

# HASTEN SLOWLY: URGENCY, DISCRETION AND REVIEW – A COUNTER-TERRORISM LEGISLATIVE AGENDA AND LEGACY

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*This article examines the practice by the Howard government from 2003 of invoking a paradigm of urgency in the introduction and enactment of multiple examples of counter terrorism legislation, with claims that review and remediation of that legislation best occur after rapid enactment. Speedy legislative passage was frequently accompanied by few amendments, a discounting of parliamentary and other review recommendations and a contrasting unwillingness or neglect to subsequently review and amend enacted legislation to strengthen safeguards and increase accountability. By examining selected major examples of counter-terrorism legislation, a comprehensive understanding of the applications of urgency as a legislative mechanism in counter-terrorism law reform from the Howard years can be obtained. These applications range between the obtaining of immediate political advantage and an ongoing concentration of executive power. Several serious and distinctive features adversely impacting upon representative democracy were also generated by this urgency paradigm in counter-terrorism legislative enactments. The Rudd government has inherited the considerable legacy of this urgency bound legislative agenda. Questions now arise as to whether proper review of that legislation will occur and whether the culture of urgency will persist in a different government's legislative responses to terrorism.*

## I INTRODUCTION

The process of enactment of Australian counter-terrorism law has produced several distinctive legislative characteristics, holding great significance for the structures and practices of representative democracy, and in particular the

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political and governmental institutions being secured and defended against terrorism.

An important emergent practice since 2003 was that of legislating in terrorism matters in haste, accompanying the legislation with claims that adequate review and remediation of the legislation would follow. This practice gained prominence with the appointment of Philip Ruddock as Attorney-General in 2003 and was accelerated when the Howard government obtained control of the Senate in 2005. The claimed need to legislate in haste was used as an overt political device to challenge the legitimacy of alternative views on counter-terrorism issues, to demonstrably assert executive power, and to accumulate that power.

A pattern emerged of rapid legislative passage, relatively few amendments, a discounting of many parliamentary and other review committee recommendations, and, contrary to earlier ministerial assurances, an unwillingness to remedy legislative deficiencies that were identified in reviews contemporary with or subsequent to the passage of the legislation. This assuaging of contrary opinion through the promise of *ex post facto* review - the recommendations of which are subsequently not acted upon - is corrosive of good faith parliamentary practice and the credibility of government in its integration of safeguards and review of counter-terrorism legislation. These developments have potentially adverse long term consequences for the legitimacy and credibility of, and public confidence in, the process of enactment and subsequent operation of counter-terrorism legislation. They signify a precedence of executive authority over the contributions of parliamentary and other review in the area of counter-terrorism legislation.

That precedence of executive authority may be asserted as legitimate by its proponents on two grounds. The first is that it is the prerogative of the executive to bring to the Parliament bills in the format that it desires, rather than the bills reflecting the preferences of some expert committee. The second ground, which such proponents might assert, is that urgency is less important when it involves the amendment of existing legislation which is claimed to adversely affect civil liberties, but for which no instant example of breach of those civil liberties arises. In other words, there is an instinctive protective priority in initially enacting counter-terrorism legislation, with a far lower priority given to the amendment of that legislation which subsequently institutes further checks and balances.

Such claims are essentially unconvincing. As will become clear in this article, the phenomenon of urgency cultivated by the Howard government in enacting counter-terrorism legislation was decidedly political in orientation, failed to integrate human rights standards, and, as the wealth of recommendations from various review committees demonstrates, produced inferior legislation.

The two grounds for the precedence of executive authority mentioned above are premised on the assumption of a pure institutional authority of the executive derived from a periodically obtained, open ended, electoral mandate. The highly attenuated version of representative democracy underpinning the two claims fails to address the important symbolic function of counter-terrorism legislation in reinforcing democratic institutions and practices, rather than providing an instrumental medium to extract political advantage.

To perceive ameliorative counter-terrorism law amendment as properly falling within a different time frame from the urgency paradigm of original legislative enactment is to discount any government assurances about subsequent review and amendment made at the time of the original legislative enactment. It also dismisses the value of operational experience with novel, far reaching counter-terrorism legislation, where such operational experience vindicates earlier warnings that strengthened safeguards are particularly needed for supervising executive discretion exercised by police and intelligence agencies.

The phenomenon of legislating in haste in terrorism matters produced, under the Howard government, several distinctive features impacting upon representative democracy. In this article, these features are conveniently expounded by a brief analysis of several major examples of the enactment of counter-terrorism legislation. Also considered is the executive response to parliamentary and other reports which reviewed the proposed and enacted legislation and recommended a range of amendments. By looking at the legislative and review processes and the extent of adoption of the committee report in each case, an appraisal can be made not only of the impact of recommendations on producing legislative change, but also of broader democratic consequences. These consequences are important considerations for the Rudd government in shaping its own approach to counter-terrorism legislative enactment.

The areas selected for this discussion are the review by the Security Legislation Review Committee (Sheller Committee) of the 2002 terrorism

legislation;<sup>1</sup> the Parliamentary Joint Committee on Intelligence and Security review of the Security Legislation Review Committee report;<sup>2</sup> the Senate Legal and Constitutional Legislation Committee review of the sedition aspects of the *Anti-Terrorism Act (No 2) 2005* (Cth);<sup>3</sup> the Australian Law Reform Commission review of the sedition provisions of the *Anti-Terrorism Act (No 2) 2005* (Cth);<sup>4</sup> and the Senate Legal and Constitutional Affairs Committee report on the Telecommunications Interception Amendment Bill 2006.<sup>5</sup>

Through examination of these significant areas of counter-terrorism law reform a broader understanding can be achieved of the deployment of urgency as a legislative mechanism in a counter-terrorism legislative agenda, thereby expanding upon existing commentary<sup>6</sup> and study.<sup>7</sup> Such

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<sup>1</sup> Commonwealth, Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) (hereafter *Sheller Committee Report*).

<sup>2</sup> Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Review of Security and Counter Terrorism Legislation* (2006).

<sup>3</sup> Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005).

<sup>4</sup> Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006).

<sup>5</sup> Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Provisions of the Telecommunications (Interception) Amendment Bill 2006* (2006).

<sup>6</sup> For a synopsis of a 'key feature' of Howard Government counter-terrorism law across four phases, see 'The rush to legislate' in Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81, 91.

<sup>7</sup> For a study of a particular application of Attorney-General Ruddock's urgency claim to a single piece of legislation, namely the *Anti-Terrorism Act [No 1] 2005* (Cth), see Andrew Lynch, 'Legislating with Urgency – The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747. Lynch examines in detail the implications of the use of urgency in the context of the *Anti-Terrorism Act [No 1] 2005* (Cth), which involved a change from the use of the definite article 'the' to the indefinite article 'a' in relation to 'terrorist act'. This change produced a broader application of the legislation to more indefinite circumstances, therefore allowing earlier police intervention in the activities of suspects. As observed 'The amendments will clarify that it is not necessary for the prosecution to identify a specific terrorist act. It will be sufficient for the prosecution to prove that the particular conduct was related to 'a' terrorist act': John Howard, 'Anti-Terrorism Bill' (Press Release 2 November 2005). In that example, there was pressure on the Government to make the described legislative change because of the unidentified nature of the terrorist target(s) revealed in November 2005 as part of the joint police and intelligence Operation Pendennis in Sydney and Melbourne. Other critical academic commentary on the urgency claim is to be found in Martin Krygier, 'War on Terror' in Robert Manne (ed), *Dear Mr Rudd: Ideas For A Better Australia* (2008), 137; Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17, 76; and Greg Carne, 'Brigitte and the French Connection: Security *Carte Blanche* or *A La Carte*?' (2004) 9 *Deakin Law Review* 573, 599.

understanding will confirm the paradigm of urgency as a central operating principle in the Howard government's political methodology in a significant and sustained counter-terrorism legislative agenda. The Howard government's operating principle of urgency coincidentally existed alongside two other significant operating devices frequently invoked during and after enactment of counter-terrorism legislation. These devices, which were used to defend counter-terrorism legislation against claims of excessive erosion of civil liberties, asserted that Australian legislation, in contrast to the legislation of other common law jurisdictions, is very 'detailed' and that it is 'balanced'.<sup>8</sup>

Questions of an enduring legacy or a transitional adjustment now face the Rudd government from the consequences of that urgency paradigm, in the form of counter-terrorism legislative practices and a vast body of legislation. Will counter-terrorism legislation produced in that paradigm persist, or should it now be systematically amended to implement the recommendations of the various reviews? And has the urgency culture in relation to counter-terrorism legislation become so institutionally entrenched as to persist under a new government?

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See also Andrew Lynch, 'Hasty Law-making Diminishes Public Respect for the Law Itself', *Canberra Times* (Canberra) 3 April 2006; and George Williams, 'New Law Frees Spy Agencies to Snoop on the Innocent', *The Age* (Melbourne) 3 April 2006. Further commentary, identifying in passing the rushed nature of counter-terrorism law reform, will be mentioned later in this article.

<sup>8</sup> These appellations of detail and balance are, of course, entirely subjective and fail to withstand rigorous scrutiny. On the claim that Australian counter-terrorism legislation is very detailed so as to protect civil rights, see Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)' above n 7, 61-71. On the issue of the government claim of balance in counter-terrorism laws, see Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Matthew, *Fresh Perspectives on the 'War On Terror'* (2008), 65; Simon Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76; Simon Bronitt and James Stellios, 'Sedition, Security and Human Rights: "Unbalanced" Law Reform in the "War on Terror"' (2006) 30 *Melbourne University Law Review* 923; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005), 875-6; Jenny Hocking, 'Liberty, Security and The State' in Peter Saunders and James Walter, *Ideas and Influence* (2005) 184-7; Jenny Hocking, 'Protecting Democracy By Preserving Justice: "Even for the Feared and The Hated"' (2004) 27 *University of New South Wales Law Journal* 319, 335-6; Christopher Michaelson, 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 *University of New South Wales Law Journal* 1; Carne, 'Brigitte and the French Connection' above n 7, 613-614; Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43; and Krygier, above n 7, 135-7. Attorney-General Ruddock persisted in using the balancing model: Philip Ruddock, 'Striking a Balance' (2007) *Lawyers Weekly* (August) 16.

Examples examined in this article demonstrate significant legislative deficiencies flowing from the urgency culture within which counter-terrorism legislation was enacted in the later years of the Howard government.

## **II THE SECURITY LEGISLATION REVIEW COMMITTEE REPORT (SHELLER COMMITTEE REPORT): A REVIEW OF SIX 2002 COMMONWEALTH TERRORISM LAW**

### **A *Establishment and Background of the Sheller Committee***

The Security Legislation Review Committee (SLRC) (Sheller Committee) was established pursuant to section 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002*.<sup>9</sup> Section 4(1) of that Act required the Attorney-General to cause a review of the operation, effectiveness and implications of amendments made by six Acts to be carried out.<sup>10</sup> This review was required as soon as practicable after the third anniversary of the commencement of the amendments.<sup>11</sup>

Membership of the Security Legislation Review Committee was established by section 4(4) of the Act, comprising two persons appointed by the Attorney-General (the appointees being the Hon Simon Sheller, a retired NSW Supreme Court judge and Mr John Davies, a former ACT Chief Police Officer), the Inspector General of Intelligence and Security, the Privacy Commissioner, the Human Rights Commissioner, the Commonwealth Ombudsman and two persons appointed by the Attorney-General on the nomination of the Law Council of Australia.<sup>12</sup>

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<sup>9</sup> As amended by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

<sup>10</sup> The *Security Legislation Amendment (Terrorism) Act 2002* (Cth), the *Suppression of the Financing of Terrorism Act 2002* (Cth), the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), the *Border Security Legislation Amendment Act 2002* (Cth), the *Telecommunications Interception Legislation Amendment Act 2002* (Cth) and the *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

<sup>11</sup> *Security Legislation Amendment (Terrorism) Act 2003* (Cth) s 4 (2). See also Sheller Committee Report, above n 1, 19. The 2002 legislation was subsequently amended: Sheller Committee Report, above n 1, Annexure A.

<sup>12</sup> *Ibid* 20.

The Security Legislation Review Committee conducted its inquiry over a six month period from 21 October 2005. It received written submissions<sup>13</sup> and background briefings<sup>14</sup> and conducted public hearings.<sup>15</sup> The Committee reported to the Commonwealth Attorney-General on 21 April 2006 and the report was tabled in Parliament on 15 June 2006.

The inquiry and subsequent report are interesting in that the establishment of the inquiry was ultimately the product of parliamentary negotiations at a time when the government did not have control of the Senate.<sup>16</sup> This lack of Senate control enabled the inclusion of this significant review mechanism as a means of ensuring passage of the legislation. The report of the Committee is noteworthy for two prominent characteristics.

## **B      *The Findings of the Sheller Committee***

On the one hand, the report acknowledges the claims of counter-terrorism law reform: the need for additional security legislation,<sup>17</sup> the acknowledgment of its preventative role<sup>18</sup> and the fact that, up to the time of the report, there had not been excessive or improper use of the Act's provisions that fell within the scope of the review.<sup>19</sup> At the same time the Committee stated that there had been very limited practical experience of how the provisions operated.<sup>20</sup>

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<sup>13</sup> A total of 35 submissions were received from professional, community and special interest groups, individuals, state governments, police and security organisations, Directors of Public Prosecutions, federal government bodies and independent statutory bodies: *ibid* 23.

<sup>14</sup> From the Australian Federal Police, Customs, Austrac and the Commonwealth Director of Public Prosecutions: *ibid*.

<sup>15</sup> *Ibid* 23-4. The public hearings were conducted over 8 days in Sydney, Canberra, Melbourne and Perth.

<sup>16</sup> For a discussion of the change in dynamics of Senate review processes following the Howard government obtaining control of the Senate on 1 July 2005, see John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (2005), 255-9. The Howard government control of the Senate brought to an end what Uhr described as 'The Age of Minority', whereby 'rejuvenation of the legislative process ... has come about at the insistence of the minor parties and with the support, often only given grudgingly, by oppositions desperate enough to help unpave the path of government convenience': John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998) 146.

<sup>17</sup> Sheller Committee Report, above n 1, 3.

<sup>18</sup> *Ibid* 3.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

On the other hand, the report raises several critical issues, such as a demonstrated intrusion upon well established human rights,<sup>21</sup> the need for proportionality in achieving the intended object of security,<sup>22</sup> the absence of a sunset clause in the Act and of a Charter of Human Rights through which review could be mandated,<sup>23</sup> and the impact of fear, alienation and distrust of authority in Muslim communities.<sup>24</sup> These differentiated perspectives reflect the larger and commonly stated challenge in this type of legislation: ‘that an appropriate balance must be struck between, on the one hand, the need to protect the community from terrorist activity and, on the other hand, the maintenance of fundamental human rights and freedoms’.<sup>25</sup>

However, in its assessment of that balance, it is significant that the Committee raises four primary areas of concern. These are (1) the executive process of proscribing an organisation as a terrorist organisation,<sup>26</sup> (2) the creation of an offence of associating with terrorist organisations,<sup>27</sup> (3) the creation of an offence of advocating the doing of a terrorist act,<sup>28</sup> and (4) the application of strict liability to elements of a criminal offence.<sup>29</sup>

The Committee made a range of recommendations indicating that there were significant concerns about the appropriateness of the balance actually achieved under the legislation. Aside from the four most prominent areas already mentioned, 16 other recommendations and several key findings were made.

These further recommendations were extensive and detailed.<sup>30</sup> They included recommendations that continuing review of security legislation be made by an independent body within the next three years; that greater efforts be made by Australian governments to explain the security legislation to, and communicate with, the Muslim and Arab communities; that proscription of a terrorist organisation be publicised; that the requirement be deleted that ‘harm’ in the definition of ‘terrorist act’ be physical; that the concept of harm in that definition be extended to include serious harm to a person’s mental health; that references to ‘threats of action’ be removed from the definition of

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 5.

<sup>25</sup> Ibid 3.

<sup>26</sup> Ibid 4.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 5.

<sup>29</sup> Ibid.

<sup>30</sup> A summary of the Sheller Committee recommendations is to be found at *ibid* 8-14.

‘terrorist act’; that a separate offence of ‘threat of action’ or ‘threat to commit a terrorist act’ be included in the legislation; that the section 102.1(1A) offence<sup>31</sup> be omitted or that the risk referred to be amended to read ‘substantial risk’; that consideration be given to deleting paragraph (a) of the definition of ‘terrorist organisation’<sup>32</sup> so that proscription would be the only way by which an organisation would become an unlawful terrorist organisation; that the defendant’s burden of proving that he or she took all reasonable steps to cease to be a member of a terrorist organisation as soon as practicable after that person knew that the organisation was a terrorist organisation be reduced from a legal burden to an evidential burden; that the offence of training a terrorist organisation or receiving training from a terrorist organisation be redrafted to make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act, as well as be extended to cover participation in training; that the defendant should bear at most an evidentiary burden in relation to the offence of getting funds to, from or for a terrorist organisation and that two purposive exemptions from criminal liability - for the provision of legal representation in proceedings and assistance to enable the organisation to comply with a law - should be provided in relation to the receipt by a person of funds from a terrorist organisation; that the offence of providing support to a terrorist organisation be amended so that ‘support’ cannot be construed to include views that appear to be favourable to a proscribed organisation and its stated objective; that the section 102.8 offence of associating with terrorist organisations be repealed; that the word ‘intentionally’ be inserted in the section 103 offence of financing terrorism; that the section 103 offence be re-drafted to make clear that the intended recipient of funds is a terrorist; that the section 80.1(1)(f) offence of conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force be amended to require, as an element of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the Australian Defence Force; that the government give consideration to implementation of the eight recommendations by Customs on border security; and that a hoax offence of making a credible and serious threat to

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<sup>31</sup> Where 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’.

<sup>32</sup> The definition of ‘terrorist organisation’ in paragraph (a) 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.

commit a terrorist act be added to the *Criminal Code*, based on the UN Draft Comprehensive Convention on International Terrorism.

### **C Government Submissions to the Sheller Committee**

Some important observations can be made about government approaches both during the Committee hearings and subsequently, in response to the Sheller Committee Report. The Attorney-General's Department submissions to the Sheller Committee placed an emphasis upon enhancing executive discretion and the simplification of prosecutorial requirements in terrorism offences.

Receiving primary emphasis in the departmental submissions to the Committee is the statement that the terrorism legislation is preventative in nature, marking out objectives different from those of conventional criminal law.<sup>33</sup> The submissions strongly advocated a 'simplifying' of the definition of a 'terrorist act' - the definition forming the basis of various terrorism offences - by removing the requirement that the action must be done or the threat made with the intention of advancing a political, religious or ideological cause.<sup>34</sup> The removal of this requirement is advocated on the basis that prosecutions are made more difficult by it<sup>35</sup> and that other overseas jurisdictions do not require the proof of such an intention.<sup>36</sup> Such 'simplification' would both broaden the scope of what constitutes a terrorism offence (each offence carrying substantial penalties) and provide greater discretion and scope for prosecuting, as terrorism offences, a broader range of behaviour. This executive flexibility in discretion and scope relating to terrorism offences is confirmed by the claim that 'the defences in

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<sup>33</sup> See *Attorney-General's Department National Security Laws – Preliminary Submission*, 1 (hereafter *A-G Preliminary Submission*); *Security Legislation Review Attorney-General's Department Submission* February 2006, 6 (hereafter *A-G February 2006 Submission*); and *Security Legislation Review Attorney-General's Department Submission No 2 Response to Questions Taken on Notice during Hearing on 3 February 2006*, March 2006, 8-10 (hereafter *A-G March 2006 Submission*).

<sup>34</sup> *Criminal Code* (Cth) s 100.1, 'Terrorist act' paragraph (b). The removal of the intention of advancing a political, religious or ideological cause is advocated in *A-G Preliminary Submission*, 2; *A-G February 2006 Submission*, 12 and *A-G March 2006 Submission*, 6: 'In the Department's view, the requirement of proving an intention of advancing a political, religious or ideological cause would add an unwarranted level of complication to terrorism trials'.

<sup>35</sup> *A-G February 2006 Submission*, 12 and *A-G March 2006 Submission*, 5 'Furthermore, the requirement that this intention be proved beyond a reasonable doubt places a heavy burden on the prosecution and has the potential of diverting attention away from the key issues in a terrorism related trial'.

<sup>36</sup> *A-G Preliminary Submission*, 2; *A-G February 2006 submission*, 12 and *A-G March 2006 submission*, 6.

subparagraph 100.1(3) add unnecessary complexity'.<sup>37</sup> These claims are disarming in the casual manner in which the factors differentiating terrorism level offences from other violent offences are discounted, in an apparent attempt to arm the executive with greater discretion and flexibility, eroding protections afforded by more narrowly defined offences.

#### **D      *Attorney-General's Responses to the Sheller Committee Report***

Attorney-General Ruddock's responses to the Sheller Committee Report were notable for their unwillingness to seriously consider and implement recommendations intended to be protective of liberty and to refine safeguards against possible abuse of power. This minimal consideration of the recommendations is an inadequate response to such a high-profile Committee and its considered report.

The then Attorney-General responded to the Sheller Committee report by first highlighting positives for the Howard government. These were that the Committee 'recognised [that] the current level of threat to Australia and Australian interests from terrorist activity justified the continuing need for important counter-terrorism legislation.'<sup>38</sup> It was further stated that 'the report recognised that the current level of threat to Australia and Australian interests from terrorist activity justified the continuing need for our strong counter-terrorism laws'<sup>39</sup> and that 'the report also found that there had been no excessive or improper use of Australia's counter-terrorism laws'.<sup>40</sup>

The response of Attorney-General Ruddock also asserted claims vindicating the Howard government's position. These were that that 'the current listing process (for proscription of terrorist organisations) contains sufficient safeguards, including judicial review and parliamentary oversight, and that it is more appropriate for the proscription power to be vested with the

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<sup>37</sup> Section 100.1(3) creates a range of exempted action which will not constitute a terrorist act: 'Action falls within this subsection if it: (a) is advocacy, protest, dissent or industrial action; and (b) is not intended (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person's death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public.'

<sup>38</sup> Philip Ruddock, 'Tabling of Security Legislation Review Committee Report' (Press Release, 15 June 2006).

<sup>39</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 38 (Philip Ruddock).

<sup>40</sup> *Ibid.*

executive'<sup>41</sup> and that 'we do not believe that there is any justification for removing the association offence'.<sup>42</sup> The response was directed to deflecting criticism within the Sheller Report of the terrorism legislation. It stated in neutral language that 'the Government had formed preliminary views on a number of the Committee's recommendations',<sup>43</sup> that the 'Australian Government remains committed to engaging with the community on security issues',<sup>44</sup> and that the government would comment on the review to the subsequent inquiry by the Parliamentary Joint Committee on Intelligence and Security.<sup>45</sup>

This further inquiry, legislatively mandated, provided the Attorney-General with a breathing space afforded by subsequent Parliamentary Committee review, including a consideration of the recommendations of the Sheller Committee. What is most striking about all of this is the lack of urgency and immediacy with which implementation of the reforms suggested by the Committee was approached, reforms which would have provided additional checks and balances. This is in sharp contrast to the culture of urgency which was evident when additional powers and expanded executive discretions under new counter terrorism laws were sought.

### **III PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY REPORT: RESPONDING TO SECURITY LEGISLATION REVIEW COMMITTEE REPORT ON REVIEW OF TERRORISM LEGISLATION**

As indicated, a major part of Attorney-General Ruddock's response to the Sheller Committee Report deflected the criticism within it and defused the

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<sup>41</sup> Ruddock, above n 38.

<sup>42</sup> Ibid. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 38 (Philip Ruddock) 'The government believes concern expressed by the committee about the offensive association is also unfounded'.

<sup>43</sup> Ruddock, above n 38.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid. See further the letter from the Hon P Ruddock 'Government comments on Recommendations of the Security Legislation Review Committee (the Sheller Review)' 06/7338 to Hon David Jull MP, Chair of the Parliamentary Joint Committee on Intelligence and Security, with 14 attached pages of recommendations and comments. Key Findings and Comments available at <<http://www.aph.gov.au/house/committee/pjccis/securityleg/subs/sub14.pdf>> at 25 August 2008 (Attorney-General's Department Submission to the Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter-Terrorism Legislation) (hereafter *Comments on SLRC recommendations*).

serious analysis of its findings by alluding to the then forthcoming review by the Parliamentary Joint Committee.<sup>46</sup> This response implicitly anticipated a more favourable review by the Parliamentary Joint Committee, which had a government majority membership. The Howard government clearly indicated that it would be commenting on the Sheller Committee report. This additional opportunity afforded to the government was later used to reinforce existing executive conceptions of security and to refute and contain the suggested Sheller Committee reforms.

### **A      *The Attorney-General's Comments to the Parliamentary Joint Committee on the Recommendations of the Sheller Committee Report***

The Attorney-General's Comments on the Recommendations of the Security Legislation Review Committee (Sheller Review)<sup>47</sup> are particularly noteworthy for the number of recommendations from the Sheller Committee which were either not supported or rejected, and for the predictable and formulaic language in which this was done.

The recommendations not supported included: the recommendation that timetabled review of the legislation occur within three years and expanded review of the legislation within ten years by an independent reviewer;<sup>48</sup> that the process of proscription of terrorist organisations be reformed;<sup>49</sup> that paragraph (c) of section 102.1(1A) of the *Criminal Code* (Cth) be omitted from the definition of 'advocates' (the section providing that an organisation advocates the doing of a terrorist act where the organisation 'directly praises

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<sup>46</sup> The Parliamentary Joint Committee on Intelligence and Security was required under the *Intelligence Services Act 2001* (Cth) s 29(1)(ba) to review the operation, effectiveness and implications of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), the *Border Security Legislation Amendment Act 2002* (Cth), the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), and the *Suppression of the Financing of Terrorism Act 2002* (Cth), and to make its report as soon as practicable after the third anniversary of the laws coming into force. Section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) required the Parliamentary Joint Committee to take account of the Sheller Committee Report in conducting its own review. The Security Legislation Review Committee was required, within six months of commencing the review, to give the Attorney-General and the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Parliamentary Joint Committee on Intelligence and Security) a written report of the review which included an assessment of matters in section 4(1) and alternative approaches or mechanisms as appropriate. See *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4 (6). See also Sheller Committee Report, above n 1, 19.

<sup>47</sup> See letter item 06/7338, Ruddock, above n 45.

<sup>48</sup> Point 1 in the *Comments on SLRC recommendations*, above n 45.

<sup>49</sup> *Ibid* Points 3 and 4.

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’),<sup>50</sup> that the burden of proof on a defendant under section 102.3(2) – requiring the defendant to prove that he or she took all reasonable steps to cease to be a member of a terrorist organisation as soon as practicable after the person knew that the organisation was a terrorist organisation – be changed from a legal burden to an evidential burden;<sup>51</sup> that section 102.7 of the *Criminal Code* ‘providing support to a terrorist organisation’ be amended to ensure that ‘support’ cannot be construed to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective;<sup>52</sup> that section 102.8 of the *Criminal Code* ‘associating with terrorist organisations’ be repealed;<sup>53</sup> that consideration be given to re-drafting section 103.2(1)(b) ‘ of the *Criminal Code* to make clear a requirement that the intended recipient of funds is a terrorist’;<sup>54</sup> and that the section 80.1(1)(f) *Criminal Code* offence of ‘conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force’ be amended to include as an element of the offence that the person knows that the other country or organisation is engaged in armed hostilities against the ADF.<sup>55</sup>

In contrast, other recommendations by the Sheller Committee that were supported or not opposed by the government are elaborated upon, qualified or glossed in the *Comments on the Recommendations of the Security Legislation Review Committee* in a way that maximised support for the Howard government approach to enacting counter-terrorism laws. This response is clearly intended to vindicate and reinforce executive claims in counter-terrorism laws. Some illustrative examples will suffice.

In relation to a recommendation supporting greater community education and government explanation of terrorism legislation,<sup>56</sup> the Howard government emphasised the non-discriminatory nature of the laws and the range of meetings and initiatives undertaken. Recommendations which would expand the scope of terrorism offences are readily approved in the Attorney-General’s comments, two examples being the recommendation that psychological harm be included in the definition of ‘terrorist act’ in the

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<sup>50</sup> Ibid Point 9.

<sup>51</sup> Ibid Point 11.

<sup>52</sup> Ibid Point 14.

<sup>53</sup> Ibid Point 15.

<sup>54</sup> Ibid Point 17.

<sup>55</sup> Ibid Point 18.

<sup>56</sup> Ibid Point 2.

*Criminal Code* (Cth)<sup>57</sup> and that a separate offence of ‘threat of action’ or ‘threat to commit a terrorist act’<sup>58</sup> be given further consideration for inclusion in the *Criminal Code* (Cth). In contrast, the Attorney-General responded to the Committee’s recommendation that the definition of ‘terrorist act’ retain the requirement that the ‘action is done or the threat is made with the intention of advancing a political, religious or ideological cause’<sup>59</sup> by simply noting the views of the Committee and indicating that the proposal would be given further consideration.<sup>60</sup>

## **B      *The Parliamentary Joint Committee on Intelligence and Security Response to the Sheller Committee Report***

If the Howard government’s strategy to defuse criticism of its counter-terrorism legislation made by the Sheller Committee was to buy time, with the expectation of a more favourable subsequent report, then it failed to achieve that objective. The Parliamentary Joint Committee on Intelligence and Security, in its *Review of Security and Counter-Terrorism Legislation*,<sup>61</sup> endorsed ‘most of the recommendations of the Sheller Committee Report, tabled in June this year’.<sup>62</sup> In particular, the two government proposals to simplify the definition of terrorism and thereby increase executive discretion and the application of terrorism offences were rejected.<sup>63</sup> Recommendations were also made that the components of various existing terrorism offences be refined and modified.<sup>64</sup> Similarly, the Committee recommended that ‘strict liability provisions applied to serious criminal offences that attract the penalty of imprisonment be reduced to an evidential burden’.<sup>65</sup>

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<sup>57</sup> Ibid Point 7.

<sup>58</sup> Ibid Point 8.

<sup>59</sup> Ibid ‘Key Findings’.

<sup>60</sup> Ibid.

<sup>61</sup> Parliamentary Joint Committee on Intelligence and Security, above n 2.

<sup>62</sup> House of Representatives Alert Service, ‘Intelligence Committee reports on Australia’s terrorism laws’ 4 December 2006.

<sup>63</sup> Parliamentary Joint Committee on Intelligence and Security, above n 2, Recommendation 7: ‘The Committee recommends that the requirement that the person intends to advance a political, religious or ideological cause be retained as part of the definition of terrorism’; Recommendation 8: ‘The Committee recommends that the current exemption for advocacy, protest, dissent and industrial action be retained as part of the definition of terrorism’.

<sup>64</sup> Ibid Recommendation 15 (membership/participation in a terrorist organisation); Recommendation 16 (provision of or receipt of training from a terrorist organisation); Recommendation 17 (receiving funds from a terrorist organisation); Recommendation 18 (providing support to a terrorist organisation); Recommendation 19 (associating with a terrorist organisation).

<sup>65</sup> Ibid Recommendation 20.

As well as these recommended reforms which would refine counter-terrorism offences and reduce executive discretion, the Parliamentary Joint Committee Report also recommended a major additional review mechanism. This recommendation was the creation of an Independent Reviewer of terrorism law.<sup>66</sup> The Independent Reviewer would have a capacity to set priorities for ongoing review of terrorism legislation, and an obligation to report annually to Parliament, with the Parliamentary Joint Committee on Intelligence and Security entrusted with the examination of the tabled reports of the Independent Reviewer.<sup>67</sup>

### **C     *The Government Response to the Parliamentary Joint Committee Report***

The Howard government's response to the report of the Parliamentary Joint Committee was muted. Parliamentary debate on the report was adjourned after the report was tabled by the Chair of the Committee on 4 December 2006, with 'resumption of the debate...[to] be made an order of the day for the next sitting'.<sup>68</sup> The Chair of the Committee had only a few minutes to provide an outline of the report, with no further speakers participating.<sup>69</sup> On 16 August 2007, the House resolved that the 'Order of the day will be removed from the Notice Paper unless re-accorded priority on the next sitting Monday after 17 September 2007'.<sup>70</sup> Furthermore, at the time of release of the report in December 2006, the Attorney-General made no apparent reference to it in a media release or other media related communication.<sup>71</sup>

It is also noteworthy that the government did not formally respond to the report within the prescribed period of three months.<sup>72</sup> An interim response was made on 21 June 2007 indicating that 'The government response is being

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<sup>66</sup> Based on the UK independent reviewer: 'In principle, the approach in the UK serves as a useful reference point for the development of an Australian model': *ibid* 21.

<sup>67</sup> *Ibid* Recommendation 2.

<sup>68</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2006, 11 (Deputy Speaker I R Causley).

<sup>69</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2006, 9-11 (Hon David Jull). The report was also presented to the Senate: see Commonwealth, *Parliamentary Debates*, Senate, 4 December 2006, 51 (Senator Ferris).

<sup>70</sup> Commonwealth, *Notice Paper*, House of Representatives, 16 August 2007.

<sup>71</sup> As indicated by the then extant Attorney-General Ruddock's website: Media Centre Information.

<sup>72</sup> See Commonwealth, *Hansard*, Senate, 21 June 2007 (Committees: Reports Responses).

considered and will be tabled in due course'.<sup>73</sup> Further circumstantial evidence suggests that the government position, consistent with earlier views and submissions, was unlikely to be supportive of the Sheller and Parliamentary Joint Committee reforms.<sup>74</sup>

Importantly, these detailed and considered reform recommendations, drawing upon extensive expert advice and submissions, and with the subsequent endorsement by the Parliamentary Joint Committee on Intelligence and Security of most aspects of the initial Sheller Committee findings, received little or no government attention, nor was any confirmation made by the government that the recommendations would be implemented. The inertia and lassitude in relation to these recommendations is striking in contrast to both the culture of urgency cultivated by the Attorney-General in the passage of executive power enhancing terrorism legislation, and in relation to the sheer volume of terrorism legislation passed by the Commonwealth Parliament since 2001.<sup>75</sup> An obvious conclusion is that the considered recommendations of both committees were largely ignored by the then government.

**IV ANTI-TERRORISM ACT (NO 2) 2005: SEDITION ASPECTS  
– THE SENATE LEGAL AND CONSTITUTIONAL  
LEGISLATION  
COMMITTEE REPORT**

**A Background and Context for the Senate Committee  
Inquiry**

The reform of the offence of sedition under Commonwealth law was, along with the introduction of control orders and preventative detention, one of

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<sup>73</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 93 (Speaker of the House); and Commonwealth, *Parliamentary Debates*, Senate, 21 June 2007, 110 (Senator Eric Abetz).

<sup>74</sup> Two examples from the Parliamentary Joint Committee report stand out: see Parliamentary Joint Committee on Intelligence and Security, above n 2, 15, para 2.39: 'The Attorney-General's Department argued that the Senate Legal and Constitutional and Legislation Committee gave extensive consideration to the legislation in 2002. In their view, further refinements are appropriate only if there are demonstrable 'problems' with the legislation'; *ibid* 20, para 2.59: 'AGD suggested that the parliamentary committee system is more inclusive and effective than an individual reviewer'.

<sup>75</sup> See the listing of the numerous pieces of legislation on the Parliamentary Library website: Parliamentary Library, *Terrorism Law* Parliament of Australia Parliamentary Library <<http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron>> at 22 August 2008.

several controversial measures in the *Anti-Terrorism Act (No 2) 2005* (Cth).<sup>76</sup> The consideration of the sedition aspects of the bill provides further insights into the nature of the urgency claim, its executive orientation and the additional reluctance to implement considered and broadly based recommendations from review committees relating to sedition. It again demonstrates, both in process and outcome, the highly political applications of terrorism law reform, with considered committee review recommendations being marginalised. In particular, the time constraints within which the Senate Legal and Constitutional Legislation Committee conducted its inquiry into the Anti-Terrorism Bill (No 2) 2005 (Cth) produced significant consequences for how the legislative and review processes of the sedition offence were carried out. Importantly, the inquiry was to be conducted and the bill passed in the new environment created by the Howard government having unexpectedly obtained control of the Senate from 1 July 2005, following the October 2004 election.<sup>77</sup>

On 3 November 2005, a reporting date of 28 November 2005 for the inquiry into the then bill by the Senate Legal and Constitutional Legislation Committee was determined.<sup>78</sup> The Senate Committee sought submissions on 5 November 2005, allowing 6 days for submission by the closing date of 11 November 2005. The Committee received 294 submissions and a number of supplementary submissions<sup>79</sup> and conducted two and a half days of public hearings.<sup>80</sup> The Committee hearings were noteworthy for the intensity of the work and the number of senators participating.<sup>81</sup> Only a few days were available for the writing of the report, with obvious adverse consequences for

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<sup>76</sup> For discussion of other controversial measures, including control orders and preventative detention, in the *Anti-Terrorism Act (No 2) 2005* (Cth) see Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105 and Carne, 'Prevent, Detain, Control and Order', above n 7.

<sup>77</sup> See the discussion of the consequences of this renewed executive control in Halligan, Miller and Power, above n 16, 255-9.

<sup>78</sup> Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 61-2 (Acting Deputy President Senator Ross Lightfoot).

<sup>79</sup> Senate Legal and Constitutional Legislation Committee, above n 3, 1.

<sup>80</sup> In general terms, important 'issues centre on what types of references are allowed to get up and the extent to which the witnesses are allowed and encouraged to appear before public committee meetings (as opposed to submitting written statements)': Halligan, Miller and Power, above n 16, 257.

<sup>81</sup> See comments by Chair of the Senate Legal and Constitutional Legislation Committee: Commonwealth, *Parliamentary Debates*, Senate, 28 November 2005, 69 (Senator Marise Payne); and Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 6 (Senator Marise Payne).

the quality of writing and the extent of the research base for the report.<sup>82</sup> Several senators were critical of this review process, citing democratic deficit issues relating to it.<sup>83</sup> It was subsequently claimed by the Chair of the Senate Legal and Constitutional Legislation Committee that many of the Committee recommendations were adopted in the bill and legislation,<sup>84</sup> but that claim is readily contestable.

The legislation passed the Senate on 6 December 2005. A commitment was given by Attorney-General Ruddock that, following enactment, the sedition aspects would be referred for review by the Australian Law Reform Commission.<sup>85</sup> The Attorney-General formally referred the provisions for review by the ALRC on 2 March 2006.<sup>86</sup>

The culture of urgency of legislative enactment has a particular twist in relation to the sedition provisions. Whilst some serious recommendations were raised in the Senate Committee Report in relation to review and reform of the bill's sedition provisions,<sup>87</sup> these same identifiably flawed and objectionable provisions were nonetheless enacted. The premises inherent in this approach are simply that the drafting mandated by the Attorney-General's department was in no immediate need of improvement or modification. This meant that, even if it could be shown that it was wise to

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<sup>82</sup> Halligan, Miller and Power observe that following the Howard government Senate majority from 1 July 2005 'The time offered to committees to report on bills has been cut by thirty per cent': Halligan, Miller and Power, above n 16, 256.

<sup>83</sup> Commonwealth, *Parliamentary Debates*, Senate, 28 November 2005, 70 (Senator Trisha Crossin) and 71 (Senator Natasha Stott Despoja); Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 12 (Senator Natasha Stott Despoja), 4-5 (Senator Chris Evans) and 18 (Senator Joe Ludwig).

<sup>84</sup> Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 7 (Senator Marise Payne): 'As I mentioned when tabling the committee report on Monday of last week, the committee made 52 recommendations, and many were in fact procedural recommendations...The committee considered those matters and, as I said, made a number of suggestions and recommendations. The overwhelming majority of those have been taken up'.

<sup>85</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 103 (Hon Philip Ruddock): 'Given considerable interest in the provisions, I would like to assure this House that I will undertake to conduct with my department a review of the sedition offences'; Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 88 (Hon Philip Ruddock): 'I have given an undertaking to my colleagues and to the parliament to have a look next year and to review the sedition provisions to further update, if necessary, the language used to describe them'.

<sup>86</sup> See Philip Ruddock, 'Australian Law Reform Commission to Review Sedition Laws' (Press Release 2 March 2006) with attachment 'Review of Sedition Laws' setting out the terms of reference.

<sup>87</sup> Senate Legal and Constitutional Legislation Committee, above n 3, Recommendations 27-9, and pp 73-131.

amend the bill, it was desirable to enact flawed legislation immediately, and to consider any amendments in the future. The granting of a review of the bill and its timing were at the discretion of the Attorney-General. The course of removing Schedule 7 from the Anti-Terrorism Bill 2005 (Cth), referring the matter to the Australian Law Reform Commission, and subsequently drafting proposed legislation in conformity with ALRC recommendations was rejected.

## **B Government Submissions to the Senate Legal and Constitutional Committee Inquiry**

Illuminating of the concentration of executive power and urgency themes in Attorney-General Ruddock's approach are both the written and oral submissions made by government parties to the Senate Committee inquiry. A good example is the insistence by the Attorney-General's Department that the relevant seditious offences required an intentional (as distinct from reckless) urging of the relevant conduct,<sup>88</sup> as the urging is a conduct element of the offence. This argument was based on the operation of section 5(6) of the *Criminal Code* (Cth).<sup>89</sup> This technically based argument, whilst correct, fails to address the chilling effect within the broader, non legal community of not clearly identifying the limits of permissible speech within the context of a

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<sup>88</sup> Namely, the overthrow by force or violence of (a) the Constitution (b) the Government of the Commonwealth, a State or a Territory; or (c) the lawful authority of the Government of the Commonwealth: s 80.2(1); the interference by force or violence with lawful processes for an election of a member or members of a House of the Parliament: s 80.2(3); for a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or groups (as so distinguished) if (b) the use of force or violence would threaten the peace, order and good government of the Commonwealth: s 80.2(5).

<sup>89</sup> The *Criminal Code* (Cth) s 5(6) states that: (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element; (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element. See also Attorney-General's Department Submission 1 to the Senate Legal and Constitutional Committee Inquiry into provisions of the Anti-Terrorism Bill (No 2) 2005 (Submission 290) (hereafter *Submission 290*), 5: 'Like the incitement offences, the prosecution must prove that the person intended to urge the conduct. As mentioned above, "urging" is intentional because it is a conduct element of the offence'; and Attorney-General's Department Submission 2 to Senate Legal and Constitutional Committee Inquiry into provisions of the Anti-Terrorism Bill (No 2) 2005 (Submission 290A) (hereafter *Submission 290A*), 19: 'Like the incitement offences the prosecution must prove that the person intended to urge the conduct. As mentioned above, "urging" is intentional because it is a conduct element of the offence.'

serious criminal offence.<sup>90</sup> That offence carries the label ‘sedition’, with all of its historical connotations. Indeed, sedition as a criminal offence was argued by the Attorney-General’s Department to be far from an anachronistic offence, and indeed was an offence made particularly relevant by new information technology.<sup>91</sup>

A further unwillingness to seriously entertain major amendments (including an alternative offence) contemporaneous with debate and passage of the bill is confirmed by the deliberate assertion of executive authority to enact the law according to a pre-determined timetable.<sup>92</sup> An assumed broader objective of counter-terrorism law, the protection of liberal-democratic values of freedom of expression, was likewise challenged by the rejection of defences protecting an expanded range of expression. The inclusion of such defences would have promoted the protection of those values.<sup>93</sup> The executive-inspired orientation of the sedition provisions is further corroborated in remarks by the Attorney-General’s department about a lack of public and other consultation – specifically with media and privacy groups – during the development of the sedition provisions of the bill,<sup>94</sup> admitting that consultation was confined to government type bodies.<sup>95</sup>

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<sup>90</sup> The prescribed penalty for each of the sedition offences in Section 80.2 is imprisonment for 7 years.

<sup>91</sup> Submission 290A, above n 89, 2: ‘My starting point is that in recent years sedition has become a more relevant offence. The web and computer technology has made it much easier to disseminate material that urges violence ... Indeed it may be that some of the people who gave testimony to the Committee may not be as in touch as the law enforcement and security and intelligence services are in understanding the penetration of the web amongst young people’.

<sup>92</sup> See comments in Commonwealth, *Senate Legal and Constitutional Legislation Committee Hansard*, Senate, 18 November 2005, 33-34 (Geoff McDonald, Attorney-General’s Department): ‘What you are proposing is to start ... a new, individual offence in this area, and to then try to get the approval of the states of that offence, because we rely on a reference of power whenever we refer to a terrorist act. With sedition, of course, that is within the Commonwealth’s power and we do not need to get their approval for that. So it would be very difficult to meet the Prime Minister’s and the Attorney-General’s timetable to have adequate laws in place before Christmas by starting from scratch with the individual offence... With the sedition offence that we have put together, we got our drafting instructions in early September and we have developed it over that period... Trying to do this individual offence on the run in the next week or so would be very difficult.’

<sup>93</sup> Submission 290A, above n 89, 4: ‘HREOC suggested that there be special defences for educational, artistic and journalistic works... The danger with using special defences is that the terrorists will attempt to use education, the arts and journalism as a shield for their activities.’

<sup>94</sup> Submission 290A, above n 89, Attachment B, 25: ‘... there was no formal public exposure of the Bill. This was due of the considerable time constraints under which the Bill was developed. However, as mentioned every effort that was possible to be taken was taken to consult on the content of the Bill. The Government consulted with the Commonwealth and State agencies during the development of the Bill, including the Privacy area of the Attorney-General’s Department, and the Privacy Commissioner was briefed about the Bill, including the sedition

A common theme in each of these instances was the Howard government's certainty of the correctness of its position and the unwillingness to concede ground through adopting amendments, even those amendments raised in Committee dialogue by its own backbenchers.<sup>96</sup>

### **C     *The Senate Legal and Constitutional Committee Recommendations***

Importantly, the bi-partisan Senate Legal and Constitutional Legislation Committee reached consensus on recommendations relating to the sedition provisions of the bill, its recommendations being contrary to the views of the government. First, the Committee recommended that Schedule 7 be removed from the bill completely.<sup>97</sup> It further recommended 'that the Australian Law Reform Commission conduct a public inquiry into the appropriate legislative vehicle for addressing the issue of incitement to terrorism. This review should examine, amongst other matters, the need for sedition provisions such as those contained in Schedule 7...'.<sup>98</sup> In the event that Schedule 7 was not removed from the bill, the Committee recommended alternative amendments which would have reduced the potential reach of the sedition offences and provided greater clarity.<sup>99</sup>

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provisions. No media or privacy groups were formally consulted regarding the proposed amendments to the sedition provisions'.

<sup>95</sup> Including the Australian Federal Police: See Commonwealth, *Senate Legal and Constitutional Legislation Committee Hansard*, Senate, 17 November 2005, 96 (Federal Agent Colvin, Australian Federal Police): 'The sedition offences are the result of discussions that we have had with the department in terms of vulnerabilities and gaps that we saw in relation to operations that we were conducting around incitement...'

<sup>96</sup> See for example, the comments of Senators Mason and Brandis, Commonwealth, *Senate Legal and Constitutional Committee Hansard*, Senate, 18 November 2005, 22-24.

<sup>97</sup> Senate Legal and Constitutional Legislation Committee, above n 3, 115, Recommendation 27.

<sup>98</sup> Ibid 115, Recommendation 28.

<sup>99</sup> Ibid 115-116, Recommendation 29: 'all offences in proposed section 80.2 should be amended to expressly require intentional urging' and 'proposed section 80.3 (the defence for acts done 'in good faith') in Schedule 7 be amended to remove the words "in good faith" and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*)' and further that 'proposed subsections 80.2(7) and 80.2(8) in Schedule 7 be amended to require a link to force or violence and to remove the phrase "by any means whatever"'. Only the final aspect – 'by any means whatever' – was deleted from the bill.

## **D     *The Attorney General's Moves to Swift Enactment of the Bill***

However, consistent with the views communicated by the Department in written and oral submissions before the Senate Legal and Constitutional Legislation Committee, the Attorney-General confirmed two important points in parliamentary debates on the bill. The first was a commitment to review the sedition offences.<sup>100</sup> Strikingly, this was without a commitment to implement the findings of the review body, if, for example, those prospective findings supported the findings of the Senate Legal and Constitutional Legislation Committee. The second related to the timing of that review, which was to occur after the passage of the existing bill.<sup>101</sup> In particular, this latter aspect was justified on the now familiar bases of the satisfactory nature of the existing drafting<sup>102</sup> and the urgency of the need to have revised sedition measures in place.<sup>103</sup>

Subsequently the bill, including the sedition provisions, was passed with considerable speed. The speed was particularly remarkable as the bill included two other major and controversial measures, namely control orders and preventative detention. The third reading of the bill occurred on 29 November 2005, the House of Representatives then adjourning. Debate on the second reading of the bill in the Senate occurred on 30 November 2005 (for incorporation of the second reading speech in *Hansard*) and debate resumed on 5 December 2005, with one and a half hours of debate initially

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<sup>100</sup> See comments in Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 103 (Hon Philip Ruddock); and Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 88 (Hon Philip Ruddock).

<sup>101</sup> See especially Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 93-94 (Hon Philip Ruddock).

<sup>102</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 88 (Hon Philip Ruddock): '...to review the sedition provisions to further update, if necessary, the language used to describe them. That does not suggest that the measures themselves are inappropriate, and that is why I argue very strongly that they ought to continue in their present form in the bill, which is preferable to the form in which they are in the present law'.

<sup>103</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 93 (Hon Philip Ruddock): 'So I do not think there is a basis upon which you can say, 'we will put this off and come back to it'...No, in my view it is important to have in place now provisions that make it clear it is an offence if a person urges another person to overthrow, by force or violence, our democratic institutions'; and Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 100 (Hon Philip Ruddock): '...the government would be arguing very strongly that this is a measure which is needed now...I think there is some urgency in relation to these measures. I do not think it is a matter that we can leave unaddressed until we come back next year, particularly in the context of the wide range of issues that are involved.'

being made available.<sup>104</sup> On the evening of 5 December 2005, the bill was declared an urgent bill by government motion, allowing only an additional four and a half hours of debate on all of the bill's schedules, including all the remaining second reading and committee stages.<sup>105</sup> The bill passed the Senate on the evening of 6 December 2005<sup>106</sup> and a message was received from the House of Representatives agreeing to the Senate amendments on 8 December 2005.<sup>107</sup> This timeline, reflective of the urgency aspects highlighted in the preceding discussion, may be contrasted with the extended use of Senate time for other purposes, including government filibustering on other bills, on the last 2005 sitting day,<sup>108</sup> to achieve a specific political objective.<sup>109</sup>

## V AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE SEDITION PROVISIONS OF THE *ANTI-TERRORISM ACT* (No 2) 2005

Attorney-General Ruddock's undertaking to have the sedition provisions reviewed after passage of the bill was followed up through his announcement that 'the Australian Law Reform Commission will review Schedule 7 of the *Anti-Terrorism Act (No 2) 2005*',<sup>110</sup> with a reporting date no later than 30 May 2006.<sup>111</sup>

The interval between the announcement and the reporting date is made noteworthy by the fact that a minor political skirmish erupted around Opposition criticism of the new sedition laws, with the Attorney-General

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<sup>104</sup> See Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 1-22.

<sup>105</sup> Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 81, 85-6.

<sup>106</sup> Commonwealth, *Parliamentary Debates*, Senate, 6 December 2005, 116.

<sup>107</sup> Commonwealth, *Parliamentary Debates*, Senate, 8 December 2005, 135.

<sup>108</sup> 9 December 2005.

<sup>109</sup> Such objective being obtaining the casting vote of Senator Fielding on voluntary student unionism, namely the *Higher Education Support Amendment (Abolition of Compulsory Upfront Union Fees) Act 2005* (Cth).

<sup>110</sup> Philip Ruddock, 'Australian Law Reform Commission to Review Sedition Laws' and Attachment 'Review of Sedition Laws', (Press Release 2 March 2006), listing the terms of reference, including consideration of (a) whether the amendments in Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth), including the sedition offence and defences in sections 80.2 and 80.3 of the *Criminal Code Act 1995* (Cth), effectively address the problem of urging the use of force or violence; (b) whether 'sedition' is the appropriate term to identify this conduct (d) any related matter.

<sup>111</sup> For a discussion of the ALRC review of the sedition provisions, see Kate Connors, 'Review of federal sedition laws' (2006) 88 *Reform* 60; Kate Connors, 'Fighting words: The ALRC's Review of Federal Sedition Laws' (2006) 89 *Reform* 73; and Bronitt and Stellios, above n 8.

claiming that such criticism misrepresented the laws.<sup>112</sup> Whether or not that was the case, the matter illustrates the adaptability of the ongoing sedition issue for partisan political ends, as well as a re-assertion of executive authority in matters concerning the correctness of the content and formulation of the new sedition offences.<sup>113</sup>

### **A        *The Australian Law Reform Commission Report on Sedition***

The ALRC Report is noteworthy for its substantial endorsement of the substance of the Senate Committee's recommendations regarding sedition. Its recommendations on this matter are carefully constructed and ordinarily would be unremarkable. The failure to swiftly implement them – to treat them as an urgent legislative item – says much about the utility of deferred review following enactment, and about a Howard government ranking of different forms of review as having different levels of credibility<sup>114</sup> in which government legislative drafting is preferred over the versions endorsed by the review bodies.

The ALRC Report made a number of significant recommendations in relation to sedition.<sup>115</sup> It recommended that the term 'sedition' should be removed from the *Criminal Code* (Cth) and in particular that section 80.2 should have a new heading, 'Urging political or inter-group force or violence'.<sup>116</sup> Two major reasons were advanced for the change in wording – that the bill's amendments meant that the term 'sedition' no longer accurately identified the section 80.2 offences<sup>117</sup> and that use of the word 'sedition' has an unfortunate history relating to the suppression of criticism of established authority.<sup>118</sup>

More particularly, the Report recommended that the section 80.2(1) offence should be changed to refer to urging the overthrow by force or violence of the

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<sup>112</sup> Philip Ruddock, 'Labor's Support of Sedition Laws: Too Little, Too Late' (Press Release 16 May 2006); and Philip Ruddock, 'Labor Continues Dishonest Campaign despite Backflip on Sedition' (Press Release 29 May 2006).

<sup>113</sup> This was particularly evident in the emphasis in the media releases above of the urging of force and violence.

<sup>114</sup> This hierarchy of review credibility is discussed in relation to the other major components of the *Anti-Terrorism Act No 2 (2005)* (Cth), namely control orders and preventative detention, in Carne, 'Prevent, Detain, Control and Order', above n 7, 43-9.

<sup>115</sup> For a summary and overview of the recommended reforms, see Connors, above n 111, 73.

<sup>116</sup> Australian Law Reform Commission, above n 4, 67, Recommendation 2-1.

<sup>117</sup> *Ibid* 66.

<sup>118</sup> *Ibid* 66-7; Connors, above n 111, 74.

Constitution or government.<sup>119</sup> Furthermore, it recommended that the section 80.2(3) offence should be changed to refer to urging interference in parliamentary elections by force or violence.<sup>120</sup> Similarly, it recommended that the section 80.2(5) offence heading should be changed to refer to urging inter-group force or violence.<sup>121</sup>

The ALRC also reached the conclusion that a sedition-type offence was necessary because, by contrast, incitement offences required the identification of a defined offence actually incited to be committed. In other words, ‘the new sedition offences were framed to avoid any need for a connection between urging and a *specific* terrorist act or other crime’.<sup>122</sup> The justification for this lack of specificity ‘relies on their coverage of general exhortations to use force or violence for broadly political or anti-social ends’.<sup>123</sup> Though accepting the justification for this broader offence, the ALRC was of the opinion ‘that there should be a more concrete link between the offences in section 80.2 and the use of force or violence’,<sup>124</sup> particularly given the seriousness of the offences.<sup>125</sup> It was stated therefore that ‘[s]ection 80.2 of the *Criminal Code* (Cth) should be amended to provide that for a person to be guilty of the offences under section 80.2, the person must intend that the urged force or violence will occur’.<sup>126</sup> Related to this recommendation is the ALRC’s acceptance that the analysis by the Attorney-General’s Department of the fault element in the sedition offences in section 80.2(1), (3) and (5) of the *Criminal Code* as requiring intention is correct.<sup>127</sup> However, additional arguments are advanced by the ALRC to bolster the inclusion of the word ‘intentionally’ in section 80.2.<sup>128</sup>

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<sup>119</sup> Australian Law Reform Commission, above n 4, 190 and Recommendation 9-1, 191.

<sup>120</sup> Ibid 193 and 194, Recommendation 9-4.

<sup>121</sup> Ibid 222, Recommendation 10-1.

<sup>122</sup> Ibid 174. ‘A central rationale for the sedition offences is that this particular form of ‘urging’ presents such serious risks to public safety and the body politic that it should be punishable without the need to prove an intention that a specific offence be committed by another’: at 174 (emphasis added).

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid 175.

<sup>126</sup> Ibid 176, Recommendation 8-1.

<sup>127</sup> Ibid 177. This approach is based upon *Criminal Code* (Cth) s 5.6, stating that ‘(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.’

<sup>128</sup> These are the importance of clear community understanding of the law to prevent chilling of expression, and the fact that reliance upon the default provision of s 5.6 of the *Criminal Code* is not exclusive, in that a variety of *Criminal Code* offences include the word ‘intentionally’: Australian Law Reform Commission, above n 4, 180. A later argument is that recommending that ‘the person must intend that the urged force or violence will occur

The existing defence for acts done in good faith under sections 80.1 and 80.2 was also the subject of major recommendations. The ALRC recommended that the good faith defences should not apply to the section 80.2 offence. It was further recommended that, in determining whether a person intends that force or violence will occur for the purpose of the offences under section 80.2(1), (3) and (5), the trier of fact must have regard to the context in which the conduct occurred.<sup>129</sup> In order to reinforce the contextual element relating to proof of intention that the force or violence urged will occur, the report recommended that a note should be included after each of the section 80.2(1), (3) and (5) offences.<sup>130</sup>

## **B      *The Attorney-General's Response to the ALRC Sedition Report***

The release of the ALRC report on sedition was, however, presented by Attorney-General Ruddock as an endorsement by the ALRC of the government's approach,<sup>131</sup> with only a statement that 'the Government would give careful consideration to the Commission's report as part of its ongoing commitment to ensure that there are appropriate Commonwealth offences to deal with such conduct'.<sup>132</sup> This initial muted response was a precursor of subsequent government inaction on the report recommendations.

The ALRC report was actually tabled in the House of Representatives by the Leader of Government Business,<sup>133</sup> and debate immediately adjourned. Subsequent Howard government contribution to debate on the report was

addresses, albeit in an indirect way, concerns about the need for a closer connection between the urging and an increased likelihood of violence eventuating': *ibid* 185.

<sup>129</sup> *Ibid* 260, and Recommendation 12-2, 261. The relevant contexts in which the conduct occurs are: (a) in the development, performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in connection with an industrial dispute or an industrial matter; or (d) in the dissemination of news or current affairs.

<sup>130</sup> *Ibid* 262, and Recommendation 12-3, 262. The note would read 'See section 80.2(7) regarding proof of intention that the urged force or violence will occur': *Ibid* Appendix 2, 284.

<sup>131</sup> See Philip Ruddock, 'ALRC Report on Sedition Laws Tabled' (Press Release 13 September 2006): 'After undertaking widespread public consultation, the Australian Law Reform Commission recognised the need to have these types of offences...The Commission recognised that by modernising the offences, the Government had sensibly shifted the focus away from critical statements to conduct urging others to use force or violence to overthrow the government or to target particular groups within the community'.

<sup>132</sup> *Ibid*.

<sup>133</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2006, 83-84 (Hon Tony Abbott).

extremely limited. Senator Brandis, on 18 October 2006,<sup>134</sup> described the report as ‘a fine piece of work, carrying further and contemporizing the work of the Gibbs review of Commonwealth criminal law...I urge the government to adopt its recommendations and to give effect to them’.<sup>135</sup> This followed debate on the report by several members of the Opposition.<sup>136</sup> The matter was still listed on the House of Representatives’ notice paper nearly a year later.<sup>137</sup>

## VI RECONSIDERING THE CONCEPT AND MEANING OF URGENCY FOLLOWING THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE AND ALRC REVIEWS OF THE SEDITION LEGISLATION

It is particularly significant, given the language and culture of urgency in counter-terrorism legislative matters - with two substantial consecutive reports advocating common reforms to the newly enacted sedition offences, and with the reason for swiftly enacting the sedition provisions justified partly on the basis that there would be subsequent review - that little, if anything, was subsequently acted upon by the Howard government in re-drafting the sedition provisions. That significance is deepened by the fact that this present example repeats the government’s earlier failure to act upon the significant recommendations in the consecutive reports of the Security Legislation Review Committee and the Parliamentary Joint Committee on Intelligence Services, which reviewed other counter-terrorism legislation. Some preliminary observations can therefore be made about the uses and

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<sup>134</sup> See Commonwealth, *Parliamentary Debates*, Senate 18 October 2006, 56 (Senator George Brandis). It was noteworthy that the Attorney-General spoke on some matters relating to terrorism in the House of Representatives on 10 October 2006, but did not engage with the ALRC report on sedition: see Commonwealth, *Parliamentary Debates*, House of Representatives, 10 October 2006, 34 (Hon Philip Ruddock).

<sup>135</sup> Commonwealth, *Parliamentary Debates*, Senate, 18 October 2006, 58 (Senator George Brandis).

<sup>136</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 2006, 140 (Nicola Roxon), 144 (Peter Garrett), 148 (Bob McMullan), 151 (Daryl Melham); Commonwealth, *Parliamentary Debates*, Senate, 12 October 2006, 162 (Senator Carol Brown) and 85 (Senator Dana Wortley) and Commonwealth, *Parliamentary Debates*, Senate, 28 November 2006, 127 (Senator Dana Wortley).

<sup>137</sup> See Commonwealth, *Notice Paper*, House of Representatives, 19 September 2007: regarding resumption of debate from 9 October 2006, the motion accepted ‘That the House take note of the document’. The Opposition pledged on 17 September 2007 to remove the word ‘sedition’ from the offences if elected to government: Lachlan Heywood, ‘Axe pledge on sedition’, *Courier Mail* (Brisbane) 17 September 2007, 14.

applications of urgency in the coalition government's counter-terrorism legislative agenda.

The raising of the issue of urgency in counter-terrorism law reform by the Howard government was contextual and relative. The situations identified show that urgency was an executive-determined and selectively applied concept, used to create momentum and force outcomes implementing an executive-driven legislative agenda. In sharp contrast, urgency was irrelevant in propelling any legislative reform arising from parliamentary or other review of elements of that legislative agenda and went unmentioned in that context. The urgency paradigm only applied to an executive-drafted bill which the executive found satisfactory in its current manifestation, which would not admit of any significant revision prior to enactment. Thus, the urgency paradigm ranked non-executive analysis and the recommended improvement of draft provisions, both before and after enactment, as significantly inferior to improvements or analysis approved by the executive, but failed to do so on any objective criteria. The urgency paradigm was as much a device to enable the executive to be seen to be acting decisively in a legislative sense, as it was a device to exert political pressure upon non-government parties and obtain political advantage.

## **VII THE TELECOMMUNICATIONS INTERCEPTION AMENDMENT BILL 2006 – THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE REPORT**

Distinctive variations of the urgency claim emerged in the enactment of the Telecommunications Interception Amendment Bill 2006 (Cth) and the Howard government's response to the report on the bill by the Senate Legal and Constitutional Legislation Committee Report.

Significantly, the issue of urgency arose where the expansion of executive power relating to counter-terrorism involved the ASIO intelligence-gathering context of persons not suspected of involvement in terrorism and relating to what are known as B party communications (that is, electronic communications of a person known to communicate with the person of interest) and in the context of access to stored communications (such as e-mails and text messages). There were differences of opinion about the level of sensitivity of the information to be accessed, based on a distinction

between stored communications information and real time communications.<sup>138</sup>

The Telecommunications Interception Amendment Bill 2006 (Cth) was introduced to the House of Representatives on 16 February 2006 and passed the House on 1 March 2006. The range of usual assurances given by the Attorney-General in the second reading debate about the necessity and balance of the legislation<sup>139</sup> might be interpreted as a precursor to the government subsequently refusing to significantly amend the legislation in a manner consistent with subsequent Senate Committee recommendations.<sup>140</sup>

### **A The Senate Legal and Constitutional Legislation Committee Recommendations**

The Senate Committee report<sup>141</sup> was tabled on 27 March 2006.<sup>142</sup> It recommended a range of significant changes to the bill's B-party communications interception regime and to the stored communications regime, the two most pressing issues in the bill as far as counter-terrorism intelligence gathering is concerned. A summary of these matters will provide a useful basis for analysis of the urgency aspect and concentration of executive power manifested in subsequent debate about the bill.

The stored communications regime was incorporated into ASIO's telecommunications interception warrant regime.<sup>143</sup> Importantly, the warrant

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<sup>138</sup> Senate Legal and Constitutional Legislation Committee, above n 5, 11.

<sup>139</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 2006, 12-13 (Hon Philip Ruddock). Emphasis was placed on the claim that 'Interception under these new amendments will only be used as an investigative tool of last resort. I think that is the point that needs to be understood. These are additional controls. They are strict controls.'

<sup>140</sup> Whilst claiming that a number of Committee recommendations were adopted, the government's own *Government Response to Senate Legal and Constitutional Legislation Committee Report on the Provisions of the Telecommunications (Interception) Amendment Bill 2006* (Cth) indicates a large number of recommendations as not accepted.

<sup>141</sup> Senate Legal and Constitutional Legislation Committee, above n 5.

<sup>142</sup> See Commonwealth, *Parliamentary Debates*, Senate, 27 March 2006, 80 (Senator Eggleston).

<sup>143</sup> The *Telecommunications (Interception and Access) Act 1979* (Cth) Part 2-2 was amended so that ASIO was given access to stored communications as part of its warranted communications interception regime: see s 9A(1A). 'The reference in paragraph (1)(b) to the interception of communications made to or from a telecommunications service includes a reference to the accessing of the communications as stored communications after they have ceased to pass over a telecommunications system.' See also s 109: Access to stored communications under Part 2-2 warrants: 'In addition to authorizing the interception of communications, a Part 2-2 warrant also authorises a person to access a stored communication if (a) the warrant would have authorized interception of the communication if it were still

authority criteria for access to stored communications are predicated upon security considerations<sup>144</sup> and do not incorporate a further range of criteria for the issuing authority to consider when deciding whether to grant warrant access to stored communications to law enforcement authorities.<sup>145</sup> The only comparable additional criteria in relation to ASIO telecommunications interception warrants apply solely in relation to B-party communications, where the person sending to or receiving from a telecommunications service is not engaged in and cannot reasonably be suspected of being engaged in activities prejudicial to security.<sup>146</sup> No Senate Committee recommendations related directly or specifically to ASIO use of stored communication warrants.<sup>147</sup>

In contrast, the Senate Committee examined the matter of the issue of B-party interception warrants on application from the Director General of ASIO, focusing upon two particular aspects – the issuing authority for the warrants<sup>148</sup> and the threshold criteria for issuing the warrant.<sup>149</sup> In particular,

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passing over a telecommunications system; and (b) the person is approved under section 12 in respect of the warrant.’

<sup>144</sup> See the interrelationship of the security-based criteria in section 9(1)(a) and (b) of the *Telecommunications (Interception and Access) Act 1979* (Cth) with section 9A(1C) of the Act which states ‘the reference in paragraph (1)(b) to the interception of communications made to or from a telecommunications service includes a reference to the accessing of the communications as stored communications after they have ceased to pass over a telecommunications system’.

<sup>145</sup> See *Telecommunications (Interception and Access) Act 1979* (Cth) s 116(2): ‘(a) how much the privacy of any person or persons would be likely to be interfered with by accessing those stored communications under a stored communications warrant; and (b) the gravity of the conduct constituting the serious contravention; and (c) how much the information referred to in paragraph (1)(d) would be likely to assist in connection with the investigation; and (d) to what extent methods of investigating the serious contravention that do not involve the use of a stored communications warrant in relation to the person have been used by or are available to, the agency; and (e) how much the use of such methods would be likely to assist in connection with the investigation by the agency of the serious contravention; and (f) how much the use of such methods would be likely to prejudice the investigation by the agency of the serious contravention, whether because of the delay or for any other reason.’

<sup>146</sup> See *Telecommunications (Interception and Access) Act 1979* (Cth) s 9(3): ‘The Attorney-General must not issue a warrant [in the situation described in the text] ...unless he or she is satisfied that (a) the Organisation has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the other person referred to in subparagraph (1)(a)(ia); or (b) interception of communications made to or from a telecommunications service used or likely to be used by that person would not otherwise be possible’.

<sup>147</sup> Senate Legal and Constitutional Legislation Committee, above n 5, Chapter 3 Stored Communications.

<sup>148</sup> Ibid 33.

<sup>149</sup> Ibid 33-34.

the loose criteria for the B-party warrant, enabling ASIO to obtain intelligence relating to security, was of concern to the Committee, extending as it does to the interception of and access to telecommunications services of persons not involved, nor suspected of involvement, in activities prejudicial to security.

All that is required under the now enacted provisions is that a telecommunications service (which includes *stored* communications) is, or is likely to be, the means by which the non-suspected person receives a communication from or sends a communication to another person who is engaged in, is reasonably suspected of being engaged in, or is likely to engage in, activities prejudicial to security – and that the interception or accessing of such communications will, or is likely to, assist ASIO in its function of obtaining intelligence relating to security.<sup>150</sup> The Senate Committee noted that such powers ‘potentially allow ASIO to engage in the kind of “fishing expeditions” of which the Blunn report warned...[T]he proposal involves access to material generated by innocent persons, and must be circumscribed as far as possible to protect their privacy’.<sup>151</sup>

The Senate Committee report then recommended that, as a precondition to issuing a warrant under section 9(3), there must be evidence that the B-party’s telecommunications service is likely to be used to communicate or receive information relevant to the particular activities prejudicial to security which triggered the warrant.<sup>152</sup> This recommendation was rejected by the government,<sup>153</sup> with the existing drafting defended on the basis of the inclusion of the requirements of section 9(3)<sup>154</sup> and the particular applications of this type of warrant.<sup>155</sup>

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<sup>150</sup> See *Telecommunications (Interception and Access) Act 1979* (Cth) s 9(1)(a)(i), (ia) and (ii).

<sup>151</sup> *Ibid* 34.

<sup>152</sup> *Ibid* 35, Recommendation 18.

<sup>153</sup> *Government Response to Senate Legal and Constitutional Legislation Committee Report on the provisions of the Telecommunications (Interception) Amendment Bill 2006*.

<sup>154</sup> See *Telecommunications (Interception and Access) Act 1979* (Cth) s 9(3): ‘The Attorney-General must not issue a warrant in a case in which subparagraph (1)(a)(ia) applies unless he or she is satisfied that (a) the Organisation has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the other person referred to in subparagraph (1)(a)(ia); or (b) interception of communications made to or from a telecommunications service used or likely to be used by that person would not otherwise be possible’.

<sup>155</sup> Namely, the interception of the B-party’s service in order to identify the unidentified target service of the intelligence target: the Government claimed that ‘It would unnecessarily limit the effective use of this provision to restrict the availability of such warrants to circumstances where the target is using the B-party to communicate or receive information directly relevant to the activities of concern’: *Government Response to Senate Legal and Constitutional*

The Senate Committee also looked at the reporting and accountability requirements of B-party warrants issued on the application of the Director General of ASIO. The Committee noted that ‘there is no existing requirement for telephone intercept warrants issued by the Attorney and associated documents to be destroyed, but monitoring and inspection regimes do apply’.<sup>156</sup> The Committee made a generic recommendation relating to the destruction, supervision of destruction, justification and reporting of B party warrants.<sup>157</sup> The legislation, however, continues to allow the Director General of ASIO great discretion and there is no obligation to destroy records or copies of communications intercepted under B-Party warrants.<sup>158</sup> In responding to the generic recommendation mentioned above, the Howard government favoured retaining such discretion, not considering it necessary to stipulate specific supervision requirements for destruction of material,<sup>159</sup> including the vastly increased store of material obtainable from B-party warrants.

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*Legislation Committee Report on the provisions of the Telecommunications (Interception) Amendment Bill 2006.*

<sup>156</sup> Senate Legal and Constitutional Legislation Committee, above n 5, 43. The Committee cited an extract of the submission by the Inspector General of Intelligence and Security that ‘the nature of B-party interception warrants inherently involves a potential for greater privacy intrusion for persons who may not be involved in activities of legitimate concern under the ASIO Act...As a result, particular attention will be given to the additional legislative tests for this type of warrant, as well as checking that the duration of 90 days is adhered to’: *ibid* 43-4.

<sup>157</sup> *Ibid* 45, Recommendation 24: that ‘there should be strict supervision arrangements introduced to ensure the destruction of non-material content in any form; the number and justification of B-party interception warrants should be separately recorded by the Agency Co-ordinator and reported to the Attorney-General; and the use of such warrants should be reported to the Parliament.’

<sup>158</sup> See *Telecommunications (Interception and Access Act) 1979* (Cth) s 14: ‘Where (a) a record or copy has been made of a communication intercepted by virtue of a Part 2-2 warrant; (b) the record or copy is in the possession or custody, or under the control, of the Organisation; and (c) the Director-General of Security is satisfied that the record or copy is not required, and is not likely to be required, in or in connection with the performance by the Organisation of its functions or the exercise of its powers (including the powers conferred by sections 64 and 65) the Director-General shall cause the record or copy to be destroyed.’

<sup>159</sup> *Government Response to Senate Legal and Constitutional Legislation Committee Report on the provisions of the Telecommunications (Interception) Amendment Bill 2006*, Recommendation 24.

**B     *The Urgency Aspect and Concentration of  
Executive Power Manifested in the  
Telecommunications Interception Amendment  
Bill 2006 – Subsequent Debate in Parliament***

Parliamentary debate subsequent to the release of the Senate Committee report reveals sharply contrasting appraisals of the issues of urgency and concentration of executive power in relation to the Telecommunications Interception Amendment Bill 2006 (Cth), indicating the volatile political usages of the bill. The contrast is between the non-government criticism of the haste of the legislative processes, precluding proper review, on the one hand, and the Howard government claims of urgency and delay, on the other.

Non-government senators repeatedly voiced serious concerns about the truncated Committee review and parliamentary processes surrounding this bill. Distinctive issues emerged: the adverse effect of the haste of the review process on the quality of submissions and the ability of the Senate Committee to respond;<sup>160</sup> the marginalisation of the Senate process by the hearing in one city;<sup>161</sup> the use of the Committee inquiry as a substitute for part of the second reading committee stage;<sup>162</sup> the claimed unwillingness of the Attorney-General to give substantive attention to improving protections under the bill;<sup>163</sup> the failure of even government-senator-supported committee recommendations in the Senate Committee report to be accepted;<sup>164</sup> and the fact that government members of the committee, having supported the recommendations, were forced to vote against the recommendations in the Senate.<sup>165</sup>

The Howard government response was unyielding. The concentration of executive power, which was characteristic of the process of enacting counter-terrorism legislation in Australia, was evident, first, in the ongoing consideration of the Committee's recommendations following passage of the legislation.<sup>166</sup> Such an *ex post facto* approach is implicitly remedial and

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<sup>160</sup> Commonwealth, *Parliamentary Debates*, Senate, 28 March 2006, 116 (Senator Joe Ludwig).

<sup>161</sup> Commonwealth, *Parliamentary Debates*, Senate, 29 March 2006, 34 (Senator Bob Brown).

<sup>162</sup> Commonwealth, *Parliamentary Debates*, Senate, 29 March 2006, 40 (Senator Natasha Stott Despoja).

<sup>163</sup> Commonwealth, *Parliamentary Debates*, Senate, 30 March 2006, 1 (Senator Joe Ludwig).

<sup>164</sup> *Ibid* 11 (Senator Joe Ludwig).

<sup>165</sup> *Ibid* 43 (Senator Natasha Stott Despoja).

<sup>166</sup> Commonwealth, *Parliamentary Debates*, Senate, 28 March 2006, 117 (Senator Chris Ellison): 'The government will continue to consider recommendations made by the Senate Legal and Constitutional Legislation Committee and that consideration will take place over the

discretionary in nature. A further aspect of that executive discretion was shown by the implementation by the Coalition of the Senate Committee's recommendations.<sup>167</sup> There is evidence that many of the substantive recommendations were rejected<sup>168</sup> and that merely minor recommendations were accepted. This was symptomatic of a government tendency in counter-terrorism legislative reform of over-stating the range of liberty-preserving concessions or safeguards incorporated into the legislation.<sup>169</sup> It demonstrates that executive discretion controls not merely whether or not substantive recommendations are taken up, but also how those recommendations are presented as being taken up.

As if to provide a further dimension to the urgency claim, Attorney-General Ruddock complained of what he considered the protracted process of Senate Committee investigation and reporting.<sup>170</sup> This perceived slowness meant that any further amendments considered necessary should, in the Attorney-General's view, be considered later and introduced in a subsequent session of

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coming months. In the event that further amendments are necessary, the government anticipates addressing those issues in the spring sittings this year'. A near identical earlier statement was made by the Senator: see Commonwealth, *Parliamentary Debates*, Senate, 28 March 2006, 93 (Senator Chris Ellison). See also Commonwealth, *Parliamentary Debates*, Senate, 29 March 2006, 31 (Senator Chris Ellison): 'We have adopted some of its recommendations and will continue to consider some of its other recommendations' and Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2006, 98 (Hon Philip Ruddock).

<sup>167</sup> 'Indeed, out of the 28 recommendations, as I understand it, a total of 11 are reflected in the bill either by way of taking up a recommendation or having already been there': Commonwealth, *Parliamentary Debates*, Senate, 30 March 2006, 13 (Senator Chris Ellison).

<sup>168</sup> See Government Response and Commonwealth, *Parliamentary Debates*, Senate, 30 March 2006, 14 (Senator Joe Ludwig): 'The Attorney-General has picked up one substantive recommendation out of the Committee report'; Commonwealth, *Parliamentary Debates*, Senate, 30 March 2006, 15 (Senator Natasha Stott Despoja): 'I do not think that 11 recommendations are a lot to boast about, just quietly, but there is also the fact that they are not exactly the largest substantive recommendations'; 'I honestly thought that more than 11 recommendations and certainly some substantial ones would be picked up': Commonwealth, *Parliamentary Debates*, Senate, 30 March 2006, 15 (Senator Natasha Stott Despoja).

<sup>169</sup> Frequently using the devices of 'detail' and 'balance' mentioned at above n 8 in the introduction.

<sup>170</sup> 'The Senate Committee took some weeks. They would say it was an expeditious consideration of the bill. But it was some weeks, and the committee report was tabled on Monday...this bill is to deal with matters that would otherwise be the subject of a sunset clause dealing with stored communications. We did not want to see those important measures come to an end, and that is why the legislation has been progressed not in haste but to ensure that these issues have been dealt with before that sunset clause comes into effect...I think the urgency is apparent': Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2006, 97-98 (Hon Phillip Ruddock).

Parliament.<sup>171</sup> The imagined Senate dilatoriness is also striking evidence of the ascendancy of executive values in counter-terrorism law reform - the Senate review processes were at odds with a pre-determined government position.<sup>172</sup> The government nonetheless claimed that the majority of recommendations of the Senate Committee report were adopted.<sup>173</sup> This distinctive reply gives the illusion of responsiveness by the executive to the Senate Committee recommendations, whilst creating a degree of legislative momentum, confirmatory of the assertions of legislative urgency. This incident represents a new twist to the legislative claims of urgency.

## **VIII LARGER REFLECTIONS UPON THE MEANING OF URGENCY: THE CONSEQUENCES OF THE APPLICATION OF URGENCY IN ENACTING COUNTER-TERRORISM LEGISLATION BY THE HOWARD GOVERNMENT**

### **A General Observations**

A major unifying theme examined in this article has been the repeatedly claimed need of Attorney-General Ruddock to enact counter-terrorism legislation in an urgent manner. The roles of various review processes which are available to scrutinise legislation prior or subsequent to its enactment have been shaped in response to this urgency claim. The nomenclature and culture of urgency as cultivated by Attorney-General Ruddock carry with them certain legislative assumptions and implications, signalling broader political applications and consequences of counter-terrorism law.<sup>174</sup>

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<sup>171</sup> Ibid 98 (Hon Phillip Ruddock).

<sup>172</sup> ‘The point I make is that there is urgency associated with this legislation. It is in a form that was acceptable to government members. My goodwill, as evidenced in a desire to further consider matters that have been raised in a bipartisan way in the Senate, should not be made light of...It is only more likely to serve to encourage people to become more intransigent’: ibid 99 (Hon Philip Ruddock).

<sup>173</sup> *Government Response to Senate Legal and Constitutional Legislation Committee Report on the provisions of the Telecommunications (Interception) Amendment Bill 2006* (Government response to Recommendation 28: Accepted in part): ‘The Government has accepted the majority of the recommendations of the Senate Committee’s report, with 18 of the recommendations already partly or wholly addressed through changes made to the Amendment Bill prior to passage or noted for future consideration’.

<sup>174</sup> Indeed, the language of urgency has been transformed to policy advocacy by the Attorney-General’s Department in time critical appraisals of how ‘Today’s terrorist environment is quite different’: see Robert Cornall, ‘International Responses to a Changing Security Environment’ (2006) *Public Administration Today* 32, 33.

In juxtaposition to the claims of legislative urgency, the rejection of many reform recommendations of various respected review committees – either during, or subsequent to, the legislative process – is remarkable. A predictable pattern of the government invoking a review process involving a parliamentary committee or other committee, followed by not seriously responding to or implementing its recommendations, has emerged. Attaching the label of ‘urgent’ to counter-terrorism legislation provides legitimacy to the content of the law and momentum in its enactment. It alters both the dynamic and the public perception of the enactment. Rather than the enactment of controversial counter-terrorism laws which diminish traditional rights being perceived as legislating in haste, those laws are perceived as responsible and necessary. The passing of urgent laws is therefore made synonymous with discharging a primary governmental obligation: protection of the community.

Similar to another, earlier identified process used by the government for justifying the latest example of counter-terrorism law,<sup>175</sup> several common characteristics of the paradigm of urgency can be derived from the experience of the legislative process examined in this article.

The claim of urgency by Attorney-General Ruddock was invoked so frequently, in relation to successive pieces of counter-terrorism legislation, as to be normalised into a paradigm or culture of urgency. The regularity and volume of counter-terrorism law reform has crystallised the development of this urgency culture, creating real difficulties in the scrutiny of counter-terrorism law reform.

The emphasis upon urgency rationalises the brief time frames afforded for review of proposed legislation, without conceding that the competency of review will inevitably be compromised through artificially created time pressures. Indeed, the granting of review processes (however compromised by time constraints) acts as a politically legitimating device for the bona fides of legislation, including present enactment of legislation with subsequent

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<sup>175</sup> See Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, 26476 (Senator Kerry Nettle) citing Joo Cheong Tham’s analysis of the government’s ‘distinctive modus operandi when proposing new anti-terrorism laws’ with a formula resting on five key strategies, namely ‘Capitalise on terrorist incidents by proposing new anti-terrorism measures in the wake of such events and justifying them on the basis of being tough on terror.’; ‘Propose changes which have nothing or very little to do with these terrorist incidents’; ‘Fetishise proposed anti-terrorism measures by depicting them as imperative in the ‘War on Terror’; ‘Ignore the existing panoply of anti-terrorism measures . . . Imply that measures are needed because a gap exists’ and ‘pretend that the proposals only target persons engaged in extreme acts of political religious violence’.

review. Review of proposed legislation contemporaneous with the parliamentary process, or, more recently, *ex post facto* review of legislation, provides an illusion of regularity in the legislative process. The invocation of the review process takes place, however, without any obligation on the government to implement amendments or to re-draft legislation in response to review recommendations. The relative lack of implementing review recommendations is the manifestation of this discretion. By contrast with its mantra of urgency, the Coalition acted here with lassitude and inertia.

Indeed, the noncommittal nature of the Coalition government response to review processes actually reflects the larger issue of increasing executive discretion, a prominent characteristic of government behaviour in counter-terrorism matters. Where a claim of urgency arose, executive discretion manifested itself firstly as the executive selectively asserting, identifying and defining what constitutes urgency. Subsequently, it meant the executive giving urgent priority to counter-terrorism legislation within its legislative program. Furthermore, the promise of *ex post facto* review as a consequence of or reward for the speedy passage of counter-terrorism legislation assumed a trust in the positive exercise of discretion and a confidence in the *bona fides* of the government's stated intention to eventually legislate in response to review committee recommendations.

The characteristics of the urgency paradigm were also manifested in the extent of executive discretion conferred in counter-terrorism legislation, being the means by which the legislation practically operates. The security argument here was that, in declining to adopt more stringent safeguards, it allowed the purposes of the legislation to be acted on and implemented more speedily, with a greater ambit for discretion, and therefore, urgently. What was striking was that the executive discretions conferred (and the lower level of legislated safeguards) were actually advanced as a safeguard. The ambit of such discretion was inverted to be presented as a positive, requiring an investment of trust by the public in the executive and an emphasis upon the integrity of those entrusted with that executive-based discretion. With security discretion so derived from and associated with the urgency of the task at hand, the absence of sufficient mechanisms for review and of sufficient safeguards increases the likelihood that such ongoing powers will be improperly applied. Urgency, in its linkage to discretion, has resulted in an accrual of executive power through counter-terrorism legislation.<sup>176</sup> This

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<sup>176</sup> Several commentators have remarked about this ongoing concentration of executive power as a consequence of serial enactment of counter-terrorism legislation: see Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of

misleading claim of governmental discretion as a safeguard of the public interest has faltered with a series of misapplied exercises of discretion in national security matters, and with adverse comments being made in the courts in situations emerging from the use of discretion.<sup>177</sup> That investment of trust in the executive, implicit in the discretion-as-safeguard argument, has been significantly diminished by these incidents.

A general conclusion that could be formed from the legislation discussed above is that those counter-terrorism legislative reforms which extended executive discretion were treated as urgent, whereas review committee recommendations of restraint upon discretion were often treated dismissively, that is, as anything but urgent. The paradigm of urgency evaporated in relation to implementing the checks and balances mandated in parliamentary and committee reviews. This indicates that the meaning of ‘urgency’ has been essentially subjective - its content was largely defined and articulated by Attorney-General Ruddock. Far from having an ascertainable, objective content, the paradigm of urgency is perhaps better considered as a newer disposition or *modus operandi* attaching to the counter terrorism legislative process, deployed as and when required for political advantage.<sup>178</sup>

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Detention, Proscription and Control’ (2003) 49 *Australian Journal of Politics and History* 355, 355; Jude McCulloch, ‘Australia’s Anti-Terrorism Legislation and the Jack Thomas Case’ (2006) 18 *Current Issues in Criminal Justice* 357, 363-4; Jude McCulloch, ‘National (In)Security Politics in Australia: Fear and the Federal Election’ (2004) 29 *Alternative Law Journal* 87, 91; Julian Burnside, ‘Protecting Rights in a Climate of Fear’ (2007) *Victorian Bar News* 70, 71; Catherine Brooks, ‘The First Casualty of Law’ (2007) *Lawyers Weekly* 14-15; and Murray McInnis, ‘Anti-Terrorism Legislation: Issues for the Courts’ (2006) *AIAL Forum* 1, 8. Others dispute an adverse impact upon civil liberties through this concentrated executive power: see Gregory Rose and Diana Nestorovska, ‘Australian Counter-terrorism Offences: Necessity and Clarity in Federal Criminal Law reforms’ (2007) 31 *Criminal Law Journal* 20, 55; and Paul O’Sullivan, ‘9/11 Five Years Later: Where To From Here?’ (2006) 18 *The Sydney Papers* 189, 191-2.

<sup>177</sup> The most prominent examples are the cases of Mohamed Haneef – see *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007); Scott Parkin - see *Parkin v O’Sullivan* [2006] FCA 1413 (3 November 2006); Izhar Ul-Haque – see *R v Ul-Haque* [2007] NSWSC 1251; and Joseph Terrence Thomas - see *R v Thomas* [2006] VSCA 165 (18 August 2006).

<sup>178</sup> In that sense, it is also possible to see the uses of urgency in a counter-terrorism legislative context ‘as a “wedge...issue”, designed to divide, confuse and embarrass...opponents, play upon hostility towards unpopular groups, and gain the support of voters who would otherwise tend to support the Labor Party’: Harry Evans, ‘Executive and Parliament’ in Chris Aulich and Roger Wettenhall, *Howard’s Second and Third Governments Australian Commonwealth Administration 1998-2004* (2005), 54. See also Gwynneth Singleton, ‘Issues and Agendas: Howard in Control’, in Chris Aulich and Roger Wettenhall (eds), *Howard’s Second And Third Governments: Australian Commonwealth Administration, 1998-2004* (2005) 3, 15.

The claim of urgency advanced by Attorney-General Ruddock also highlighted a particular set of relations and government perceptions of the relationship between the executive and Parliament and broader matters of representative government and democracy. This relationship has several distinctive characteristics.

## **B        *The Status of Different Forms of Review***

One characteristic is the relative status accorded by the executive to parliamentary committee review and extra-parliamentary review. Within the paradigm of urgency, it was clear that the status of those forms of review, or the relative merits in different possible forms of review – as confirmed, for example, by the time afforded to review committees to carry out the review, or the extent to which review committee recommendations were acted upon – was distinctly inferior to review of terrorism legislation by the executive or through an executive related process. This inferior status is corroborated by several factors. On occasions, suggested amendments to introduce safeguards like those operating in other jurisdictions were rejected for no sound reason.<sup>179</sup> Often the changes adopted from such review processes were those that are amenable to executive orientated objectives and were therefore selectively adopted. Alternatively, the recommendations were promoted as having been adopted, when quite limited implementation had in fact occurred. This inferior status has been further confirmed by Howard government members of parliamentary review committees voting against their own committee recommendations at the time of passage of the legislation, as well as by the fact that the consultative process through the Attorney-General's backbench committee has greater authority than other forms of review.

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<sup>179</sup> Two prominent examples are the establishment by legislation of an Independent Reviewer of Terrorism Law (based on the UK Independent Reviewer) and the inclusion of meaningful sunset clauses on counter-terrorism legislation, linked to a legislated form of review of relevant legislation. On the issue of the Independent Reviewer, see Sheller Committee Report, above n 1, 8 and 202-3; and Parliamentary Joint Committee on Intelligence and Security, above n 2, xv and 16-21. See also the introduction of a private member's bill: Independent Reviewer of Terrorism Laws Bill 2008 (Cth) by Liberal Party backbencher Petro Georgiou: see Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2008, 76-7. On the issue of legislated sunset clauses, see Senate Legal and Constitutional Legislation Committee, above n 3, xi (Recommendation 18) and xii (Recommendation 26) and xiv (Recommendation 38).

### C *The Government Claim of Ongoing Review*

A further rejoinder emerged to the claim that parliamentary committee review of counter-terrorism legislation was being given too low a status. This rejoinder, reflecting an immediacy of response associated with the urgency paradigm, was the Howard government claim that counter-terrorism legislation was under constant executive, as distinct from parliamentary, review. A claim of ongoing executive review does several things – it appropriates the concept of ‘review’ and locates it within a government or bureaucracy-based sphere of what should be reviewed.<sup>180</sup> It creates the illusion of balanced review, legitimating the passage of legislation in a speedy manner. It enables parliamentary committee or independent review to be incorporated within an established, ongoing executive-based review process. Operational considerations can further be invoked to justify the need for locating review within the sphere of executive control, and also allow individual, non-executive review committee recommendations to be rejected as impractical.

Such ongoing review may also further distinctive government-orientated objectives and give rise to political opportunities available in counter-terrorism legislative areas. Opposition party contributions to the broader form of parliamentary committee review are then able to be subsumed, neutralised or discredited. This further encourages the ceding of political expertise on national security counter-terrorism matters to the government, the Opposition being keen to retreat and to limit disagreement. A government armed with an established urgency paradigm is able to activate it to extract political advantage, by showing decisiveness and by exploiting perceived weakness in an Opposition’s national security credentials.<sup>181</sup>

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<sup>180</sup> An illustrative example of this phenomenon is found in Philip Ruddock, ‘A Safe and Secure Australia: An Update on Counter-Terrorism’ (2006) 2 *Original Law Review* 40, 48-9: where the former Attorney-General referred to reviews by the Sheller Committee, COAG and the ALRC to state the claim that ‘I see these reviews as an important element in ensuring that law enforcement and security agencies have sufficient, targeted powers and are also accountable for the exercise of those powers’.

<sup>181</sup> As Lynch describes the situation, ‘to oppose or seek amendment of these Bills is to risk being portrayed as exposing the community to unnecessary danger’: Lynch, above n 7, 776. A most obvious example was in ‘the fact that the confluence of issues surrounding the boat people, Tampa and 11 September terrorist attacks were skilfully exploited by Howard’: Singleton, above n 178, 12.

## **D Invoking a Preventative and Protective Principle**

A further dimension of the urgency paradigm is to be found in government advocacy of an overwhelming responsibility to exercise protective and preventative functions through the enactment of counter-terrorism provisions – that is, to do everything conceivable in a counter-terrorism legislative and executive sense.<sup>182</sup> This is an adapted version of the preventative principle derived from environmental law and policy.<sup>183</sup> Restraints on executive power in the form of committee recommendations are seen as compromising this protective or preventative principle – raising political costs and risks in the event of a terrorist incident, and also preventing maximum political leverage being gained from regularly exercising power by enacting legislation. This preventative approach invokes executive discretion based on the argument that such discretion is necessary to avert catastrophe, and through highlighting the political consequences should such catastrophes occur. It was linked by Attorney-General Ruddock to an improperly reconstituted international legal obligation to protect.<sup>184</sup>

## **E Consequences for Representative Government Institutions and Practices**

The intersection of legislative processes with the urgency associated with enlarged manifestations of executive discretion relating to counter-terrorism has significant consequences for representative government institutions and

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<sup>182</sup> See Philip Ruddock, 'Primary Duty To Protect Our Nation' (Press Release 13 August 2007); Philip Ruddock, 'Legislating Against Atrocities' (2007) *Lawyers Weekly* 16, 16; and Ruddock, above n 180, 46. Lynch considers that this focus upon prevention has meant that 'precautionary justifications for the enlargement of the scope of criminality and the diminution of civil liberties have been taken to their logical extreme': Lynch, above n 7, 780.

<sup>183</sup> See Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision Making and Scientific Uncertainty* (2005); Gerry Bates, *Environmental Law in Australia* (6<sup>th</sup> ed, 2006) 129-37; and Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002). See also Adrian Deville and Ronnie Harding, *Applying the Precautionary Principle* (1997); Hughes, 'The Status of the "Precautionary Principle" in Law' (1995) 7 *Journal of Environmental Law* 224; Warwick Gullett, 'Environmental Protection and the Precautionary Principle: A Response to Scientific Uncertainty in Environmental Management' (1997) 14 *Environment and Planning Law Journal* 52.

<sup>184</sup> On this point see Christopher Michaelsen, 'Security Against Terrorism: Individual Rights or State Purpose?' (2005) 16 *Public Law Review* 178; Michaelsen, above n 8, 11-15; Greg Carne, 'Reconstituting "Human Security" in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1; Bronitt and McSherry, above n 8, 875; and Andrew Lynch, 'Exceptionalism, Politics and Liberty: A Response to Professor Tushnet from the Antipodes' (2008) *International Journal of Law in Context* 305, 306.

practices, the ultimate subjects warranting protection from terrorism. Due to the fact that the focus in such debate as occurs is almost exclusively upon physical protection of persons and property through counter-terrorism laws, the impact of such laws upon the regularity and propriety of those institutions and practices – in short upon protecting representative democracy – has been inadequately considered.

At least within the example of serial counter-terrorism law reform, the role of parliamentary scrutiny, contribution and debate has been severely compromised by the habituation of legislative practices to an urgency paradigm and methodology. That urgency paradigm and methodology, applied in a setting of serial counter-terrorism law reform to extract political advantage, and without any systematic justification of what further legislative change was objectively urgent, became the expected, normal method of Howard government counter-terrorism legislative enactment. This development unfortunately reinforced traditional deference to the interests of the executive in national security matters. It represented an ascendancy of executive mandated legislation, framing legislative amendment as a concession from executive authority.

By doing so, urgency further re-cast the practice of parliamentary representative democracy along narrowly functional and formal lines, in place of a more deliberative and consultative democratic model. Characteristics of the narrower model include the emphasis on a broad executive mandate obtained by periodic elections,<sup>185</sup> the inappropriateness of engaged civic participation influencing changes to proposed legislation,<sup>186</sup> with only elected representatives initiating activity<sup>187</sup> and with those representatives not obliged to form a consultative relationship with their electors.<sup>188</sup>

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<sup>185</sup> The emphasis by the Howard government in executive-Senate relations on an electorally acquired mandate to implement all policies, with Senate opposition characterised as illegitimate, is discussed by Evans, above n 178, 45-6. Frustrations with the lack of a Senate majority until 2005 saw the Howard government propose two options for radical constitutional changes relating to joint sittings of the two chambers: *ibid* 46-8. The Senate's proportional electoral system was also the subject of contemplated reform by the Howard government to increase its chances of winning a majority of Senate seats: see Senator Helen Coonan, 'The Senate: Safeguard or Handbrake on Democracy?' (1999) 11 *Sydney Papers* 106 (Address to the Sydney Institute).

<sup>186</sup> Such civic participation being confined to voting and discussion to provide for regular functioning of electoral requirements: see Carol Pateman, *Participation and Democratic Theory* (1970), 5.

<sup>187</sup> *Ibid*.

<sup>188</sup> David Held, *Models of Democracy* (1987), 165.

In contrast, a deliberative model ‘emerges as a qualification of pure and simple democracy, and as a check against what has been termed “majoritarian democracy” in which law and policy are formed on the basis of the preferences of the majority, with few protections for the rights of minorities, ... to be heard in the central councils of political debate...’<sup>189</sup>

The paradigm of urgency created legislative conditions necessarily at odds with a properly deliberative model. Such a model would produce carefully tailored, calibrated and proportionate responses<sup>190</sup> to terrorism issues. Consensus and bi-partisanship would be arrived at by testing options and identifying unanticipated legal and other difficulties in the draft legislation, and by allowing adequate time and space for deliberation and compromise in parliamentary committee inquiries and chamber debate. Such inquiries and debate would draw upon and be improved by both formal and informal political contributions of citizens.

The volume of counter-terrorism legislation enacted since 2001 in Australia,<sup>191</sup> with the practice of frequent new legislation and amendment, have accentuated such consequences of the urgency paradigm. Aside from inadequate checks and balances, urgency is likely to produce drafting errors and creates a false confidence or an over-reliance on legislation as a counter-terrorism response, since speedily enacted laws create an illusion of action.<sup>192</sup> Furthermore, that paradigm of urgency is potentially transferable to other, non-terrorism based legislation, multiplying the adverse consequences for democratic institutions and practices.

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<sup>189</sup> Uhr, above n 16, 10. A deliberative democratic model in a system of representative government also assumes a ‘link between political representation and ‘participatory democracy’, embodying the practices of active citizenship in the form of political participation, ‘as an effective instrument of accountability for the elected and bureaucratic elite in whose hands the day to day power of government typically rested’: *ibid* 11.

<sup>190</sup> Indeed, many of the recommendations of the Sheller Committee in reviewing existing counter-terrorism legislation relate to amending those laws to make them more proportionate to the nature of the terrorism threat addressed.

<sup>191</sup> See Commonwealth Parliamentary Library Website for a summary of the many pieces of counter-terrorism legislation enacted since 2001: Parliamentary Library, *Terrorism Law* Parliament of Australia Parliamentary Library <<http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron>> at 22 August 2008 (Chronology of Legislative and other Legal Developments since 11 September 2001).

<sup>192</sup> This impetus to be seen as responding legislatively to a terrorism attack is also described by Krygier, above n 7, 127-8.

## **F      *A Lack of Conformity with International Human Rights Standards***

The paradigm of urgency makes it difficult to achieve consistency of counter-terrorism legislation with international human rights standards, as the role of parliamentary and independent review which would invoke such standards is marginalised. The absence of a charter of rights at the Commonwealth level means that there is no systematic pre-legislative assessment of an Act's conformity with human rights principles in the drafting, review and enactment stages. Such assessment of conformity with human rights must ordinarily occur on an ad hoc basis, so the invocation of urgency in this situation effectively precludes structured review and analysis of compliance with international human rights standards.

On a superficial level, these consequences of the urgency model as applied to counter-terrorism law reform resonate strongly with the preferred parliamentary model of human rights protection, expressed by the Commonwealth government in the key document *Australia's National Framework for Human Rights National Action Plan*.<sup>193</sup> However, such a parliamentary model must be understood to be a formalist, procedural model,<sup>194</sup> rather than a deliberative model of democracy as outlined above.

## **G      *Concentrating Executive Power for Political Advantage***

In a broader sense, the consequences of the urgency paradigm, as examined in this article in the context of major examples of counter-terrorism law reform, are also part of a more general assertion and expansion of executive power by the Howard government across a host of policy areas, at the expense of wider conceptions of representative democracy. This phenomenon has attracted considerable commentary,<sup>195</sup> much of it focused upon an

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<sup>193</sup> Attorney-General's Department, *Australia's National Framework For Human Rights National Action Plan* (2004) Australian Government: Attorney-General's Department <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Australiasnationalframeworkforhumanrights-NationalActionPlan-December2004](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Australiasnationalframeworkforhumanrights-NationalActionPlan-December2004)> at 13 August 2008.

<sup>194</sup> In the sense that the scope and formal legislative recognition of human rights as legislatively expressed will be determined by the executive, which is antipathetic to international human rights influences and sees a limited role for public contribution into legislative expression of those rights.

<sup>195</sup> See, for example, Clive Hamilton and Sarah Maddison, *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (2007); David Marr 'His Master's Voice The Corruption of Public Debate Under Howard' (2007) 26 *Quarterly Essay* 1; Judith Brett 'Relaxed and Comfortable: The Liberal Party's Australia' (2005) 19

incremental, transformative erosion of rights and a curtailing of the open, deliberative characteristics of Australian democracy.

The paradigm of urgency in Australian counter-terrorism law was elevated to a central legislative operating principle and given new momentum under the stewardship of Attorney-General Ruddock, truncating debate as part of an ongoing counter-terrorism legislative agenda. That agenda was strategically used to drive the political objectives of the concentration of executive power and the casting of Opposition and minor parties as weak on national security. The election of a new Labor government, which at various times in opposition had raised objections to the practical legislative consequences of urgency in counter-terrorism law reform, may provide opportunities for the egregious aspects of that urgency-driven counter-terrorism legislative agenda to be addressed and remedied. It is too early to predict how durable the Howard government urgency culture in counter-terrorism law and its enactments actually are, as well as to assess how explicitly the Rudd government will act to remediate them. Some preliminary observations can, however, be offered.

## **IX ENDURING LEGACY OR TRANSITIONAL ADJUSTMENT?: URGENCY, COUNTER-TERRORISM AND THE RUDD GOVERNMENT**

The enduring habits of Howard government urgency culture in counter-terrorism law may be seen in the Rudd government's first piece of counter-terrorism-related legislation, the Telecommunications (Interception and Access) Amendment Bill 2008 (Cth). In the bill's second reading speech, Attorney-General McClelland identified the bill as 'time critical',<sup>196</sup> and then described a number of further amendments as merely technical.<sup>197</sup> The latter description echoed Howard government practices as the bill's original

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*Quarterly Essay 1*; Margo Kingston, *Not Happy John* (2004); Margo Kingston, *Still Not Happy John* (2007); Linda Weiss, Elizabeth Thurbon and John Matthews, *National Insecurity The Howard Government's Betrayal of Australia* (2007); Robert Manne, (ed) *The Howard Years* (2004); Robert Manne, 'Little America: How John Howard Has Changed Australia' (2006) *The Monthly* 20 (March); Judith Brett, 'The Unravelling of John Howard (Exit Right) (Critical essay)' (2007) 28 *Quarterly Essay 1*.

<sup>196</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 20 February 2008, 836 (Hon Robert McClelland).

<sup>197</sup> *Ibid* 837 (Hon Robert McClelland): stating that 'Again, the amendments do not provide any new powers for law enforcement or security agencies...The process for adding additional devices to a device based named person warrant will be clarified and aligned with the existing process for service based named person warrants'.

drafting provided for a substantial expansion of power through the subsequent interception of further communications devices without new warrant authority.

On 19 March 2008, the bill was referred to the Senate Legal and Constitutional Affairs Committee, with the due date for the report being 1 May 2008. The Senate Committee in its report<sup>198</sup> observed that the bill's provisions would enable interception agencies to add new devices to a warrant, without further independent scrutiny by the issuing authority.<sup>199</sup> The Committee was of the view that 'after the fact' reporting is insufficient to adequately address issues associated with individuals' 'privacy and rights'.<sup>200</sup> It considered 'that the process of adding a device to a device-based named person warrant after the warrant has been issued should include an independent scrutiny process'.<sup>201</sup> It is the Supplementary Report of the Committee<sup>202</sup> however, which sharply highlights the persistent influence of the Howard government's urgency culture<sup>203</sup> upon the Rudd government's first enactment of a counter-terrorism law.

The Rudd government did, however, respond more positively to the Senate Committee recommendations in relation to device-based named person warrants. It acknowledged that 'the bill as introduced proposed to allow a device-based named person warrant to permit the interception of multiple devices as well as to allow intercepting agencies to add further devices to the warrant as they are identified'<sup>204</sup> and acknowledged Recommendations 3 and

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<sup>198</sup> Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Telecommunications (Interception and Access) Amendment Bill 2008* (2008).

<sup>199</sup> Ibid 27.

<sup>200</sup> Ibid 32.

<sup>201</sup> Ibid 40. The proposed scrutiny process was set down in Recommendation 3 and Recommendation 4 of the Report.

<sup>202</sup> Ibid: Supplementary Report with Additional Comments of Dissent by the Australian Democrats (Senator Stott Despoja).

<sup>203</sup> Ibid. See Supplementary Report paragraphs 1.6, 1.9 and 1.10: 'It is of great concern...that on the first occasion that the new Government turns its mind to any form of legislation that impacts upon Australia's national security regime, it has labelled the bill "time critical" and sought to limit debate...in one of the first legislative acts in the new Parliament, the Government has revisited this legislation, attempted to curtail debate, and has made no attempt to address the numerous concerns that it had with the legislation in 2006...Further it is clear...that the amendments proposed by this bill are far from "minor" or "technical"...the amendments in relation to device based warrants "propose to remove an important existing safeguard"'. See also Commonwealth, *Parliamentary Debates*, Senate, 14 May 2008, 1686-1688 (Senator Andrew Bartlett).

<sup>204</sup> Commonwealth, *Parliamentary Debates*, Senate, 14 May 2008, 1693 (Senator Joe Ludwig).

4 in the Report.<sup>205</sup> It decided to accept these recommendations for further consideration, and, given the time constraints and complicated drafting issues, to move amendments ‘to the bill that remove the provisions allowing agencies to add devices to device-based named person warrants’.<sup>206</sup>

Similarly, the absence as yet of a comprehensive remedial legislative agenda of the Rudd government to address the most egregious aspects of the urgency phenomenon in a range of counter-terrorism law may mean that, by default, inferior laws that fail tests of necessity and proportionality will persist unnoticed, when not invoked in circumstances producing controversy.<sup>207</sup> Ironically, the likelihood of legislative remediation may in fact diminish if there is a shift in the Rudd government’s counter-terrorism priorities *away from* new legislative responses towards a concentration on other aspects of counter-terrorism policy, including desisting from using counter-terrorism enactment practices for overtly political purposes.

Evidence does exist of a new emphasis in counter-terrorism policy away from a dominating legislative agenda. The first major address of the new Attorney-General, Robert McClelland, regarding national security, gave considerable precedence to community-building, public diplomacy and inclusive development, in order to reduce the barriers causing alienation of some

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<sup>205</sup> Above n 198, Recommendation 3: ‘The Committee recommends that the bill be amended to provide that an agency be permitted to add a device to a device-based named person warrant after the warrant has been issued if the facts of the case would have justified the issue of a warrant by the issuing authority; and the investigation in relation to the person named in the warrant will be, or is likely to be, seriously prejudiced if the interception does not proceed.’ Recommendation 4: ‘The committee further recommends that the Bill be amended to provide that if an agency adds a telecommunications device or devices not identified on a device-based named person warrant at the time that the issuing authority issued the warrant: (i) the agency be required to notify an issuing authority, within 2 working days, that a device had been added to the warrant; and (ii) the issuing authority must examine the supporting documentation against the criteria that it would have considered, in accordance with the requirements of the *Telecommunications (Interception and Access) Act 1979*, in relation to an application by an agency for a device-based named person warrant, and make a determination about whether the facts of the case justified the addition of the device; and (iii) the issuing authority shall order that the interception cease immediately and that all evidence gathered be destroyed if it determines that the facts of the case would not have supported the issue of a device based named person warrant.’

<sup>206</sup> Commonwealth, *Parliamentary Debates*, Senate, 14 May 2008, 1693 (Senator Joe Ludwig).

<sup>207</sup> Such as the controversial detention of Dr Mohamed Haneef, brought about through the operation of the ‘dead time’ provisions (ss 23CA(8)(m) and 23CB of the *Crimes Act 1914* (Cth) which effectively allowed the 24 hours of allowable questioning to be distributed over a number of days whilst Haneef was held in continuous custody.

segments of the community.<sup>208</sup> Interestingly, the concomitants of the previous government's dominant counter-terrorism legislative agenda, such as its heavy emphasis on national security laws and the exploitation of insecurity for political gain, were also criticised.<sup>209</sup>

The shift in emphasis away from further counter-terrorism laws was also noticeable in the recommendations of the Street Review of the Australian Federal Police.<sup>210</sup> The recommendations included the establishment of a co-ordinating Committee between ASIO, the AFP and the Commonwealth DPP;<sup>211</sup> the adoption of a Joint Operations Protocol between the AFP and ASIO;<sup>212</sup> the formalisation of the role of the Commonwealth DPP in giving advice regarding prosecutions during the planning stages of actual or likely terrorism offence investigations;<sup>213</sup> the physical co-location and participation of ASIO officers in Joint Counter-Terrorism teams;<sup>214</sup> the automated sharing of information through an integrated technology system;<sup>215</sup> and enhanced co-operative training arrangements.<sup>216</sup>

The new White Paper on terrorism<sup>217</sup> and the inquiry into the Haneef matter<sup>218</sup> will necessarily touch upon the matters of executive discretion and

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<sup>208</sup> Robert McClelland, 'Security in Government Conference', (Speech delivered at the Security in Government Conference, Canberra, 7 December 2007) <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2007\\_FourthQuarter\\_7December2007-SecurityinGovernmentConference](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2007_FourthQuarter_7December2007-SecurityinGovernmentConference)> at 25 August 2008. See Robert McClelland 2GB Radio, 'Interview with Philip Clark, 2GB Radio, 5.15PM', 11 April 2008 <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Transcripts\\_2008\\_interviewwithphilipclark,2gbradio,5.15PM](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Transcripts_2008_interviewwithphilipclark,2gbradio,5.15PM)> at 25 August 2008.

<sup>209</sup> See Robert McClelland, above n 208.

<sup>210</sup> *The Street Review: A Review of the Interoperability Between the AFP and its National Security Partners*. See also Robert McClelland, 'Attorney-General Welcomes Release of AFP Street Review Recommendations' (Press Release 13 March 2008) <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_FirstQuarter\\_13March2008-Attorney-GeneralwelcomesreleaseofAFPStreetReviewrecommendations](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_FirstQuarter_13March2008-Attorney-GeneralwelcomesreleaseofAFPStreetReviewrecommendations)> at 25 August 2008.

<sup>211</sup> Street Review, above n 210, Recommendation 1.

<sup>212</sup> Ibid Recommendation 2.

<sup>213</sup> Ibid Recommendation 3.

<sup>214</sup> Ibid Recommendation 4.

<sup>215</sup> Ibid Recommendation 6.

<sup>216</sup> Ibid Recommendation 8.

<sup>217</sup> For the previous White Paper on Terrorism, see Alexander Downer, 'Transnational Terrorism: The Threat to Australia' (Press Release 15 July 2004) <[http://www.foreignminister.gov.au/releases/2004/fa0102\\_04.html](http://www.foreignminister.gov.au/releases/2004/fa0102_04.html)> at 25 August 2008. On 22 February 2008, Prime Minister Rudd announced a comprehensive review of Australia's homeland and border security arrangements: See Kevin Rudd, 'Homeland and Border Security Review' (Press Release 22 February 2008) <[http://www.pm.gov.au/media/Release/2008/media\\_release\\_0084.cfm](http://www.pm.gov.au/media/Release/2008/media_release_0084.cfm)> at 25 August 2008. The review 'will consider the roles, responsibilities and

urgency as adversely influential factors in recent years. Similarly, a commitment to implement the ALRC recommendations on sedition law will provide the opportunity to give real meaning to the ex post facto review process mandated by Attorney-General Ruddock as the justification for swift passage of the sedition provisions in 2005, instead of the option existing at the time to sever Schedule 7 of the then bill and subject it to thorough review before enactment. Real evidence of a shift in emphasis would be the wholesale enactment by the Rudd government of the recommendations of the ALRC report.<sup>219</sup>

In time, the legacy of hastening slowly as a counter-terrorism legislative stratagem may well be identified specifically with damage done to both individual rights in celebrated cases, as well as to the fabric of Australian democracy. It is too early to make conclusive determinations on this emphatic Howard government approach to counter-terrorism laws. What can be conservatively said, however, is that the culture of urgency in enacting counter-terrorism legislation, coupled with governmental indifference and lassitude to enacting many considered review recommendations of those same laws, failed to produce optimum legislative outcomes reflecting an integrated, holistic response to terrorism issues best protective of the institutions and practices of Australian representative democracy.

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functions of departments and agencies involved in homeland and border security. The review will also consider possible changes to optimise the coordination and effectiveness of our homeland and border security efforts’.

<sup>218</sup> See, for example ‘Haneef inquiry flagged’, *The Weekend Australian* (Sydney), 1-2 December 2007, 2; ‘Haneef inquiry essential: Burke’, *Sydney Morning Herald* (Sydney), 2 November 2007; ‘Haneef Inquiry “A Must”’, *The Age* (Melbourne), 3 November 2007; ‘Haneef Inquiry to “Boost” Security’, *The Australian* (Sydney), 25 February 2008. On 13 March 2008, it was announced that former NSW Supreme Court judge, Hon John Clarke QC, would chair an inquiry into the case of Dr Mohamed Haneef: see Robert McClelland, ‘Clarke Inquiry into the Haneef Case’, (Press Release 13 March 2008) <[http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_FirstQuarter\\_13March2008-ClarkeInquiryintotheHaneefCase](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_FirstQuarter_13March2008-ClarkeInquiryintotheHaneefCase)> at 25 August 2008. The terms of reference of the Inquiry require it to examine and report on ‘a. the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and the issuing of a criminal justice stay certificate; b. the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters; c. the effectiveness of cooperation, coordination and interoperability between Commonwealth agencies and with state enforcement agencies relating to these matters; and d. having regard to (a), (b) and (c). any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies, including agency and interagency communication protocols and guidelines: Clarke Inquiry into the case of Dr Mohamed Haneef Terms of Reference’ <[http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Terms\\_of\\_Reference](http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Terms_of_Reference)> at 25 August 2008.

<sup>219</sup> ALRC Report, above n 4.



