

**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW COMMISSION
CONCERNING ITS INVESTIGATION INTO SECURITY LEGISLATION:
TERRORISM (PROJECT 105)**

The South African Law Commission completed a report on terrorism which has been submitted to the Minister for Justice and Constitutional Development on 29 August 2002.

The SA Police Service (SAPS) conducted the initial research on terrorism and drafted an Anti-Terrorism Bill which was submitted to the Commission's project committee on security legislation in October 1999. That Bill contained, amongst other things, a clause which provided for detention for purposes of interrogation. The motivation for the legislation was the spate of bombings which occurred during the last half of 1999 in the Western Cape. It was considered by the drafters that detention for interrogation would enable law enforcement to obtain information it would not otherwise be able to obtain.

The SAPS' draft document formed the basis of the discussion paper which was considered by the project committee at meetings held on 12 February and 29 April 2000. The draft document was enhanced by additional research focusing, inter alia, on the issues relating to detention for interrogation. Amendments to the discussion paper and the draft Bill were effected and the working committee of the Commission (which is the executive committee of the Commission) considered and approved the publication of Discussion Paper 92 for general information and comment on 8 June 2000.

The project committee decided at that stage that it should retain the SAPS' proposal for detention for interrogation in the Bill so as to elicit public comment. It however inserted certain safeguards in the Bill such as the detainee's right to legal representation and communication with and visitation by the detainee's spouse or partner, next of kin, chosen religious counsellor, and chosen medical practitioner. The project committee pointed out that it considered that the provision would not pass constitutional muster and requested comment on this aspect in particular. The project committee was of the view that insufficient justification was presented to it to justify the infringement which detention without trial posed to the right to freedom and security of the detainee. The committee also questioned whether there was any need for anti-terrorism legislation.

The Commission hosted a media conference on 8 August 2000 to announce the availability of Discussion Paper 92 for general information and comment. The Bill contained in the discussion paper elicited concerns particularly from members of the Muslim community, mainly from the Western Cape. They considered that the Bill targeted them in particular. They raised concern about the proposed provision criminalising the giving of support to terrorist organisations and financial support in particular. The events of 11 September 2001 in the USA gave rise to an international diplomatic initiative requiring every country to determine whether its legislation could be applied successfully to combat terrorism and to cooperate with other jurisdictions. Internationally the attention shifted to the combating of the financing of terrorism. South Africa is obliged to respond to these developments.

The finalisation of the Commission's investigation into terrorism occurred against this background. The Commission has had the benefit of considering numerous precedents set by other countries which have passed legislation since September 11, 2001.

The Commission ascertained that there are shortcomings in South African legislation and that they should be remedied. The offence of terrorism currently set out in section 54(1) of the Internal Security Act of 1982, relates only to terrorism aimed at the South African Government or population. International terrorism is, however, often directed at foreign officials, guests, embassies and the interests of foreign states. The offence of terrorism as it exists in South African law is therefore clearly inadequate as its operation is too narrow. The South African legislation for combating terrorism should be brought in line with the international conventions dealing with terrorism, our law should provide for extra-territorial jurisdiction, and financing of terrorism must be addressed. There is therefore a need for legislation dealing with terrorism.

The Bill recommended in the report differs fundamentally from the one provisionally proposed in the discussion paper. Detention for interrogation no longer forms part of the Bill. In its place it is suggested that provision should be made for investigative hearings which closely resemble the procedure contained in section 205 of the Criminal Procedure Act of 1977 in order to obtain information from a person suspected of being in possession of information on terrorist acts. The provisions on investigative hearings are also based on recently introduced Canadian procedure. A brief period of detention is possible under the Bill but provision is made for legal representation and bail may be granted. As many other safeguards as possible have been incorporated to ensure that the Bill can withstand constitutional scrutiny.

Provision is also made in the Bill for preventative measures. This entails that a person suspected of being about to commit a terrorist act can be brought before a court to enter into an undertaking to refrain from certain activities. The Bill provides that the court may impose conditions to ensure compliance, such as that the person be prohibited from possessing any weapon or explosive for any period specified in the undertaking.

The Bill also provides for forfeiture of terrorist property and property used for terrorist purposes. Provision exists currently for asset forfeiture under the Prevention of Organised Crime Act of 1998. The provisions on forfeiture of terrorist property are based on these provisions. The recent challenge of the Prevention of Organised Crime Act in the case of *Mohamed v NDPP* heard by the Constitutional Court was taken into account when the Bill was formulated. The Court raised concern about owners being heard on applications for forfeiture of their property. The absence of a rule nisi procedure was also in contention in the *Mohamed* case. The Bill addresses these issues.

The Bill defines a terrorist act as one that is committed (inside or outside the country) for a political, religious or ideological purpose, objective or cause with the intention of intimidating the public with regard to its security, or of compelling a person a government or a domestic or an international organisation to do or to refrain from doing, any act, whether the person, government or organisation is inside or outside the Republic, and which act causes death or serious bodily harm to a person by the use of violence or endangers a person's life, or causes a serious risk to the health or safety of

the public, or causes substantial damage to property, or causes serious interference with or serious disruption of an essential service, facility or system. The Bill excludes action taken as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in the Bill. The Bill also excludes conventional military action in accordance with customary international law or conventional international law.

The Bill in addition deals with offences set out in international conventions which identify certain acts as constituting terrorist acts. They are the hijacking of aircraft; endangering the safety of maritime navigation; bombing offences; taking of hostages; the protection of internationally protected persons and the protection of property occupied by foreign governments; offences involving interference with fixed platforms on the high seas and on the continental shelf; and offences with regard to nuclear matter and facilities.

Provision is also made for the proscription of terrorist organisations by the Minister, for revocation of proscription by the Minister and for the Minister's decisions to be taken on review by the High Court.

Following the events of 11 September 2001, there has been nationally and internationally a significant number of false alarms involving packages or letters containing apparently hazardous material, which have highlighted the need to have specific offences on the statute book and for tough penalties to deter such malicious and irresponsible action.

Finally, extradition procedures are also incorporated in the Bill.

The report will be made available on the Internet at the following site:
<http://www.law.wits.ac.za/salc/salc.html>

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