the [Suppression of the Financing of Terrorism Act 2002](#) (all accessed 21 July 2014).
3. Key measures were included in the [Anti-Terrorism Act \(No. 2\) 2005](#) (accessed 21 July 2014). For an overview of other relevant legislation enacted since September 2001, see G Williams, 'A decade of Australian anti-terror laws', *Melbourne University Law Review*, 35(3), 2011, pp. 1136–76 (accessed 21 July 2014).
4. [Independent National Security Legislation Monitor Act 2010](#) (INSLM Act), accessed 21 July 2014; Revised Explanatory Memorandum, [Independent National Security Legislation Monitor Bill 2010](#), p. 1, accessed 21 July 2014.
5. Parliament of Australia, [National Security Legislation Amendment Bill \(No. 1\) 2014 homepage](#), Australian Parliament website, accessed 21 July 2014. The Parliamentary Library is in the process of preparing a Bills Digest for this Bill.
6. Parliamentary Joint Committee on Intelligence and Security (PJICIS), [Report of the inquiry into potential reforms of Australia's national security legislation](#), Parliament of Australia, Canberra, May 2013, accessed 15 July 2014. The term Australian Intelligence Community refers to six security and intelligence agencies: ASIO, Australian Secret Intelligence Service (ASIS), Australian Signals Directorate (ASD, previously Defence Signals Directorate), Australian Geospatial-Intelligence Organisation (AGO, previously Defence Imagery and Geospatial Organisation), Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA).
7. G Brandis, '[Second reading speech: National Security Legislation Amendment Bill \(No. 1\) 2014](#)', Senate, *Debates* (proof copy), 16 July 2014, pp. 65–68, accessed 21 July 2014.
8. T Abbott (Prime Minister) and G Brandis (Attorney-General), [New counter-terrorism measures for a safer Australia](#), media release, 5 August 2014, accessed 5 August 2014.

Summary of key reviews

Independent National Security Legislation Monitor

Reports: 2012–2014.

Government response: The Government is yet to formally respond to these reports. As noted in the **Appendix**, the National Security Legislation Amendment Bill (No. 1) 2014 contains two measures that accord with recommendations made in the INSLM's 2013–14 report because they had earlier been made by the PJCIS. The Government's announcement of further measures in August 2014 indicates that several key recommendations will be rejected.⁹ These instances are noted in the relevant sections below.

The INSLM was established by the [Independent National Security Legislation Monitor Act 2010](#) (INSLM Act). Under subsection 6(1) of the Act, the INSLM has the following functions:

- (a) to review, on his or her own initiative, the operation, effectiveness and implications of:
 - (i) Australia's counter-terrorism and national security legislation; and
 - (ii) any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;
- (b) to consider, on his or her own initiative, whether any legislation mentioned in paragraph (a):
 - (i) contains appropriate safeguards for protecting the rights of individuals; and
 - (ii) remains proportionate to any threat of terrorism or threat to national security, or both; and
 - (iii) remains necessary;
- (c) if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister—to report on the reference;
- (d) to assess whether Australia's counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.¹⁰

Section 8 provides that, in performing these functions, the INSLM must have regard to:

- Australia's obligations under international agreements including those relating to human rights, counter-terrorism and international security and
- arrangements between the Commonwealth, state and territory governments on a national approach to countering terrorism.¹¹

Section 4 provides that the provisions subject to review are:

- Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) (special powers relating to terrorism offences)¹²
- Part 4 of the *Charter of the United Nations Act 1945* (implementing United Nations Security Council decisions on terrorism and dealings with assets)¹³
- Division 3A of Part IAA (powers in relation to terrorist acts and terrorism offences), section 15AA (bail not to be granted in certain cases), section 19AG (non-parole periods for sentences for certain offences) and Part IC

9. New counter-terrorism measures for a safer Australia, op. cit.

10. INSLM Act, op. cit.

11. Ibid.

12. [Australian Security Intelligence Organisation Act 1979](#) (ASIO Act), accessed 21 July 2014.

13. [Charter of the United Nations Act 1945](#), accessed 21 July 2014.

(investigation of Commonwealth offences—to the extent that it relates to investigation of terrorism offences) of the *Crimes Act 1914* (Crimes Act)¹⁴

- Chapter 5 of the *Criminal Code* (offences relating to the security of the Commonwealth, including treason and urging violence, espionage and similar activities, terrorism, terrorism financing and harming Australians; provisions relating to the proscription of terrorist organisations; control orders and preventative detention orders)¹⁵
- Part IIIAAA of the *Defence Act 1903* (use of the Australian Defence Force to protect Commonwealth interests and states and territories)¹⁶
- any other provision of any of the Acts set out above, as far as it relates to the provisions identified above
- the *National Security Information (Criminal and Civil Proceedings) Act 2004* and¹⁷
- any other Commonwealth law to the extent that it relates to any of the above legislation.¹⁸

Bret Walker SC was appointed as the first INSLM and filled the position from April 2011 to April 2014. In that time, four annual reports were produced, three of which contained recommendations for legislative reform.¹⁹

In the [2011–12 report](#), which focused on the control order and preventative detention order regimes, ASIO's special counter-terrorism powers and the statutory definition of 'terrorism', the INSLM made 21 recommendations, key among them:

- repeal of the control order regime (Division 104 of the *Criminal Code*)
- repeal of the preventative detention order regime (Division 105 of the *Criminal Code*) and
- repeal of 'questioning and detention' warrants (Subdivision C, Division 3, Part III of the ASIO Act), but not the 'questioning only' warrants in Subdivision B.²⁰

The Government's August 2014 announcement of further counter-terrorism measures indicates that these key recommendations will be rejected, with the Government instead introducing amendments to remove or extend the sunset provisions that currently apply to those measures.²¹

In the [2012–13 report](#), the INSLM made 30 recommendations in relation to:

- enhancing powers and offences under the *Charter of the United Nations Act 1945*
- streamlining the listing, designation and proscription of terrorist organisations under the *Criminal Code* (including a recommendation to replace any listings of parts of such organisations with listings of the whole organisations)
- amending exceptions to offences in the *Criminal Code* concerning association with terrorist organisations and
- amending provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, including extending the Act's application (with appropriate adaptations) to proceedings in all Australian courts and Commonwealth tribunals.²²

In the [2013–14 report](#), the INSLM made 31 recommendations in relation to:

- the emergency call-out powers under Part IIIAAA of the *Defence Act 1903*
- laws concerning Australians engaging in armed conflicts overseas

14. [Crimes Act 1914](#) (Crimes Act), accessed 21 July 2014.

15. [Criminal Code Act 1995](#) (Criminal Code), accessed 21 July 2014.

16. [Defence Act 1903](#), accessed 21 July 2014.

17. [National Security Information \(Criminal and Civil Proceedings\) Act 2004](#), accessed 21 July 2014.

18. INSLM Act, op. cit.

19. The position of INSLM was vacant at the time of writing. The Government introduced legislation to abolish the position in March 2014, but reversed its decision and withdrew the Bill when it introduced the National Security Legislation Amendment Bill (No. 1) 2014 in July 2014: Parliament of Australia, '[Independent National Security Legislation Monitor Repeal Bill 2014 homepage](#)', Australian Parliament website, accessed 21 July 2014. The INSLM's first annual report identified issues for consideration but did not include any recommendations.

20. B Walker, [Declassified annual report](#), Australian Government Independent National Security Legislation Monitor (INSLM), Canberra, 20 December 2012, accessed 31 July 2014.

21. New counter-terrorism measures for a safer Australia, op. cit.

22. B Walker, [Annual report](#), Australian Government INSLM, Canberra, 7 November 2013, accessed 31 July 2014.

- laws governing use of foreign evidence in terrorism cases
- passport and citizenship laws, to the extent they are relevant to counter-terrorism, and
- several ‘miscellaneous improvements’, some suggested by relevant agencies, including:
 - enactment of a delayed notification search warrant scheme for the investigation of terrorism offences and
 - consideration of a legislative scheme to protect ASIO officers and human sources from criminal and civil liability for certain conduct in the course of authorised intelligence operations (based on the controlled operations scheme outlined in Part IAB of the Crimes Act for law enforcement purposes).²³

The Government’s August 2014 announcement of further counter-terrorism measures indicates that some of the recommendations in the 2013–14 report will be implemented. In particular, legislation will be introduced to enable ASIO to request the suspension of an Australian passport (or foreign passport held by a dual national) in certain circumstances, and to improve the collection and admissibility of evidence gathered overseas.²⁴ While the detail of these proposals was not publicly available at the time of publication, these proposals appear to accord with recommendations V/4 and V/5 and recommendation IV/2 of that report respectively.²⁵

Council of Australian Governments Review of Counter-Terrorism Legislation

Report: tabled in May 2013.

Government response: under consideration.

At a special meeting on counter-terrorism held on 27 September 2005, COAG agreed to strengthen counter-terrorism laws, including through the introduction of control orders and preventative detention orders. It also agreed to review the new laws after five years.²⁶ Initially scheduled to commence in 2010, a committee was not appointed until 9 August 2012.²⁷

The COAG Review Committee was tasked with reviewing the operation, effectiveness and implications of certain Commonwealth, state and territory counter-terrorism laws.²⁸

Commonwealth laws included within the committee’s [Terms of Reference](#) were:

- Sections 100.1, 101.2, 101.4, 101.5, 101.6, 102.1, 102.5, 102.6, 102.8, 103.1, 103.2, 103.3, 106.2, 106.3, and Divisions 104 and 105 of the *Criminal Code Act 1995* (Cth)
- Section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)
- Sections 3C, 3D and Division 3A of the *Crimes Act 1914* (Cth)
- Section 16 of the *Financial Transaction Reports Act 1988* (Cth)
- Schedule 1 (dab) and (dac) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The COAG Review [report](#) included 44 recommendations relating to Commonwealth laws.²⁹ These included:

- amendments to the definition of ‘terrorist act’, including:
 - removing ‘threat of action’ from the definition into a separate offence
 - creating an offence for a hoax threat
 - extending what is considered to be ‘harm’ to include psychological harm

23. B Walker, [Annual report](#), Australian Government INSLM, Canberra, 28 March 2014, accessed 31 July 2014.

24. New counter-terrorism measures for a safer Australia, op. cit.

25. *Annual report*, 2014, op. cit., pp. 34–36, 46–49.

26. Council of Australian Governments (COAG), [Communique, special meeting on counter-terrorism](#), 27 September 2005, accessed 14 July 2014.

27. J Gillard (Prime Minister), [COAG to review counter-terrorism legislation](#), media release, 9 August 2012, accessed 14 July 2014.

28. COAG, [‘About the review’](#), COAG Review of Counter-Terrorism Legislation website, accessed 14 July 2014. The page contains a link to the complete terms of reference.

29. COAG, [Council of Australian Governments review of counter-terrorism legislation](#), Australian Government, 2013, accessed 31 July 2014. It included a further three recommendations that applied only to state and territory laws.

- explicit inclusion of hostage-taking in the definition and
- excluding acts committed by parties regulated by the law of armed conflict
- amendments to terrorism, terrorist organisation and terrorism financing offences, including:
 - changes to the processes that apply to the proscription of terrorist organisations, including consideration of postponing the commencement of associated regulations until the parliamentary disallowance period has expired and better communication of new listings
 - repeal of the offence of associating with a terrorist and
 - changes to the offence of financing terrorism and consideration of repeal of the offence of financing a terrorist
- retention of the control order regime, but with significant amendments, including:
 - consideration of a system of ‘Special Advocates’ to participate in proceedings relating to control orders
 - introduction of minimum standards of information to be given to a person subject to a control order
 - amendments to reduce the severity of some of the conditions that may be applied under a control order and
 - specific provision for the Commonwealth Ombudsman to oversee interim and confirmed control orders
- repeal of the preventative detention order regime and
- amendments to stop, search and seizure powers available in relation to terrorism.

The Government’s August 2014 announcement of further counter-terrorism measures indicates that the recommendation to repeal the preventative detention order regime will be rejected, with the Government instead introducing amendments to remove or extend the sunset provision that currently applies.³⁰

Inquiry into Potential Reforms of National Security Legislation

Report: tabled in June 2013.

Government response: legislative amendments addressing recommendations 20–41 (legislation governing the AIC) are contained in the National Security Legislation Amendment Bill (No. 1) 2014. The Attorney-General’s Department’s submission to an inquiry into the Bill includes a table comparing the recommendations (most of which have been implemented) to the provisions of the Bill.³¹ The remaining recommendations remain under consideration and are currently the subject of a further Parliamentary inquiry.³²

In May 2012, the then Attorney-General, Nicola Roxon, asked the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to consider potential national security reforms.³³ The Government subsequently released a discussion paper outlining reforms it wished to progress, those it was considering and those on which it expressly sought the views of the PJCIS. The potential reforms related to telecommunications interception and access to telecommunications data; telecommunications sector security; and legislation governing the AIC, particularly ASIO.³⁴

The PJCIS’s [report](#) contained 43 recommendations in total, some calling for specific legislative amendments and others suggesting the Government either give further consideration to a particular matter or pursue reforms in a certain way if it chooses to progress them.³⁵ The PJCIS made 18 recommendations on [telecommunications interception and access to telecommunications data](#), including:

- amendments to the proportionality tests applied under the [Telecommunications \(Interception and Access\) Act 1979](#) (TIA Act) when agencies seek access to interception or data

30. New counter-terrorism measures for a safer Australia, op. cit.

31. Attorney-General’s Department (AGD), [Submission to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into the National Security Legislation Amendment Bill \(No. 1\) 2014](#), July 2014, accessed 30 July 2014.

32. Senate Standing Committee on Legal and Constitutional Affairs, [‘Comprehensive revision of the Telecommunications \(Interception and Access\) Act 1979’](#), Australian Parliament website, accessed 30 July 2014.

33. N Roxon (Attorney-General), [Public consultation for national security legislation reform](#), media release, 4 May 2012, accessed 14 July 2014.

34. AGD, [Equipping Australia against emerging and evolving threats](#), Australian Government, July 2012, accessed 14 July 2014.

35. Report of the inquiry into potential reforms of Australia’s national security legislation, op. cit.

- a review of oversight arrangements applicable to ensuring accountability under the TIA Act
- a review of the threshold for access to telecommunications data with a view to reducing the number of agencies to which access is available on the basis of the gravity of the conduct to be investigated
- amendments to allow interception based on specific attributes of communications, based on the existing 'named person' warrants
- a review of the information-sharing provisions in the TIA Act
- streamlining of the TIA Act through development of a single interception warrants regime including recommended safeguards
- a review of the application of interception-related industry assistance obligations, and amendments to clarify and simplify those obligations
- consultation with relevant agencies and industry if the Government decides to develop an offence for failure to assist with decrypting communications or impose timelines on industry assistance to law enforcement and national security agencies and
- comprehensive revision of the TIA Act in order to design an interception regime underpinned by clear protection for the privacy of communications, technology neutral provisions, maintenance of investigative capabilities and robust oversight and accountability.

It made 22 recommendations on [legislation governing the AIC](#), including:

- amendments, or in some instances further consideration of amendments, that would improve the efficacy of ASIO's computer access warrant regime
- amendments to allow the Attorney-General to vary and renew warrants issued under Division 2 of Part III of the ASIO Act, subject to appropriate accountability and oversight
- amendments to establish an authorised intelligence operations scheme to protect ASIO officers from criminal and civil liability for certain conduct undertaken for the purposes of an operation, to be based on the controlled operations regime available to law enforcement agencies under the Crimes Act
- further consideration of factors enabling ASIO to seek a single warrant specifying access to multiple powers against a single target, if the Government chooses to proceed with amendments providing for 'named person' warrants
- amendments to formalise ASIO's capacity to cooperate with the private sector
- amendments to provide for the issue of evidentiary certificates to protect the identity of ASIO officers, sources and information about sensitive operational capabilities in court proceedings
- amendments to provide for the application of common standards across agencies, based on those in the ASIO Act, where ASIO is cooperating with the Australian Secret Intelligence Service, Australian Signals Directorate (previously the Defence Signals Directorate) or the Australian Geo-Spatial Intelligence Organisation (previously the Defence Imagery and Geospatial Organisation), for the authorisation of intrusive activities involving collection of intelligence on an Australian person and
- public and targeted consultation on an exposure draft of amendments relating to the AIC and parliamentary scrutiny of the draft legislation.

It made two recommendations on a [potential mandatory data retention regime](#), specifically that if the Government decides to legislate for a mandatory data retention regime:

- the regime should include certain features (including explicit exclusion of content and Internet browsing data and a maximum retention period of two years), be released as an exposure draft, and the exposure draft referred to the PJCIS for examination and
- the regime should be subject to oversight by the PJCIS and annual reports to Parliament on its operation, and its effectiveness reviewed by the PJCIS after three years.

Finally, the PJCIS recommended that the [Telecommunications Act 1997](#) be amended to provide a telecommunications security framework that includes:

- an industry-wide obligation to protect infrastructure and information from unauthorised interference

- a requirement to provide information to the Government to assist its assessment of national security risks to telecommunications infrastructure and
- enforcement mechanisms to ensure compliance.

As noted above, the recommendations not addressed in the Bill are currently the subject of a further Parliamentary inquiry. On 12 December 2013, the Senate referred the following matter to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report:

Comprehensive revision of the *Telecommunications (Interception and Access) Act 1979* (the Act), with regard to:

- a. the recommendations of the Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* report, dated May 2008, particularly recommendation 71.2; and
- b. recommendations relating to the Act from the Parliamentary Joint Committee on Intelligence and Security *Inquiry into the potential reforms of Australia's National Security Legislation* report, dated May 2013.³⁶

The Committee is due to report by 27 August 2014.

Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995

Report: tabled in September 2007.

Government response: a response was provided in 2008 that supported five recommendations in full and one in part, and noted one recommendation.³⁷

The [Criminal Code Amendment \(Terrorist Organisations\) Act 2004](#), which amended the terrorist organisation listing regime that operates under the *Criminal Code*, required the PJGIS to review the operation, effectiveness and implications of the provisions and report to Parliament and the Minister as soon as possible after March 2007.³⁸

The PJGIS tabled its [report](#) on 27 September 2007.³⁹ It made seven recommendations relating to the implications and community impacts of proscription, the criteria used to determine listings, procedural issues, the application of strict liability to terrorist organisation offences, and the duration and review of listings.

Security Legislation Review Committee

Report: tabled in June 2006.

Government response: no formal government response provided. However, the Government commented on each recommendation in a submission to the 2006 PJGIS inquiry outlined below.⁴⁰

The Security Legislation Review Committee (SLRC), chaired by Simon Sheller QC, was established in October 2005 in accordance with section 4 of the [Security Legislation Amendment \(Terrorism\) Act 2002](#) to review the operation, effectiveness and implications of amendments made by that Act and the following legislation:

- *Suppression of the Financing of Terrorism Act 2002*
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*
- *Border Security Legislation Amendment Act 2002*
- *Telecommunications Interception Legislation Amendment Act 2002* and
- *Criminal Code Amendment (Terrorism) Act 2003*.⁴¹

36. 'Comprehensive revision of the Telecommunications (Interception and Access) Act 1979', op. cit.

37. Australian Government, '[Parliamentary Joint Committee on Intelligence and Security Inquiry into the proscription of "terrorist organisations" under the Australian Criminal Code: Government response to recommendations](#)', Australian Government, December 2008, accessed 30 July 2014.

38. [Criminal Code Amendment \(Terrorist Organisations\) Act 2004](#), Schedule 1, clause 4, accessed 15 July 2014.

39. PJGIS, [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), Parliament of the Commonwealth of Australia, Canberra, September 2007, accessed 15 July 2014

40. Australian Government, [Submission to Parliamentary Joint Committee on Intelligence, Review of security and counter terrorism legislation](#), n.d., p. 10, accessed 17 July 2014.

41. P Ruddock (Attorney-General), [Independent committee to review security legislation](#), media release, 12 October 2005, accessed 15 July 2014; *Security Legislation Amendment (Terrorism) Act 2002*, op. cit.

The SLRC reported to the Attorney-General and the PJCIS in April 2006. The [report](#) (the Sheller Review), which included 20 recommendations along with additional findings, was tabled in June 2006.⁴²

Review of Security and Counter Terrorism Legislation

Report: tabled in December 2006.

Government response: a response was provided in 2008 in which the Government supported 13 of the 26 recommendations and did not support five. The remainder were noted, accepted in part or in principle or were to be given further consideration.⁴³ Implementation of some of the recommendations supported in the response did not require legislative amendment. However, in some instances where legislative amendment was required, it did not actually eventuate.⁴⁴

The PJCIS, which was also statutorily required to review the *Security Legislation Amendment (Terrorism) Act 2002*, *Suppression of the Financing of Terrorism Act 2002*, *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* and the *Border Security Legislation Amendment Act 2002* undertook a separate review following the SLRC review.⁴⁵ The PJCIS was required under subsection 4(9) of the *Security Legislation Amendment (Terrorism) Act 2002* to take account of the SLRC review, but was not limited by its content, recommendations or findings.⁴⁶

The PJCIS tabled its [report](#) in December 2006.⁴⁷ It contained 26 recommendations, some of which mirrored those of the Sheller Review, others of which either contradicted them or covered separate issues.

Review of Division 3 Part III of the ASIO Act—Questioning and Detention Powers

Report: tabled in November 2005.

Government response: a response was provided in March 2006 in which the Government agreed to six recommendations, agreed in part to a further six and disagreed with the remaining seven.⁴⁸ This response was implemented through the *ASIO Legislation Amendment Act 2006*.⁴⁹

Division 3, Part III of the ASIO Act provides for the issue of questioning warrants and questioning and detention warrants in relation to suspected terrorism offences where other means of collecting the relevant intelligence would be ineffective. The warrants are intended as intelligence gathering and preventative tools, not investigative tools. As such, a person is questioned on the basis that they can provide information about a potential terrorism offence rather than on suspicion of having committed an offence, and detained on the basis of preventing the person from damaging evidence or alerting someone involved in a terrorism offence to the fact it is being investigated.

The [Australian Security Intelligence Organisation Legislation Amendment \(Terrorism\) Act 2003](#) (2003 Act), which inserted Division 3, Part III into the ASIO Act, provided that the provisions would sunset after three years. It also required the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJC-AAD, now the PJCIS) to review the operation, effectiveness and implications of the amendments made by the 2003 Act six months before the provisions expired.⁵⁰

42. Security Legislation Review Committee, [Report of the Security Legislation Review Committee](#), Australian Government, June 2006, accessed 15 July 2014.

43. Australian Government, [‘Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter-Terrorism Legislation: Government response to recommendations’](#), Australian Government, December 2008, accessed 16 July 2014.

44. Several such instances are outlined in the Appendix to this Research Paper.

45. [Intelligence Services Act 2001](#), paragraph 29(1)(ba), accessed 15 July 2014.

46. *Security Legislation Amendment (Terrorism) Act 2002*, op. cit.

47. PJCIS, [Review of Security and Counter Terrorism Legislation](#), Parliament of the Commonwealth of Australia, Canberra, December 2006, accessed 15 July 2014.

48. Australian Government, [‘Parliamentary Joint Committee on Intelligence and Security Report on the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979: Government response’](#) (‘ASIO’s questioning and detention powers: Government response’), Australian Government, March 2006, accessed 18 July 2014.

49. [ASIO Legislation Amendment Act 2006](#), accessed 30 July 2014. For information on the originating Bill, which was passed without amendment, see J Norberry, [ASIO Legislation Amendment Bill 2006](#), Bills digest, 114, 2005–06, Parliamentary Library, Canberra, 2006, accessed 30 July 2014.

50. [Australian Security Intelligence Organisation Legislation Amendment \(Terrorism\) Act 2003](#), Schedule 1, clauses 24 and 27D, accessed 16 July 2014.

The PJC-AAD tabled its [report](#) in November 2005.⁵¹ The PJC-AAD concluded that the provisions were useful and to date had been used within the bounds of the law and administered in a professional way. However, it considered the laws could be improved and should continue to be subject to a sunset clause. The report contained 19 recommendations, many of which were aimed at improving the clarity of the provisions, accountability mechanisms and legal representation and access to complaints mechanisms.

Comparison of the INSLM and COAG Review recommendations

The INSLM and the COAG Review Committee had different terms of reference, so each examined legislation that was not considered by the other. Of the matters considered by both, the [main areas of agreement](#) between the recommendations made by the INSLM and the COAG Review are:

- the abolition of preventative detention orders (a majority recommendation of the COAG Review)
- express inclusion of hostage-taking in the definition of ‘terrorist act’ in the *Criminal Code*
- exclusion of acts committed during an armed conflict governed by international law from the definition of ‘terrorist act’ in the *Criminal Code*
- repeal of the offence of financing a terrorist in the *Criminal Code* and
- amending the offence of foreign incursion in the [Crimes \(Foreign Incursions and Recruitment\) Act 1978](#) (Foreign Incursions Act) to remove the need to prove an intention to engage in hostile activity in a particular foreign State.⁵²

Recommendations of the INSLM and the COAG Review that are in [direct conflict](#) are:

- abolition (INSLM) versus retention and amendment (COAG) of the control order regime and
- repeal of two of the exceptions to the offence of associating with terrorist organisations (INSLM) versus repeal of the offence itself (COAG).

The conclusions of the INSLM and the COAG Review on each of these issues are outlined below. A table outlining recommendations made by the INSLM and the COAG Review that accord with or contradict recommendations of earlier reviews, the content of earlier recommendations and information on any relevant government responses is provided in the **Appendix**.

Preventative detention orders

Preventative detention orders (PDOs) were introduced in the Commonwealth jurisdiction by the [Anti-Terrorism Act \(No. 2\) 2005](#).⁵³ The introduction of the Bill for this Act followed on from the London bombings in July 2005 and the subsequent agreement to strengthen counter-terrorism laws reached at the special meeting of COAG in September 2005.

The purpose of the PDO regime in Division 105 of the *Criminal Code* is to allow a person to be taken into custody for a limited time period in order to either prevent an imminent terrorist act from occurring or preserve evidence of, or in relation to, a recent terrorist Act.⁵⁴

A member of the Australian Federal Police (AFP) may apply to a senior member of the AFP for a PDO against a person 16 years of age or older, for an initial period of 24 hours. An order extending the period of detention to 48 hours may only be granted by a judge of a state or territory Supreme Court, a Judge, a former judge who served at least five years as a judge in one or more superior courts, or certain members of the Administrative Appeals Tribunal.⁵⁵

PDOs were the most controversial aspect of the Anti-Terrorism Bill (No. 2) 2005, with key concerns centred around the adequacy of procedural safeguards (or lack thereof), access to the courts and information on which

51. Parliamentary Joint Committee on ASIO, ASIS and DSD, [ASIO's questioning and detention powers: Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979](#), Parliament of the Commonwealth of Australia, Canberra, November 2005, accessed 16 July 2014.

52. [Crimes \(Foreign Incursions and Recruitment\) Act 1978](#) (Foreign Incursions Act), accessed 18 July 2014.

53. *Anti-Terrorism Act (No. 2) 2005*, op. cit., Part 2 of Schedule 4.

54. *Criminal Code*, op. cit., section 105.1.

55. *Ibid.*, section 105.2 and Subdivision B of Division 105.

the PDO is based, conditions of detention and standards of treatment, discretion to prohibit contact with the outside world and restrictions on access to lawyers.⁵⁶

As at 30 June 2013, no Commonwealth PDOs had been made (and the INSLM's 2011–12 states that there had been no instances where seeking a PDO had even been seriously considered).⁵⁷ The South Australian Government's submission to the COAG Review stated that none of the states had made use of their PDO legislation either.⁵⁸

Review recommendations

The INSLM recommended repealing Division 105 of the *Criminal Code* on the basis that:

- as was the case at the time the PDO regime was introduced, it remained the case that no reason had been provided as to why existing powers such as arrest are not sufficient, particularly given the early stage of offending that is captured by the terrorism offences
- discussions with the AFP 'strongly suggested that "in a real, practical, urgent sense" the ability to arrest a person is a more efficient and effective process for dealing with imminent terrorist threats than the complex and time consuming process of a PDO' and
- because a person detained under a PDO cannot be questioned by police or ASIO, even on a voluntary basis, opportunities to gain valuable information and further lines of inquiry are lost.⁵⁹

The COAG Review recommended, by majority, the repeal of Commonwealth and state and territory PDO regimes. The report notes the suggestion of James Renwick SC that the availability and use of PDO laws 'may have saved lives, and protected the public in the London bombing situation; or at least it may have preserved evidence and assisted investigation more effectively'.⁶⁰ It also notes that arrest without reasonable prospects of conviction could expose police to significant criticism. However, the majority of the Review Committee was persuaded 'by a singular and compelling feature revealed' in submissions it received—namely that evidence from Victorian, South Australian and Western Australian police services 'unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime'.⁶¹

The Government's August 2014 announcement of further measures indicates that these recommendations to repeal the preventative detention order regime will be rejected, with the Government instead introducing amendments to remove or extend the sunset provision that currently applies.⁶²

Hostage-taking

The INSLM and the COAG Review Committee both considered that while hostage-taking could be argued to fall within the existing definition of 'terrorist act' in section 100.1 of the *Criminal Code*, its importance was such that it should be expressly included. The INSLM noted that this would accord with international practice, including several conventions on terrorism and the inclusion of hostage-taking for terrorist purposes in a model definition of terrorism prepared by a former United Nations Special Rapporteur.⁶³

56. For further details of the legislation and concerns raised at the time, see: S Harris Rimmer, A Palmer, A Martyn, J Davidson, R Jordan and M Coombs, [Anti-Terrorism Bill \(No. 2\) 2005](#), Bills digest, 64, 2005–06, Parliamentary Library, Canberra, 18 November 2005; S Harris Rimmer and N Brew, [Proposals to further strengthen Australia's counter-terrorism laws 2005](#), E-Brief, Parliamentary Library, Canberra, updated 25 November 2005; Senate Standing Committee on Legal and Constitutional Affairs, [Provisions of the Anti-Terrorism Bill \(No. 2\) 2005](#), The Senate, Canberra, 28 November 2005 (all accessed 21 July 2014).

57. *Declassified annual report*, 2012, op. cit., p. 45; Australian Government, [Control orders and preventative detention orders: annual report 2012–13](#), Commonwealth of Australia, 2013, accessed 16 July 2014. The 2013–14 annual report was not yet available as at the time of publication.

58. South Australian Government and Police, quoted in Council of Australian Governments review of counter-terrorism legislation, op. cit., p. 70.

59. *Declassified annual report*, 2012, op. cit., pp. 45–67 (quote taken from p. 56).

60. Council of Australian Governments review of counter-terrorism legislation, op. cit., p. 69.

61. *Ibid.*, pp. 68–71 (quotes taken from p. 69).

62. New counter-terrorism measures for a safer Australia, op. cit.

63. *Ibid.*, pp. 9–10; *Declassified annual report*, 2012, op. cit., pp. 120–122.

Acts committed in an armed conflict

In its December 2006 report, the PJCIS recommended that 'to remove doubt the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict'.⁶⁴

The Rudd Government's December 2008 response to that report did not support this recommendation, stating:

Acts of terrorism may still occur during armed conflict; therefore the unqualified exclusion of armed conflict will encourage misapplication of the principles of public international law. The express exclusion of conduct regulated by the law of armed conflict from the definition of terrorist act would neither add to nor detract from Australia's international obligations and is unlikely to add clarity to the operation of relevant Criminal Code provisions.⁶⁵

The COAG Review Committee considered that response but was not persuaded by it. It countered that the proper avenue for prosecution of crimes committed in the context of an armed conflict to be the war crimes offences in Division 268 of the *Criminal Code*.⁶⁶ Accordingly, it recommended that 'consideration be given to incorporating in the legislation an amendment to the effect that Part 5.3 of the *Criminal Code* will not apply to acts committed by parties regulated by the law of armed conflict'.⁶⁷

The INSLM considered that Australia should not criminalise under domestic law acts that are lawful under international humanitarian law, and also that acts that are unlawful under international humanitarian law should be excluded from the definition and treated as such, instead of as acts of terrorism. He suggested provisions in Canada's Criminal Code as an 'excellent model' to be used for appropriate amendments.⁶⁸

Offence of financing a terrorist

The offence of financing terrorism was inserted into the *Criminal Code* in 2002.⁶⁹ In 2005, an additional offence of financing a terrorist was enacted.⁷⁰ It is similar to the financing terrorism offence but applies where a person collects funds for, or makes them available to, another person, reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

The COAG Review Committee and the INSLM recommended repealing the offence of financing a terrorist for the same reason, namely that the conduct it is designed to capture is already captured, to the extent that it should be, under the offence of financing terrorism under subsection 103.1.⁷¹

The COAG Review notes that the additional offence of financing a terrorist was inserted to address criticism from the international Financial Action Task Force (FATF) in 2005.⁷² However, the COAG Review Committee and the INSLM both accept the Gilbert + Tobin Centre for Public Law's argument that the FATF was incorrect, that the offence of financing a terrorist is narrower than the financing terrorism offence, and that there is a strong likelihood that the latter offence would capture situations in which funds are made available to an individual terrorist.⁷³

Foreign incursion offence

Under subsection 6(1) of the Foreign Incursions Act, it is an offence for a person to (emphasis added):

- (a) enter a foreign State with intent to engage in a hostile activity in *that* foreign State; or

64. Review of Security and Counter Terrorism Legislation, op. cit., pp. 63–65 (quote taken from p. 65).

65. Australian Government, 'Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations', op. cit.

66. Council of Australian Governments review of counter-terrorism legislation, op. cit., pp. 10–11.

67. Ibid., p. 10.

68. *Declassified annual report*, 2012, op. cit., pp. 122–4 (quote taken from p. 123).

69. *Suppression of the Financing of Terrorism Act 2002*, op. cit., Schedule 1, clause 2 (section 103.1 of the Criminal Code).

70. *Anti-Terrorism Act (No. 2) 2005*, op. cit., Schedule 3 (section 103.2 of the Criminal Code).

71. Annual report, 2013, op. cit., pp. 75–6; Council of Australian Governments review of counter-terrorism legislation, op. cit., pp. 38–40.

72. The FATF considered the offence of financing terrorism to be largely but not entirely compliant with recommendation II of its Special Recommendations on Terrorist Financing because it does not specifically address collection or provision of funds for an individual terrorist: Financial Action Task Force (FATF), *Third mutual evaluation report on anti-money laundering and combating the financing of terrorism: Australia*, FATF and Organisation for Economic Co-operation and Development, Paris, 14 October 2005, pp. 32–33.

73. Ibid.

(b) engage in a hostile activity in a foreign State.⁷⁴

The offence applies if the person was an Australian citizen or resident at the time, or if the person was present in Australia before engaging in the relevant act and their presence in Australia was for a purpose connected with the act.⁷⁵

Section 7 provides that it is an offence to engage in certain preparatory activities with the intention of committing an offence against section 6.⁷⁶

In its submission to the COAG Review, the AFP raised concerns that subsection 6(1) as currently drafted would require the prosecution to prove not just that a person intended to engage in a hostile activity in a foreign State (as defined in subsection 6(3)), but that a person had intended to engage in hostile activity in a particular foreign State. It argued that this may not always be possible in the contemporary environment:

The AFP has observed that an increasing number of Australians are travelling overseas with the intention to engage in hostile activity. In such cases, individuals may have a general desire or intention to fight for a 'cause', but are not concerned with (nor have they turned their mind to) the country in which that fighting might occur. That is, the person travels to State X with the intention of engaging in hostile activity somewhere (but not necessarily State X, or even State Y).⁷⁷

In light of the desirability of Australian authorities being able to intervene before a person departs Australia and the particular application of the difficulty identified by the AFP in gathering evidence of a preparatory offence, the COAG Review Committee was persuaded of the need for 'an amendment to subsection 6(1)(a) to remove the need to prove an intention to engage in hostile activity in a particular foreign State'.⁷⁸

The INSLM noted the COAG Review recommendation and the inadequacy of the current offence when considering the proximity, for example, of Turkey, Lebanon and Iraq to Syria. The INSLM supported the COAG Review's recommendation and noted the need for the inclusion of equivalent amendments to subsection 6(3) to address the issue.⁷⁹

Control orders

Control orders (COs) were introduced by the *Anti-Terrorism Act (No. 2) 2005*.⁸⁰ The purpose of the CO regime in Division 104 of the *Criminal Code* is 'to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act'.⁸¹

A senior AFP member may seek the Attorney-General's written consent to request an interim control order if he or she:

- considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act or
- suspects on reasonable grounds that the person has provided training to, or received training from, a terrorist organisation listed under the [Criminal Code Regulations 2002](#).⁸²

Following consent from the Attorney-General, an application for a control order may be made to an issuing court. An interim control order may be made that imposes one or more of the following obligations, prohibitions and restrictions, as set out in subsection 104.5(3):

- (a) a prohibition or restriction on the person being at specified areas or places;
- (b) a prohibition or restriction on the person leaving Australia;

74. Foreign Incursions Act, op. cit.

75. Ibid., subsection 6(2).

76. Ibid.

77. Australian Federal Police, [Submission to Council of Australian Governments review of counter-terrorism legislation](#), October 2012, accessed 18 July 2014.

78. Council of Australian Governments review of counter-terrorism legislation, op. cit., p. 77.

79. *Annual report*, 2014, op. cit., pp. 13–14 (pp. 18–19 of hard copy report).

80. *Anti-Terrorism Act (No. 2) 2005*, op. cit., Part 1 of Schedule 4.

81. *Criminal Code*, op. cit., section 104.1.

82. Ibid., subsection 104.2(2); [Criminal Code Regulations 2002](#), accessed 21 July 2014.

- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
- (d) a requirement that the person wear a tracking device;
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;
- (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
- (g) a prohibition or restriction on the person possessing or using specified articles or substances;
- (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- (i) a requirement that the person report to specified persons at specified times and places;
- (j) a requirement that the person allow himself or herself to be photographed;
- (k) a requirement that the person allow impressions of his or her fingerprints to be taken;
- (l) a requirement that the person participate in specified counselling or education.⁸³

The interim control order must specify a day on which the person may attend the court so it can confirm or revoke the order, or declare it to be void.⁸⁴ Control orders may be varied and can remain in force for up to 12 months.⁸⁵

Along with PDOs, the CO regime was one of the more controversial aspects of the legislation. Some of the key issues concerned the impact of the procedures for *ex parte* interim COs on the principles of natural justice and procedural fairness, the breadth of the threshold for the issue of COs, the adequacy of procedures to ensure a fair hearing and the inclusion of a criminal offence for breaching a CO.⁸⁶

When the INSLM examined the use of COs, the AFP had considered them in relation to 25 individuals. They had been applied for and issued only in relation to two individuals—Jack Thomas and David Hicks. Both cases are detailed in the INSLM’s 2011–12 report.⁸⁷

INSLM recommendation and rationale

The INSLM recommended repeal of Division 104 on the basis:

- that COs appear to be less effective and present poorer value for money than surveillance and other investigatory techniques
- of the ‘practically complete’ convergence between the ‘kind and cogency of evidence’ required to support an application for a CO and to justify the laying of charges, particularly given the early stage of offending captured by the terrorism offences (additionally, courts have shown that they are prepared to hand down significant sentences to those convicted of preparatory offences)
- that, based on United Kingdom experience, they are not effective as a preventative mechanism
- of arguments against their use in most of the circumstances in which they might be sought, specifically:
 - on the basis of UK experience, using a CO against a person **pre-charge** can have a negative impact on the investigation

83. Criminal Code, *op. cit.*

84. *Ibid.*, paragraph 104.5(1)(e).

85. *Ibid.*, section 104.20 and paragraphs 104.5(1)(f) and 104.16(1)(d).

86. For further details of the legislation and concerns raised at the time, see the references included in footnote 56.

87. Declassified annual report, 2012, *op. cit.*, pp. 12–25. See also Council of Australian Governments review of counter-terrorism legislation, *op. cit.*, pp. 46–48.

- using a CO against a person who is not being prosecuted because there is **insufficient evidence to support a prosecution** presents fundamental difficulties ('There is no proper need for another route to official restraints on a person's liberty where the case against a person may be arguably considered weak') and
- there are philosophical problems with use of a CO against a person against whom there is enough evidence, but where there are **legitimate concerns about the disclosure of sensitive information that preclude prosecution**, given their 'quasi-punitive' effect.⁸⁸

The INSLM did consider, however, that 'Fardon type' provisions enabling restraints on liberty to prevent recidivism after the expiry of a sentence are justifiable in some circumstances.⁸⁹ The INSLM is referring to orders under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which the High Court upheld in 2004 as constitutional in *Fardon v Attorney-General (Qld)*.⁹⁰ The Act allows a court, if satisfied a prisoner released from custody would otherwise be a serious danger to the community, to order that the prisoner be detained in custody indefinitely for control, care or treatment or that the prisoner be released subject to requirements set out in the order.

The INSLM stated:

Proof of terrorist crime plus proven dangerousness would be much less disturbing of the principle of legality than the latter without the former. And susceptibility to this future supplement to sentence could be seen as fitting the deserts of terrorist convicts. Their established guilt of offences with the defining characteristics of terrorism, including its motivations, amounts to a badge of dangerousness to society. Those who can be shown at the end of their (usually rather long) sentences of imprisonment to have resisted CVE [countering violent extremism] attempts or to have failed to show rehabilitation easily fit a Fardon model. That is, they are the very type of convict – not just suspect – against whom restraints after expiry of sentence are justifiable.⁹¹

The INSLM recommended that following repeal of Division 104, consideration be given to replacing control orders with 'Fardon type provisions authorizing COs against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness'.⁹² The INSLM confirmed this position in the 2013–14 annual report and made a further recommendation that a scheme for registration and management of convicted terrorists following their release from prison, modelled on the existing Australian National Child Offender Register, be enacted.⁹³

COAG Review recommendation and rationale

The COAG Review Committee took a different view and recommended that Division 104 be retained, but with additional safeguards and protections included (it made 11 recommendations on what these should be), stating 'the present safeguards are inadequate and ... substantial change should be made to provide greater safeguards against abuse and, in particular, to ensure that a fair hearing is held'.⁹⁴

One factor that seems to have influenced the different recommendation of the COAG Review Committee is the weight it accorded a submission from, and discussions with, the AFP (and possibly other agencies). The report includes the following quote from the AFP submission:

The AFP considers that control orders remain a necessary and proportionate preventative measure and form an important part of the counter-terrorism toolkit. The removal of the control order regime would create a substantial vacuum in counterterrorism options, reducing the tools available to police to respond to the evolving trends of terrorist planning and modes of attack and increase the risk to community safety.⁹⁵

The COAG Review Committee recognised and considered arguments against retention of the CO regime made in submissions it received. It also accepted that aspects of the two COs that have been made were problematic.

88. Ibid., pp. 26–44 (quotes taken from pp. 30, 31 and 33).

89. Ibid., p. 37.

90. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), accessed 17 July 2014; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575. See also <http://www.austlii.edu.au/au/cases/cth/HCA/2004/46.html>, accessed 17 July 2014.

91. *Declassified annual report*, 2012, op. cit., p. 37.

92. Ibid., p. 44.

93. *Annual report*, 2013, op. cit., pp. 67–71.

94. Council of Australian Governments review of counter-terrorism legislation, op. cit., pp. 54–63 (quote taken from p. 54).

95. AFP, quoted in *ibid.*, p. 53.

Among the points made to the COAG Review Committee were that the three circumstances the UK designed its CO regime (on which Australia's is based) to overcome did not (and do not) exist in Australia. However, it considered that those obstacles did not tell the whole story:

The real thrust of the UK control order system was the inability, for whatever reason, to prosecute the person who posed a terrorism risk in the community. That, as we see it, is essentially the same basis that underlines and frames the Australian legislation. That is, there is, other than by way of criminal prosecution, a need to protect the community from attack and prevent the carrying out of a terrorist act on these shores.⁹⁶

Unlike the INSLM, the COAG Review Committee considered COs are appropriate not just for those who have been convicted, but also:

- where a prosecution is not a feasible or possible alternative
 - 'it must be recognised that prosecution, although a clear first choice, cannot always suffice as a single antidote to terrorism risk' and
- 'where a person has been acquitted of a terrorist offence on a purely technical ground, or where the intelligence/evidence pointing to terrorist activity has been rejected otherwise than on the merits'
 - it accepted this category is 'highly contentious' but considered that in an 'exceptional and possibly rare case' it could be justified.⁹⁷

Government response

The Government's August 2014 announcement of further counter-terrorism measures indicates that the control order regime will be retained, but does not make clear whether the changes to the regime recommended by the COAG Review Committee will be taken up.⁹⁸

Offence of associating with terrorist groups

The offence of associating with terrorist organisations was inserted into the *Criminal Code* by the [Anti-terrorism Act \(No. 2\) 2004](#).⁹⁹ Much of the evidence received by the Senate Standing Committee on Legal and Constitutional Affairs (L&C Committee) during its inquiry into the originating Bill related to the proposed offence. In its report, the L&C Committee stated that all who commented on the offence expressed serious concerns and strong opposition, except for the AFP.¹⁰⁰ As outlined in the L&C Committee's [report](#) on the Bill, those concerns related to:

- the breadth of the offence and associated definitions, and potential impacts on the right to freedom of association, implied freedom of political communication and other rights
- the narrowness of the exceptions and
- the interaction with other legislation such as that regulating bail and non-parole periods for terrorism offences.¹⁰¹

The L&C Committee stated:

The evidence does not persuade the Committee of the need for the offence in the first place, given the already wide ambit of terrorism offences under current law in Australia, the breadth of the definition of 'terrorist organisation' contained in the *Criminal Code*, and other existing laws such as the law of conspiracy and accessory liability.¹⁰²

It went on to make six recommendations in relation to the association offence, two of which were addressed through amendments.¹⁰³

96. Council of Australian Governments review of counter-terrorism legislation, op. cit., p. 56.

97. Ibid., p. 55.

98. New counter-terrorism measures for a safer Australia, op. cit.

99. [Anti-terrorism Act \(No. 2\) 2004](#), Schedule 3, accessed 17 July 2014 (section 102.8 of the Criminal Code).

100. Senate Standing Committee on Legal and Constitutional Affairs, [Provisions of the Anti-terrorism Bill \(No. 2\) 2004](#), The Senate, Canberra, August 2004, p. 17, accessed 17 July 2014.

101. Ibid., pp. 17–33.

102. Ibid., p. 33.

Previous recommendations

The Sheller Review recommended the association offence be repealed. The SLRC considered that the offence denies the right to freedom of association and lacks clarity to the extent that the actual scope of the offence could only be determined by a challenge to its constitutionality (due to subsection 102.8(6), which provides that the offence 'does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication').¹⁰⁴

In its submission to the PJCIS's 2006 inquiry, the Government stated the following in relation to the Sheller Review recommendation:

The Government does not support this recommendation. The Government considers that there is no justification for removing the offence nor is there evidence that the offence is being misused to capture legitimate activities.

The Government does, however, consider that the fault elements could be clarified, first by applying strict liability to the question of whether the organisation is a proscribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation.¹⁰⁵

The PJCIS shared the concerns of the Sheller Review, and recommended that the offence be re-examined, taking into account the recommendation of the earlier review.¹⁰⁶

The Government's December 2008 response to the PJCIS report supported its recommendation:

The Government supports recommendation 19. The Government will refer the matter for examination by the new National Security Legislation Monitor once appointed.¹⁰⁷

COAG and INSLM recommendations

The majority of the COAG Review Committee was persuaded by submissions it received (in particular from the Human Rights Law Centre, Gilbert + Tobin Centre for Public Law and the Law Council of Australia) that the offence should be repealed:

136. The majority of the Committee has significant problems with the very existence of the association offence in section 102.8 ... The majority of the Committee is persuaded by the submissions received, however, that section 102.8 contributes little and poses too great a risk to fundamental human rights and freedoms to meet the test of proportionality in legislation and, accordingly, recommends its repeal.

137. Fundamentally, the criminalisation of mere association is a troubling concept. It is perfectly plain that, where mere association transmutes into an action or actions in preparation for a terrorist act (with the need to prove the statutory intentions and purposes inherent in that legislative phrase), prosecution will be an appropriate consideration. But the mere fact of association (as opposed to membership or 'expanded' membership) is too slender a reed to bear the burden of criminal liability.

... there can be little doubt that enforcement agencies (and the Government) see some value in a provision of this kind intended to curtail radicalisation and dilute local support for terrorist organisations. There is no empirical evidence, however, to demonstrate that the presence of the association offence has had either of these effects. At the same time, there is no empirical evidence to show that the mere presence of the offence has offended Muslim sensibilities, at least to any significant extent. Ultimately, however, the majority consider that the section is neither necessary nor effective ...¹⁰⁸

103. *Ibid.*, p. 34; I McDonald, 'In Committee: Anti-terrorism Bill (No. 2) 2004', Senate, *Debates*, 12 August 2004, pp. 26501–2, accessed 17 July 2014 (recommendations four and seven of the Committee's report).

104. Report of the Security Legislation Review Committee, *op. cit.*, pp. 127–133.

105. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, *op. cit.*

106. *Review of security and counter terrorism legislation*, *op. cit.*, pp. 79–81.

107. 'Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations', *op. cit.*

108. Council of Australian Governments review of counter-terrorism legislation, *op. cit.*, p. 37.

The INSLM's report does not examine the broader questions of the need for, or appropriateness of, the association offence. Rather, the report focuses specifically on the appropriateness of the exceptions to it. Essentially, the INSLM argues that the exception concerning close family associations is illogical—that meeting with a family member intending thereby to assist a terrorist organisation to expand or continue to exist could never reasonably be regarded as a matter of family or domestic concern. In relation to the public place of religious worship exception, the INSLM argues that:

- the *International Covenant on Civil and Political Rights* (ICCPR) permits limitations on freedom of religion in cases where they are necessary to protect public safety or the fundamental rights of others and
- the exception inappropriately singles out freedom of religion, as opposed to freedoms of secular thought, which are also protected under the ICCPR.¹⁰⁹

Accordingly, the INSLM recommended repeal of both of these exceptions.¹¹⁰

Conclusion

The National Security Legislation Amendment Bill (No. 1) 2014 introduced in July 2014 represents the beginning of a series of national security and counter-terrorism related reforms, the next stage of which was foreshadowed in August 2014. The Bill implements some of the recommendations of the PJCIS's 2013 review, and the announcement of further measures in August 2014 indicates that direction the Government will be taking on several key recommendations of the INSLM and COAG Review Committee. However, the Government is yet to formally respond to the broad range of reforms proposed by the INSLM and the COAG Review Committee.

The Government has stated it is undertaking a 'comprehensive review' of national security and counter-terrorism laws and that it will respond to recent reviews as part of that process.¹¹¹ There is agreement between those reviews in several key areas, most significantly in relation to the repeal of the preventative detention regime, which the Government has indicated it will not implement. Further, several of the recommendations made by those reviews have been made previously and not taken up by the Government of the day. This fact should be accorded some weight in the Government's consideration of which recommendations should now be taken forward.

109. *Annual report*, 2013, op. cit., p. 83–85.

110. *Ibid.*, p. 85.

111. G Brandis, 'Second reading speech: National Security Legislation Amendment Bill (No. 1) 2014', op. cit.

Appendix: INSLM and COAG Review recommendations: a comparison with other reviews and responses

The following table outlines recommendations made by the INSLM and the COAG Review that accord with or contradict recommendations of earlier reviews, the content of earlier recommendations and information on any relevant government responses.¹¹²

INSLM/COAG RECOMMENDATION	RECOMMENDATIONS OF PREVIOUS REVIEWS
ASIO questioning warrants—Subdivision B, Division 3, Part III of the ASIO Act	
<p>INSLM recommendation IV/1 (2012): The issuing authority as well as the Attorney-General should be required to consider all the prerequisites for the issue of QWs [questioning warrants], rather than the issuing authority taking the consent of the Attorney-General as conclusive of some of them.</p> <p>The last resort requirement for QWs should be repealed and replaced with a prerequisite that QWs can only be sought and issued where the Attorney-General and issuing authority are “satisfied that it is reasonable in all the circumstances, including consideration whether other methods of collecting that intelligence would likely be as effective”.</p>	<p>The first part of the INSLM’s recommendation accords with recommendation 1 of the PJC-AAD’s 2005 report. The PJC-AAD noted that the issuing authority is not required to be satisfied of all the same matters as the Attorney-General, specifically:</p> <ul style="list-style-type: none"> • in the case of questioning and questioning and detention warrants, that other methods of intelligence-gathering would not be effective and • in the case of questioning and detention warrants, the additional grounds required for that type of warrant (as per current paragraph 34F(4)(d)).¹¹³ <p>The PJC-ADD concluded:</p> <p style="padding-left: 40px;">The Committee notes that, in the criminal law context, an officer is not necessarily required to demonstrate that information can be obtained another way. However, there is a persuasive argument that, in the context of extraordinary and coercive powers that are to be used as a measure of last resort, the issuing authority should be independently satisfied that other methods of collection would not be effective. This will require ASIO to provide a factual basis to their claim that other methods of intelligence gathering would not be effective. It will also act as a strong safeguard against potential misuse of coercive questioning powers, for example, to lay the groundwork for charge of false and misleading information, where the information is already known to the agency.¹¹⁴</p> <p>Accordingly, it recommended:</p> <p style="padding-left: 40px;">... that the issuing authority be required to be satisfied that other methods of intelligence gathering would not be effective.¹¹⁵</p> <p>In its 2006 response, the Government rejected this recommendation partly on the basis that issuing authorities are not in a position to make such an assessment: ‘Unlike the Attorney-General, they would not be briefed on or be fully across the security apparatus to know whether the criterion can be met’.¹¹⁶</p>

112. The recommendations in the left column are quoted as they appear in the relevant reports.

113. ASIO’s questioning and detention powers, op. cit., pp. 34–7.

114. Ibid., p. 37.

115. Ibid.

116. ‘ASIO’s questioning and detention powers: Government response’, op. cit., p. 1.

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	If the second part of the INSLM’s recommendation were to be taken up, this concern that the issuing authority would not be qualified to make such an assessment would be somewhat mitigated.
<p>INSLM recommendation IV/4 (2012): The length of imprisonment for offences of deliberate contravention of safeguards in relation to QWs should be amended to be at parity with the length of imprisonment for offences against secrecy obligations in relation to QWs.</p>	<p>Recommendations IV/4 and IV/5 of 2012 accord with <u>recommendation 15 of the PJC-AAD’s 2005 report</u>, which was as follows:</p> <p style="padding-left: 40px;">The Committee recommends that the penalty for disclosure of operational information be similar to the maximum penalty for an official who contravenes safeguards.¹¹⁷</p> <p>Under section 34ZS of the ASIO Act, the maximum penalty for offences against secrecy obligations relating to warrants and questioning under Division 3 of Part III is imprisonment for five years. Under section 34ZF, the maximum penalty for offences regarding deliberate contravention of safeguards under the same Division is imprisonment for two years.¹¹⁸</p>
<p>INSLM recommendation IV/5 (2012): The length of imprisonment for offences against secrecy obligations in relation to QWs should be reduced to 2 years.</p>	<p>In its 2006 response to the PJC-AAD report, the Government rejected this recommendation, stating it ‘considers that it would not be appropriate to arbitrarily equate the penalties for officials and subjects questioned under a warrant (and other persons who are disclosed information in contravention of non-disclosure obligations)’. As well as decreasing deterrence, the Government expressed concern that reducing the penalty for the secrecy offences would lead to inconsistency with penalties for other offences such as those in current section 34L (concerning failing to appear or provide information and giving false or misleading information).¹¹⁹</p> <p>When considering an appropriate penalty for the secrecy offences, the INSLM compared them to others in the ASIO Act and elsewhere and concluded that a maximum penalty of two years would be consistent.¹²⁰</p>
Special intelligence operations—ASIO Act	
<p>INSLM recommendation VI/9 (2014): Consideration should be given, as a matter of priority to the introduction of a legislative scheme to provide ASIO officers and ASIO human sources with protection from criminal and civil liability for certain</p>	<p>This recommendation accords with <u>recommendation 28 of the PJCIS’s 2013 report</u>, which was for the introduction of an ‘authorised intelligence operations scheme, subject to similar safeguards and accountability arrangements’ as apply to law enforcement agencies under the ‘controlled operations’ scheme in Part IAB of the Crimes Act.¹²¹</p> <p>Controlled operations are covert operations carried out for the purpose of obtaining evidence that may lead to prosecution for a serious offence. Under the scheme, participants in a controlled operation (who may be law enforcement officers or</p>

117. *ASIO’s questioning and detention powers*, op. cit., pp. 83–7 (quote taken from p. 87).

118. *ASIO Act*, op. cit.

119. ‘ASIO’s questioning and detention powers: Government response’, op. cit., pp. 5–6 (quote taken from p. 5).

120. *Declassified annual report, 2012*, op. cit., pp. 80–83,

121. Report of the inquiry into potential reforms of Australia’s national security legislation, op. cit., p. 112.

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<p>conduct in the course of authorized intelligence operations.</p>	<p>other authorised participants such as informants) are protected from criminal liability for engaging in conduct in the course of, and for the purposes of, the controlled operation.</p> <p>Some of the oversight and accountability measures that apply to the scheme include:</p> <ul style="list-style-type: none"> • twice-yearly reports from the heads of law enforcement agencies to the Commonwealth Ombudsman and the Minister (s.15HM) • annual reports from the heads of law enforcement agencies to the Commonwealth Ombudsman and the Minister and the tabling of the report to the Minister in Parliament (s.15HN) • maintenance of a general register of records by each agency allowed to authorise controlled operations (s.15HQ) and • regular inspections by the Ombudsman of records associated with controlled operations (s.15HS) and annual reports on those inspections, which are tabled in Parliament (s.15HO).¹²² <p>There are also a range of safeguards within the scheme, including restrictions on the particular conduct that may be authorised and the duration of operations.</p> <p>Amendments to introduce a ‘special intelligence operation’ scheme are set out in Schedule 3 of the National Security Legislation Amendment Bill (No. 1) 2014 introduced on 16 July 2014.¹²³</p>
<p>ASIO and intelligence agency cooperation—<i>Intelligence Services Act 2001</i> (ISA)</p>	
<p>INSLM Recommendation VI/10 (2014): Consideration should be given, as a matter of priority, to amending the Intelligence Services Act to facilitate intelligence collection and production by ASIS, ASD and DIGO without ministerial authorisation where the intelligence collection and production is at the request of the Director-General of ASIO and is for the purpose of assisting ASIO in the</p>	<p>This recommendation accords with <u>recommendation 39 of the of the PJCIS’s 2013 report</u>, which was broader in that it was not made only in relation to ASIO’s counter-terrorism function:</p> <p style="padding-left: 40px;">The Committee recommends that where ASIO and an <i>Intelligence Services Act 2001</i> agency are engaged in a cooperative intelligence operation a common standard based on the standards prescribed in the <i>Australian Security Intelligence Organisation Act 1979</i> should apply for the authorisation of intrusive activities involving the collection of intelligence on an Australian person.¹²⁴</p> <p>Due to their different functions, different thresholds and procedures apply to ASIS, ASD and AGO on the one hand and ASIO on the other in relation to producing intelligence on Australians. The Government discussion paper prepared for the PJCIS’s</p>

122. Crimes Act, op. cit.

123. National Security Legislation Amendment Bill (No. 1) 2014, op. cit.

124. Report of the inquiry into potential reforms of Australia’s national security legislation, op. cit., p. 136.

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<p>performance of its counter-terrorism function.</p>	<p>inquiry indicated that this has led to situations where ASIS, ASD or AGO is unable to fully cooperate with and assist ASIO in activities it is able to undertake.¹²⁵</p> <p>The discussion paper proposed that special ministerial authorisations could be given where an agency is cooperating with ASIO, without the need to meet the usual ministerial authorisation requirements under section 9 of the ISA.¹²⁶</p> <p>The PJCIS preferred a proposal from the IGIS that where an agency is cooperating with ASIO under section 13A, it is required to obtain an authorisation equivalent to that which ASIO would be required to obtain for the same activity to be conducted in Australia:</p> <p style="padding-left: 40px;">So, for example, under such a scheme if DSD was to intercept the communications of an Australian person outside Australia a ministerial authorisation might be required. If ASIS or ASIO was to use a listening device to collect intelligence on an Australian outside Australia a ministerial authorisation might be required. However, if ASIS or ASIO was to ask an agent what they know about an Australian person who may be allegedly involved in terrorist activity or to task an agent to try to find out if any Australian persons are present at a terrorist training camp, specific ministerial authorisation would not be required.¹²⁷</p> <p>Amendments to address these recommendations are set out in Schedule 5 of the National Security Legislation Amendment Bill (No. 1) 2014 introduced on 16 July 2014.¹²⁸</p>
Definition of terrorist act—Division 100 of the <i>Criminal Code</i>	
<p>INSLM recommendation VI/1 (2012): Motivation [that the action is done or threat made with the intention of advancing a political, religious or ideological cause] should be removed as an element of the defined term “terrorist act” in the Code.</p>	<p>This recommendation is in contrast to recommendations of two earlier reviews. <u>Recommendation 7 of the PJCIS’s December 2006 report</u> was that this element of the definition of terrorist act be retained.¹²⁹ The <u>Sheller Review</u> did not make a formal recommendation, but included as a ‘key finding’ that it did not recommend deletion of this element of the definition.¹³⁰</p> <p>As well as considering submissions, the PJCIS examined international practice. It noted that while Australia’s definition differed from US and French legislation in this respect, it aligned with legislative definitions in other countries, including the UK, Canada, New Zealand and South Africa. It concluded:</p> <p style="padding-left: 40px;">There are arguments for and against the inclusion of the element of ‘political, ideological and religious cause’ but, on balance, we agree with the Sheller Committee that it’s important to retain this distinguishing element. The case for a special terrorism law</p>

125. Equipping Australia against emerging and evolving threats, op. cit., p. 53.

126. Ibid., pp. 53–4.

127. Inspector-General of Intelligence and Security, [Submission to Parliamentary Joint Committee on Intelligence and Security, Inquiry into potential reforms of National Security Legislation](#), 23 August 2012, p. 25, accessed 18 July 2014.

128. National Security Legislation Amendment Bill (No. 1) 2014, op. cit.

129. Review of security and counter terrorism legislation, op. cit., pp. 53–58.

130. Report of the Security Legislation Review Committee, op. cit., pp. 15, 54–57.

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	<p>regime is made out on the basis that terrorism is qualitatively different from other types of serious crime. Terrorist violence is typically directed toward the public to create fear and promote political, religious or ideological goals. We believe that terrorist violence is seen by the public as something distinctive from other serious crime. A serious criminal offence committed for personal reasons, no matter how heinous, does not fall into that category and should be prosecuted under separate offence provisions.¹³¹</p> <p>The INSLM points out that the UK definition on which Australia’s is based was in turn based upon a definition used by the US Federal Bureau of Investigation:</p> <p>The FBI antecedent, via the UK TA 2000, of Australia’s motivation element can be seen as a workable description for operational law enforcement purposes of the kind of crime and criminal in question. It was not devised or used for the purpose of defining elements of a criminal offence requiring to be proved by the prosecution. The contrast between this FBI usage and the US criminal definition noted above is instructive.¹³²</p> <p>The INSLM considered that removal of this element would be more consistent with Australia’s international obligations, both in relation to counter-terrorism and under the ICCPR. He also considered that a ‘sound policy reason for removing the motivation element from Australia’s definition is to avoid glamorizing the accused and his or her “cause”’.¹³³</p>
<p>COAG recommendation 1: <i>Criminal Code</i> - Section 100.1 – Definition of a terrorist act – ‘threat of action’</p> <p>The Committee recommends that ‘threat of action’ be removed from the definition and a separate offence of ‘threatening to commit a terrorist act’ be created.</p>	<p>This recommendation duplicates <u>recommendations 7 and 8 of the Sheller Review</u> and <u>recommendation 10 of the December 2006 PJCIS report</u>.¹³⁴</p> <p>In its submission to the PJCIS’s 2006 inquiry, the Government stated the following in relation to recommendation 7 of the Sheller Review:</p> <p>The Government agrees that the way in which the threat of terrorist action is dealt with in the Criminal Code should be given further consideration.</p> <p>The Government notes that the definition of ‘terrorist act’ is a central concept to the terrorism offences in the Criminal Code, and the provisions relevant to the proscription of terrorist organisations.</p> <p>Any change to the definition of terrorist act will need to take into account the impact that change would have on those provisions</p>

131. Review of Security and Counter Terrorism Legislation, op. cit., p. 57.

132. *Declassified annual report*, 2012, pp. 110–12 (quote taken from p. 111–12).

133. *Ibid.*, pp. 112–20 (quote taken from p. 119).

134. Report of the Security Legislation Review Committee, op. cit., pp. 50–53; Review of security and counter terrorism legislation, op. cit., p. 62.

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	<p>and any relevant powers to inquire into terrorist activity.¹³⁵</p> <p>On recommendation 8, its comment was:</p> <p>The Government agrees that the way in which the threat of terrorist action is dealt with in the Criminal Code should be given further consideration.</p> <p>The Government notes that there is operational experience to support the need for threat offences (either in their current or a modified form), particularly from the point of view of early intervention.</p> <p>The Government also notes that ‘threat’ and ‘hoax’ offences are separate concepts.¹³⁶</p> <p>The Government’s December 2008 response to the PJCIS report supported this recommendation in principle:</p> <p>The Government supports in principle recommendation 10, and will consult the States and Territories on clarifying the application of ‘threat of action’ within the definition of terrorist act.</p> <p>As the Sheller Review and PJCIS review both raised issues in relation to the concept of threat within the definition, a clarification to the definition would assist in making it clear that the threats of action relate to damage which is likely to be caused as a result of the terrorist threat as opposed to damage which is actually caused by a terrorist act.¹³⁷</p>
<p>COAG recommendation 2: <i>Criminal Code</i> - Section 100.1 – Definition of a terrorist act – ‘hoax threat’</p> <p>The Committee recommends that an additional offence be inserted into Part 5.3 of the <i>Criminal Code</i> to provide for a ‘hoax threat’ to commit an act of terrorism.</p>	<p>This recommendation accords with <u>recommendation 20 of the Sheller Review</u> and <u>recommendation 13 of the December 2006 PJCIS report</u>.</p> <p>Recommendation 20</p> <p>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’.¹³⁸</p> <p>Recommendation 13</p>

135. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 5.

136. Ibid., p. 6.

137. ‘Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations’, op. cit.

138. Report of the Security Legislation Review Committee, op. cit., p. 190.

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	<p>The Committee recommends that a separate hoax offence be adopted but that penalties reflect the less serious nature of a hoax as compared to a threat of terrorism.¹³⁹</p> <p>In its submission to the PJCIS's 2006 inquiry, the Government provided the following comment on recommendation 20 of the Sheller Review:</p> <p>While hoax offences are outside the Committee's terms of reference the Government supports this recommendation put forward by the Commonwealth Director of Public Prosecutions.</p> <p>Two recent incidents, involving the use of the postal service to carry a hoax explosive device, and the use of the internet to make a hoax threat to use chemical weapons on public utilities, have demonstrated that existing hoax offences that apply in other contexts may not be as effective for investigating and prosecuting elaborate terrorist hoax offences.</p> <p>The Government considers that hoaxes relating to terrorist activity should be distinguished from other types of hoax incidents because of the potential to cause significant alarm and disruption in the community, and to divert valuable law enforcement, emergency services and related resources in responding to those hoaxes.¹⁴⁰</p> <p>The Government's 2008 response to the PJCIS report supported this recommendation:</p> <p>The Criminal Code currently contains offences for the commission of hoaxes that are made either via the post or a telecommunications network. However, if a terrorist-related hoax is committed without the use of the post or a telecommunications network, it will not be captured by the offence. Given the potential for a terrorist-related hoax to cause significant alarm to the community and to divert valuable law enforcement and emergency services, the creation of a terrorist-related hoax offence is warranted.¹⁴¹</p> <p>The COAG Review agreed with the PJCIS in relation to the penalty stating that it should be 'significantly less than that applicable to a genuine threat'.¹⁴²</p>
<p>COAG recommendation 3: <i>Criminal Code</i> - Section 100.1 – Definition of a terrorist act</p>	<p>This recommendation accords with <u>recommendation 6 of the Sheller Review</u> but is in conflict with <u>recommendation 9 of the December 2006 PJCIS report</u> (both reproduced below).</p>

139. Review of security and counter terrorism legislation, op. cit., p. 67.

140. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 11.

141. 'Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations', op. cit.

142. Council of Australian Governments review of counter-terrorism legislation, op. cit., p. 9.

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<p>– meaning of ‘harm’</p> <p>The Committee recommends that ‘harm’ in subsection 100.1(2) be amended to allow the harm contemplated by the Act to extend to psychological harm, together with any consequential amendment, for example, to subsection 100.1(3)(b)(i).</p>	<p>Recommendation 6</p> <p>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.¹⁴³</p> <p>The Sheller Review report indicates that this recommendation was made on the basis of a suggestion from the Attorney-General’s Department, but provides no detailed reasoning.</p> <p>In its submission to the PJCIS’s 2006 inquiry, the Government supported recommendation 6 of the Sheller Review.¹⁴⁴</p> <p>Recommendation 9</p> <p>The Committee recommends that psychological harm not be included in the definition of a terrorist act. Alternatively, that the Government consult with the States and Territories on this issue and give consideration to the question in light of other amendments to the definition.¹⁴⁵</p> <p>The PJCIS noted that psychological harm was initially included in the definition but that it ‘was removed because psychological harm was considered remote from commonly understood forms of terrorism’.¹⁴⁶ It noted submissions supporting both positions and ultimately concluded:</p> <p style="padding-left: 40px;">While there is general appeal in aligning the notion of harm with the <i>Criminal Code</i>, popular notions of terrorism involve, for example, terrorist bombings intended to kill and cause serious physical harm. The issue is more problematic than seeking a simple internal consistency with the <i>Criminal Code</i>, and in our view, requires more consideration.¹⁴⁷</p> <p>The Government’s December 2008 response to the PJCIS report supported the alternative suggested by the PJCIS:</p> <p style="padding-left: 40px;">The Government supports the alternative option in this recommendation to consult the States and Territories to give consideration to including psychological harm within the definition of terrorist act.</p> <p style="padding-left: 40px;">The general definition of <i>harm</i> in the Criminal Code includes harm to a person’s mental health, whether temporary or permanent.</p>

143. Report of the Security Legislation Review Committee, op. cit., p. 50.

144. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 5.

145. Review of security and counter terrorism legislation, op. cit., p. 62.

146. Ibid., p. 60.

147. Ibid., p. 61.

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	<p>In order to ensure consistency within the Criminal Code, the notion of harm which applies to the definition of ‘terrorist act’ in section 100.1(2)(a) (being serious harm that is physical harm) could be expanded to include psychological harm. Psychological harm can be just as damaging as physical harm. Fear associated with the threat of terrorism or the implications associated with the commission of a terrorist act manifest beyond tangible physical harm.</p> <p>Amendment to the definition would be consistent with the recommendations made by the Sheller Committee and the submissions made to the PJCIS by bodies such as the Law Institute of Victoria and the Gilbert & Tobin Centre of Public Law.¹⁴⁸</p> <p>The COAG Review provided only brief justification for its recommendation:</p> <p>The intention here is to extend the notion of harm to include psychological harm. This is a form of injury now well recognised in the medical field. It has a particular resonance in relation to harm suffered by participants in warfare and victims of mass casualty attacks. It would also extend to the harm suffered by hostages, which we will next address.¹⁴⁹</p>
<p>COAG recommendation 5: <i>Criminal Code - Section 100.1 – Definition of a terrorist act – United Nations and its agencies</i></p> <p>The Committee recommends that subsection 100.1(1)(c)(i) extend to include reference to the United Nations, a body of the United Nations, or a specialised agency of the United Nations.</p>	<p>This recommendation accords with, but is narrower than, <u>recommendation 11 of the December 2006 PJCIS report</u>:</p> <p>The Committee recommends that the definition of terrorism recognise that international organisations may be the target of terrorist violence.¹⁵⁰</p> <p>One of the components making up the definition of terrorism in subsection 100.1(1) is that the relevant action is done or threat made with the intention of:</p> <ul style="list-style-type: none"> (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.¹⁵¹ <p>The PJCIS and the COAG Review Committee considered the definition should also capture actions or threats intended to coerce, influence or intimidate an international organisation or specifically the UN, respectively.</p> <p>The Government’s December 2008 response supported the PJCIS recommendation:</p> <p>The Government supports recommendation 11 to recognise that international organisations, such as the United Nations, may be</p>

148. ‘Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations’, op. cit.

149. Council of Australian Governments review of counter-terrorism legislation, op. cit., p. 9.

150. Review of security and counter terrorism legislation, op. cit., p. 63.

151. Criminal Code, op. cit., paragraph (c) of the definition of ‘terrorist act’ in subsection 100.1(1).

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	the target of terrorist violence. ¹⁵²
Terrorist organisations—Division 102 of the <i>Criminal Code</i>	
<p>COAG recommendation 12: <i>Criminal Code</i> - Section 102.1 – Proscription of terrorist organisations</p> <p>The Committee does not recommend that the present method of proscription of a terrorist organisation be changed.</p>	<p>The Sheller Review made several recommendations in relation to the proscription process that have not since been taken up.</p> <p>Recommendation 3</p> <p>The SLRC recommends that the process of proscription be reformed to meet the requirements of administrative law.</p> <p>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.¹⁵³</p> <p>Recommendation 4</p> <p>The SLRC recommends that either:</p> <p>i. the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General</p> <p>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.</p> <p>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.</p> <p>or</p> <p>ii. the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media</p>

152. 'Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations', op. cit.

153. Report of the Security Legislation Review Committee, op. cit., p. 99.

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	<p>advertisement, service of the application on affected persons and a hearing in open court.¹⁵⁴</p> <p>Recommendation 10</p> <p>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.</p> <p>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.¹⁵⁵</p> <p>In its submission to the PJCIS’s 2006 inquiry, the Government provided the following comment on recommendation 3 of the Sheller Review:</p> <p>The Government does not support this recommendation. The Government considers that the current process of proscription conforms with administrative law and provides for sufficient accountability mechanisms.</p> <p>The Government notes that a decision by the Attorney-General to proscribe an organisation is reviewable under the <i>Administrative Decisions (Judicial Review) Act 1977</i> (the AD(JR) Act). Under the AD(JR) Act this is a review as to whether the decision to specify an organisation was made in accordance with the law. This enables a court, for example, to determine whether the decision that the Attorney-General is satisfied that an organisation is assisting in the doing of a terrorist act, was not made in bad faith or at the direction or behest of another person or is so unreasonable that no reasonable person could have so exercised the power.</p> <p>The Government considers that the providing notice prior to listing could adversely impact operational effectiveness and prejudice national security. The Government is not persuaded that advance notification would provide any greater transparency to the existing process and considers that such notification could lead to confusion with the listing process.</p> <p>Allowing for a right to be heard in opposition would necessarily involve advance notice as a pre-condition.</p> <p>Once an organisation is listed, the legislation does allow for a case to be put to the Attorney-General outlining why the</p>

154. Ibid., pp. 99–100.

155. Ibid., p. 11.

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	<p>organisation should be de-listed.¹⁵⁶</p> <p>On recommendation 4, it stated:</p> <p>The Government does not support this recommendation.</p> <p>The Government considers that the current listing process contains sufficient safeguards, including judicial review and parliamentary oversight (including a power to disallow a regulation proscribing a terrorist organisation), and that it is more appropriate for the proscription power to be vested with the Executive.</p> <p>The Government considers that the process of proscription should continue as an Executive decision based on the advice of relevant Australian Government agencies (including ASIO, DFAT and AGD). The Government considers that opening up that advisory process to a public committee would be inappropriate given the sensitivity of the information. It would also unnecessarily complicate review processes.</p> <p>See comments on recommendation 3 in relation to the provision of advance notification and right to be heard in opposition.¹⁵⁷</p> <p>On recommendation 10 it stated:</p> <p>The Government notes that the SLRC made this recommendation only in the context of the possible adoption of recommendation 3. As noted above, the Government does not support a reform of the proscription process as set out in recommendation 3.</p> <p>The Government considers that the dual definition for a ‘terrorist organisation’ is necessary to capture the activities of persons associated with emerging terrorist organisations.</p> <p>The definition of ‘terrorist organisation’ is central to a range of terrorism offences in the Criminal Code.</p> <p>To date, all of the charges for offences related to terrorist organisations have, or will be, prosecuted on the basis that the organisation was a terrorist organisation within paragraph (a) of the definition. At the time the offences were committed none of the respective organisations were proscribed organisations.</p> <p>If the definition was limited to proscribed terrorist organisations it would have prevented those charges being laid, and would prevent future prosecutions for offences associated with new or emerging terrorist organisations that had not yet been identified</p>

156. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 3.

157. Ibid., p. 4.

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	<p>or proscribed.</p> <p>Operational experience also supports the need for the dual definition, particularly as recent activities (such as Operation Pendennis), and current investigations, dealt or are dealing with terrorist organisations that would fall within paragraph (a) of the definition.</p> <p>Overseas experience has also demonstrated the need to ensure that law enforcement has the capacity for early intervention and proactive disruption of previously unidentified or ‘home-grown’ terrorist groups.¹⁵⁸</p>
<p>COAG recommendation 13: <i>Criminal Code</i> - Subsection 102.1(1A) – Definition of ‘advocates’</p> <p>The Committee recommends that subsection 102.1(1A) be amended to omit (c). This subsection deals with a situation where an organisation directly praises the doing of a terrorist act.</p>	<p>Recommendation 13 of the COAG Review accords with <u>recommendation 9 of the Sheller Review</u>:</p> <p>The SLRC recommends that paragraph (c) of section 102.1(1A) be omitted from the definition of ‘advocates’.</p> <p>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.’</p> <p>If paragraph (c) is not omitted from the definition, the SLRC recommends that ‘risk’ should be amended to read ‘substantial risk’.¹⁵⁹</p> <p>The grounds for proscribing an organisation were expanded by the <i>Anti-Terrorism Act (No. 2) 2005</i>, to provide for proscription if the Minister was satisfied on reasonable grounds that an organisation advocates the doing of a terrorist act (whether or not such an act has occurred or will occur).¹⁶⁰ The COAG and Sheller Review recommendations recommend the repeal of just one of the three grounds upon which an organisation can be taken to advocate the doing of a terrorist act.</p> <p>In its submission to the PJCIS’s 2006 inquiry, the Government provided the following comment on recommendation 9 of the Sheller Review:</p> <p>The Government does not support this recommendation and considers that amendments at this time would be premature as the</p>

158. Ibid., p. 7.

159. Report of the Security Legislation Review Committee, op. cit., p. 73.

160. Anti-Terrorism Act (No. 2) 2005, op. cit., Schedule 1.

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	<p>legislation has only recently been enacted and has yet to be tested by the courts.</p> <p>In addition, the Government has some concerns that elevating the requirement in paragraph (c) to a <i>substantial</i> risk could undermine the operational effectiveness of the provision which is aimed at early intervention and prevention of terrorism.¹⁶¹</p> <p>Advocacy as a basis for being listed as a terrorist organisation was also considered by the PJCIS in its 2006 inquiry. <u>Recommendation 14 of the PJCIS's December 2006 report</u> was as follows:</p> <p>The Committee does not recommend the repeal of 'advocacy' as a basis for listing an organisation as a terrorist organisation but recommends that this issue be subject to further review.</p> <p>The Committee recommends that 'risk' be amended to 'substantial risk'.¹⁶²</p> <p>The PJCIS recognised the concerns raised about the breadth of the paragraph in the context of the Sheller Review and evidence to its own inquiry, but was not convinced of an immediate need for repeal.</p> <p>The Government's December 2008 response to the PJCIS report supported the recommendation concerning 'substantial risk' and the provision was amended by the National Security Legislation Amendment Act 2010.¹⁶³</p>
<p>COAG recommendation 14: <i>Criminal Code</i> - Section 102.1A – Commencement of listing a terrorist organisation</p> <p>The Committee recommends that the Government give consideration to postponing commencement of a listing until after the Parliamentary disallowance period has expired.</p>	<p>Recommendation 14 of the COAG Review accords with <u>recommendation 4 of the 2007 PJCIS report</u>, which also recommended the change be reconsidered:</p> <p>The Committee recommends that the Government give consideration to reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period has expired.</p> <p>The Committee recognises that the Attorney-General should, in exceptional cases, retain the power to begin the commencement of a listing on the date the instrument is lodged with the Federal Register of Legislative Instruments where the Attorney-General certifies that there are circumstances of urgency and the immediate commencement of the listing is required for reasons of national security.¹⁶⁴</p>

161. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 6.

162. Review of security and counter terrorism legislation, op. cit., p. 71.

163. 'Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations', op. cit.; [National Security Legislation Amendment Act 2010](#), accessed 18 July 2014.

164. Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code, op. cit., p. 46.

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	<p>In making its recommendation, the PJCIS noted that all of the listings that had so far been made could have commenced after the disallowance period without any prejudice to national security.¹⁶⁵</p> <p>When the proscription provisions were first enacted, subsection 102.1(4) provided that listings could not commence until after the parliamentary disallowance period has expired.¹⁶⁶ That subsection was repealed by the Criminal Code Amendment (Terrorist Organisations) Act 2002, and regulations made since that time have commenced after registration on the Federal Register of Legislative Instruments.¹⁶⁷</p>
<p>COAG recommendation 15: Criminal Code - Communication of proscription decisions</p> <p>The Committee recommends that the Attorney-General's Department should consider whether it is able to enhance its communication methods to ensure that communities are more effectively notified when an organisation has been proscribed. Such methods should be effectively responsive and personal to the specific information needs of ethnic and religious communities.</p>	<p>This recommendation accords with recommendation 5 of the Sheller Review and the first part of recommendation 1 of the 2007 PJCIS report.¹⁶⁸</p> <p>In its submission to the PJCIS's 2006 inquiry, the Government noted the steps already taken to publicise listings and stated that it was investigating how they could be improved. It also noted it would make information about listings available in the eight most commonly spoken languages in Australia.¹⁶⁹</p>
<p>COAG recommendation 16: Criminal Code - Section 102.5 – Training unconnected with terrorist activities</p> <p>The Committee recommends that section 102.5 be amended to include specific exemptions for providing training to or receiving training from a terrorist</p>	<p>Recommendations 16–18 of the COAG Review accord with recommendation 12 of the Sheller Review and recommendation 16 of the December 2006 PJCIS report:</p> <p style="text-align: center;">Recommendation 12</p> <p>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.</p>

165. Ibid., p. 45.

166. Security Legislation Amendment (Terrorism) Act 2002, op. cit., Schedule 1, clause 3.

167. *Criminal Code Amendment (Terrorist Organisations) Act 2002*, op. cit., Schedule 1, clause 2; [Criminal Code Regulations 2002](#) (principal and amendments), accessed 18 July 2014.

168. Report of the Security Legislation Review Committee, op. cit., p. 100; Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code, op. cit., p. 23.

169. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 5. As at the time of writing, the relevant page of the Government's National Security website currently only provided information in English: Australian Government, '[Listed terrorist organisations](#)', National Security website, accessed 18 July 2014.

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<p>organisation for purposes unconnected with the commission of a terrorist act.</p>	<p>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.</p>
<p>COAG recommendation 17: <i>Criminal Code</i> - Section 102.5 – ‘Participation’ in training</p> <p>The Committee recommends the offence in section 102.5 be amended to include ‘participation’ in training.</p>	<p>The SLRC recommends that the scope of the offence should be extended to cover participation in training.</p> <p>The SLRC recommends that neither the offence nor any element of it should be of strict liability.¹⁷⁰</p> <p>Recommendation 16</p>
<p>COAG recommendation 18: <i>Criminal Code</i> - Section 102.5 – Strict liability in respect of proscribed terrorist organisations</p> <p>The Committee recommends the repeal of subsections 102.5(2) – (4).</p>	<p>The Committee recommends that the training offence be redrafted to define more carefully the type of training targeted by the offence. Alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act.¹⁷¹</p> <p>In its submission to the PJCS’s 2006 inquiry, the Government provided the following comment on recommendation 12 of the Sheller Review:</p> <p>The Government supports part of this recommendation and agrees that the scope of the offence should be extended to cover participation in training.</p> <p>The Government does not support the recommendation that the training be specifically connected with a terrorist act or preparing the organisation or individual to engage in, or assist with, a terrorist act. The offences in 102 relate to terrorist organisations. Those organisations by definition are engaged in terrorist acts. It is appropriate that providing training to, or receiving training from, such organisations is an offence without the training itself having to be connected to a terrorist act.</p> <p>Recent operational experience has highlighted the risk that training with terrorist organisations can equip persons with capabilities for use in Australia.</p> <p>The Government does not support the removal of the application of strict liability from paragraph (2)(b).</p> <p>The Government does, however, consider that the fault elements could be clarified, first by applying strict liability to the question of whether the organisation is a proscribed or listed organisation and secondly by introducing a new offence that the person was</p>

170. *Report of the Security Legislation Review Committee*, op. cit., p. 118. Subsections 102.5(2) to (4) concern the application of strict liability to an element of one of the training offences.

171. *Review of security and counter terrorism legislation*, op. cit., p. 75.

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	<p>reckless as to the nature of the organisation.¹⁷²</p> <p>The Government’s December 2008 response to the PJCIS report supported recommendation 16 in part:</p> <p>The Government supports in part recommendation 16 in relation to clarifying that the offence does not capture legitimate activities (such as those provided by humanitarian aid organisations).</p> <p>The purpose of the terrorist organisation offences is to ensure that terrorist organisations are disbanded. In order to achieve this, it is appropriate that providing training to, or receiving training from, such organisations is an offence without the training itself having to be connected to a terrorist act.¹⁷³</p> <p>The 2007 PJCIS report recommended that strict liability not be applied to any of the terrorist offences in Division 102 of the <i>Criminal Code</i> (recommendation 5).¹⁷⁴</p>
<p>COAG recommendation 19: <i>Criminal Code</i> - Subsection 102.6(3) – Reduction of the burden on the defendant</p> <p>The Committee recommends that the legal burden in the note in subsection 102.6(3) be reduced to an evidential one.</p>	<p>Recommendations 19 and 20 of the COAG Review accord with <u>recommendation 13 of the Sheller Review</u> and <u>recommendation 17 of the December 2006 PJCIS report</u>.</p> <p>Section 102.6 of the <i>Criminal Code</i> provides for offences for getting funds to, from, for or on behalf of a terrorist organisation. Subsection 102.6(3) provides exceptions to the offences if the defendant proves he or she received funds only for the purpose of providing legal representation for a person in proceedings relating to Division 102 of the <i>Criminal Code</i>, or assistance to the organisation with its compliance with Australian law.¹⁷⁵</p>
<p>COAG recommendation 20: <i>Criminal Code</i> - Subsection 102.6(3) – Exception for lawyers’ receipt of funds from a terrorist organisation</p> <p>The Committee recommends subsection 102.6(3)(a) be amended to exempt the receipt of funds from a terrorist</p>	<p>The Sheller Review recommended:</p> <p>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:</p> <p>(a) legal representation in proceedings under Part 5.3, or</p> <p>(b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.¹⁷⁶</p>

172. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 8.

173. ‘Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations’, op. cit.

174. Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code, op. cit., pp. 47–48.

175. *Criminal Code*, op. cit.

176. Report of the Security Legislation Review Committee, op. cit., p. 120.

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<p>organisation for the purpose of legal advice or legal representation in connection with criminal proceedings or proceedings relating to criminal proceedings (including possible criminal proceedings in the future) and in connection with civil proceedings of the following kind:</p> <p>(i) Proceedings relating to whether the organisation in question is a terrorist organisation, including the proscription of an organisation, a review of any proscription, or the de-listing of an organisation; or</p> <p>(ii) A decision made or proposed to be made under Division 3 of Part III of the <i>Australian Security Intelligence Organisation Act 1979 (Cth)</i>, or proceedings relating to such a decision or proposed decision; or</p> <p>(iii) A listing or proposed listing under section 15 of the <i>Charter of the United Nations Act 1945 (Cth)</i> or an application or proposed application to revoke such a listing, or proceedings relating to such a listing or application or proposed listing or application; or</p> <p>(iv) Proceedings conducted by a military commission of the United States of America or any proceedings relating</p>	<p>In its submission to the PJCIS's 2006 inquiry, the Government stated that it did not support any part of the above recommendation.¹⁷⁷ The PJCIS recommended:</p> <p>Recommendation 17</p> <p>The Committee recommends that:</p> <ul style="list-style-type: none"> • it be a defence to the offence of receiving funds from a terrorist organisation that those funds were received solely for the purpose of the provision of representation in legal proceedings; and • that the legal burden be reduced to an evidential burden.¹⁷⁸ <p>The Government took the same position in its December 2008 response to the 2006 PJCIS report as the previous Government had in relation to the Sheller Review recommendation:</p> <p>The Government does not support recommendation 17.</p> <p>The Government does not support recommendation 17(a) as section 102.6(3) already provides that if funds are received for the sole purpose of funding legal representation, then the transaction does not fall within the ambit of the offence with the defendant bearing a legal burden of proof. This subsection effectively operates as a defence and as such recommendation 17(a) is already accommodated within the legislative framework.</p> <p>Further, the Government does not support recommendation 17(b). This legal burden requires the defendant to prove on the balance of probabilities that the funds were received solely for the purposes of legal representation. It is preferable that the defendant be required to prove the issue on the balance of probabilities as opposed to merely pointing to evidence which suggests that a reasonable possibility exists (evidential burden) because the evidence concerned will be readily available to the defendant but not the prosecution.¹⁷⁹</p>

177. Australian Government, Submission to Parliamentary Joint Committee on Intelligence, *Review of security and counter terrorism legislation*, op. cit., p. 9.

178. *Review of security and counter terrorism legislation*, op. cit., p. 77.

179. 'Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations', op. cit.

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<p>to or arising from such a proceeding; or</p> <p>(v) Proceedings for a review of a decision relating to a passport or other travel document or to a failure to issue such a passport or other travel document (including a passport or other travel document that was, or would have been, issued by or on behalf of the government of a foreign country).</p>	
Terrorist financing—Division 103 of the <i>Criminal Code</i>	
<p>COAG recommendation 24: <i>Criminal Code</i> - Section 103.1— Financing terrorism</p> <p>The Committee recommends that this section be repealed and replaced by a graded continuum of offences, capturing both higher and lower culpability situations. The gradation should be:</p> <p>(i) Providing or collecting funds with the intention or knowledge that they be used to facilitate or to allow engagement in a terrorist act. The Committee recommends this offence attract a maximum penalty of life imprisonment.</p> <p>(ii) Providing or collecting funds reckless to their use in</p>	<p>This recommendation expands on the first part of <u>recommendation 21 of the December 2006 PJCIS report</u>:</p> <p>The Committee recommends that:</p> <ul style="list-style-type: none"> • section 103.1 be amended by inserting ‘intentionally’ after ‘the person’ in paragraph (a) and removing the note; • that recklessness be replaced with knowledge in paragraph (b). <p>The Committee recommends that paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.¹⁸⁰</p> <p>The Government’s December 2008 response to the PJCIS report did not support that recommendation, stating that ‘elevating the standard of proof from recklessness to knowledge would be contrary to the standard <i>Criminal Code</i> fault element for a circumstance which is recklessness’.¹⁸¹</p> <p>An alternative approach might be to retain the current offence but reduce the maximum penalty from life imprisonment to imprisonment for 25 years.</p>

180. Review of security and counter terrorism legislation, op. cit., p. 89.

181. ‘Parliamentary Joint Committee on Intelligence and Security Review of security and counter-terrorism legislation: Government response to recommendations’, op. cit.

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<p>facilitating or allowing engagement in a terrorist act. 'Recklessness' for this purpose is defined in section 5.4 of the <i>Criminal Code</i>. The Committee recommends this offence attract a maximum penalty of 25 years.</p>	

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