GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

30 May 2007

Ms Jane Hearn
Inquiry Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Ms Hearn,

Inquiry into Terrorist Organisation Listing Provisions: Questions on notice

Thank you for providing the Gilbert + Tobin Centre of Public Law with the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security.

At the hearing, the Chair, the Hon David Jull MP, asked us to provide the Committee with the comparative research we had undertaken into the proscription of terrorist organisations. This research is at **Attachment A**.

Mr Anthony Byrne MP asked us to provide further information on the Proscribed Organisations Appeals Commission (POAC) operating in the UK, in particular the effectiveness of the Commission, the number of cases that have been put to it and the outcome of those cases. This research is at **Attachment B**.

We note that we are unable to report on the outcomes of cases before POAC as requested. Extensive searching for primary and secondary sources provided few comprehensive results. This experience echoes that of the UK's independent reviewer of the Terrorism Act, Lord Carlile, who has stated in three consecutive annual reports (2003-2005), "there were very few representations to me or comments of any kind about the proscription regime": Lord Carlile of Berriew Q.C, 'Report on the operation in 2005 of the Terrorism Act 2000'. Lord Carlile does not report on POAC cases or outcomes in his comprehensive review of the workings of the Terrorism Act.

Please contact us if you require further information.

Yours sincerely,

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ATTACHMENT A: COMPARATIVE PROSCRIPTION PROCESSES

United Kingdom

Listing Process

The *Terrorism Act 2000* (UK) vests in the Secretary of State for the Home Department the power to proscribe an organisation as terrorist by placing it on Schedule 2 of the Act. The Home Secretary may, by order, add or remove an organisation from Schedule 2 (s 3(3)).

To make such an order, the Home Secretary must believe that an organisation is 'concerned with terrorism' (s 3(4)). An organisation is 'concerned with terrorism' if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism or is otherwise concerned in terrorism (s 3(5)).

The power of the Home Secretary is checked by s 123(4), which provides that an order to proscribe an organisation will not be made unless a draft order has been laid before and approved by resolution of each House of Parliament. An exception operates in urgent cases, as defined by the Secretary of State. In these cases, an order containing a declaration of the Home Secretary's opinion bypasses parliamentary scrutiny and is valid for 40 days (s 123(5)).

The explanatory memorandum that accompanies each proscription order laid before Parliament provides information on the aims and history of the organisation, the attacks it has carried out, both generally and in relation to UK and Western interests, and its representation in the UK. In effect, this explanatory memorandum provides a statement of reasons for the proscription.

The legislation does not establish an expiry date for proscription orders.

The *Prevention of Terrorism Act 2005* provides for an independent reviewer to report annually on the impact of the Terrorism Act (s 14(3)). Additionally, it appears that a government working group reviews all proscriptions every six months 'in the light of intelligence and other information, all of which is quality assessed'.[1]

De-listing process

The Secretary of State has the power to remove an organisation from Schedule 2 (s 3(3)(b)). A proscribed organisation or any person affected by the organisation's proscription can apply for the organisation to be de-proscribed (s 4(2)). However, in making an application, a 'person affected' will presumably risk being caught by the UK's 'membership' offence (s 11 provides that a person commits an offence by professing to belong to a proscribed organisation).

De-listing applications must be determined by the Secretary of State within a time specified by regulation (this period has yet to be specified), and must state the grounds on which a decision is made (s 4(4)).

A de-proscription order is subject to annulment by resolution of either House of Parliament (s 123(2)).

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[1] Lord Carlile of Berriew QC, *Report on the operation in 2005 of the Terrorism Act 2000* (2006), 11.

Where a de-proscription application has been refused, the applicants can appeal to the Proscribed Organisation Appeal Commission (s 5(2)). An appeal will be allowed if the Commission 'considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review' (s 5(3)).

Where a decision to refuse de-proscription is reversed, the Home Secretary must lay the de-proscription order before Parliament as soon as reasonably practicable (s 4(5)).

Where a decision to refuse de-proscription is upheld, a further appeal to the Court of Appeal is allowed on a question of law, provided permission is granted by the Commission or the relevant Court (s 6). The Secretary of State must not take any action until a final determination is made (s 6(3)).

New Zealand

Listing process

The *Terrorism Suppression Act 2002* (NZ) allows the Prime Minister to designate an organisation as terrorist if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out or participated in the carrying out of one or more terrorist acts (s 22). Before making a designation, the Prime Minister must consult with the Attorney-General (s 22(4)). The designation takes effect on being made, in writing, and signed by the Prime Minister (s 22(d)).

After an organisation has been designated as terrorist, another entity can be designated as an associate entity if it is connected with the first entity in the manner specified by s 22(2).

A distinction is drawn between interim designations and final designations. The former can be made on the Prime Minister's 'reasonable suspicion' (s 20(1), contrast to 'reasonable belief'), but expires after 30 days (s 21(e)). The Prime Minister must consult with the Minister of Foreign Affairs as well as the Attorney-General before making interim designation (s 20(4)) and must advise the Leader of Opposition of the interim designation after it is made (s 20(5)). A final designation is made while an interim designation is in force (s 23(a)(ii)). Once an interim designation has expired, neither a further interim designation nor a final designation can be made against the entity unless the new designation is based on information that came to light after the earlier designation expired (s 23(c)).

Both interim and final designation must be noted in the Gazette (s 21(c)) and notice must be given to affected members (s 21(d)). Both notices must give an overview of the proscription process (ss 26-28) and failure to give sufficient notice would invalidate a designation (s 29). Both types of designation can also be subject to judicial review (s 33).

De-listing procedure

A final designation expires after 3 years, unless revoked (s 35(1)).

The Prime Minister can revoke a designation on his or her own initiative or by application of an entity or third party whom the Prime Minister considers to have a special interest in the designation (s 34). The offence of participating in terrorist groups (s 13) may mean an individual is unlikely to make an application for de-proscription. A non-exhaustive list of factors that may constitute 'special interest' is contained in s 34(2), and includes 'an especially

close association'. The Attorney-General does not have to be consulted about de-proscription applications (s 34(4)). The application for a revocation must state why the entity no longer fulfils the criteria for designation (s 34(3)).

The High Court, on application from the Attorney-General, can order a designation to remain in force for three years from the making of that order (s 35(2)). To make an order the Court must be satisfied on the balance of probabilities that the entity is currently a subject of, or has previously been convicted of, criminal proceedings relating to terrorism in a national or international court or tribunal within or outside New Zealand (s 37). Before the expiry of that order the High Court, on application from the Attorney-General, can make another order extending the designation for a further three years (s 35(3)). The court can make '2 or more' orders in respect of the same designation (s 35(4)). An entity subject to an extension of a designation can appeal to the Court of Appeal (s 41). The entity is denied access to the classified security information considered by the High Court when deciding whether to extend a designation, but is provided with a summary of the information (s 38(3)).

Once a designation has expired, an organisation can only be re-listed if the new designation is based on information that became available after the expiry of the earlier designation, and is significantly different from the information on which the earlier designation was based (s 23(c)).

General

In considering whether to make or revoke a designation, the Prime Minister can consider any relevant information, including classified security information (s 30).

Canada

Listing process

An organisation is proscribed if the Governor in Council is satisfied that there are reasonable grounds to believe that the entity has carried out, attempted to carry out, participated in or facilitated a terrorist activity or the entity has knowingly acted in association with an entity that has done so (s 85.03 *Criminal Code*). The Governor acts on the recommendation of the Minister for Public Safety and Emergency Preparedness (s 83.05(1.1)), who in turn acts on criminal and/or security intelligence reports.

If the Governor in Council is satisfied that there are reasonable grounds to believe the organisation is terrorist, it can be placed on a list of entities. The listing of an entity is published in the Canada Gazette. There does not appear to be any Parliamentary oversight.

Judicial review is incorporated into the Canadian proscription model. An organisation must be given notice of its listing or deemed listing without delay (s 83.05(4)) and is given 60 days to make an application for judicial review (s 83.05(5)). In this review, a judge examines any relevant security or intelligence reports in private and provides the applicant with a statement of reasons summarising the information available. The applicant is provided with a reasonable opportunity to be heard, after which the judge determines whether proscription is reasonable on the grounds available (s 83.05(6)). If judicial review is successful, a notice will be published without delay in the Canada Gazette stipulating that the organisation has been de-proscribed (s 83.05(7)).

De-listing process

If a listed entity applies in writing, the Minister will decide if there are reasonable grounds to make a recommendation to the Governor that the organisation be de-listed (s 83.05(2)) If no decision on the application is made within 60 days, the Minister is deemed to have recommended that the organisation remained listed (s 83.05(3)). An entity cannot make another application to be de-listed except if there has been a material change in circumstances since the last application was made. (s 83.05(8)).

It should be noted that Canada has no 'membership' offence in relation to terrorism. This means that fear of individual prosecution will not deter a member from bringing a de-proscription application on behalf of an entity.

The list of terrorist organisations is reviewed every two years, with the Minister determining whether there are still reasonable grounds for the organisation to be proscribed and then making appropriate recommendations to the Governor in Council (s 83.05(9)). The review must be completed as soon as possible, within 120 days of its commencement (s 83.05(10)).

United States of America

Proscription in the USA occurs in three ways:

Foreign Terrorist Organizations (declared under s 219 Immigration and Nationality Act (INA))

Listing

Organisations are monitored by the Office of the Coordinator for Counter-Terrorism of the State Department (S/CT). If a target is identified, S/CT prepares an 'administrative record', a mixture of classified and open-source material that demonstrates that the statutory criteria in s 219 have been satisfied, namely:

- foreign organisation;
- engages in terrorist activity;
- terrorist activity must threaten the security of US nationals or the national security of the US.

On the basis of the administrative record, the Secretary of State, consulting with the Attorney General and Secretary of Treasury, decides whether to designate an organisation as terrorist. If a designation is made, Congress is notified and has seven days to review the decision. If Congress does not take action to block the designation, the designation is published in the Federal Register and takes effect upon publication. The organisation has 30 days from the publication date to seek judicial review of the designation.

De-listing

Under the INA, designations lapse after two years unless remade. However, under the *Intelligence Reform and Terrorism Prevention Act 2004*, the onus in the revocation process is placed on the organisation. An organisation can petition for revocation two years after its designation, providing evidence that the circumstances forming the basis for the designation are sufficiently different to warrant revocation. If no such review has been conducted in a five year

period with respect to a designation, the Secretary of State is required to review the designation and to determine whether revocation would be appropriate.

In addition, the Secretary of State can revoke a designation at any time upon finding that the circumstances forming the basis of the designation have changed in such a way to warrant revocation.

A designation may be revoked by an Act of Congress or set aside by a court order.

While there is no membership offence, representatives and members of designated organisations may be refused entry to the US or deported. It is also unlawful for any person in the United States (or subject to US jurisdiction) to knowingly provide 'material support or resources' to a designated organisation.

Terrorist Exclusion List

This list is authorised under s 411 of the *USA PATRIOT Act 2001*, and was created to facilitate the US Government's ability to exclude non-citizens associated with terrorist groups.

Listing

An organisation is placed on the Terrorist Exclusion List if the Secretary of State, in consultation with or upon the request of the Attorney General, finds that the organisation:

- commits or incites to commit a terrorist activity, in circumstances indicating an intention to cause death or serious bodily injury;
- prepares or plans a terrorist activity;
- gathers information on potential targets for a terrorist activity; or
- provides material support to further terrorist activity.

A decision to place an organisation on the Terrorist Exclusion List is made on the basis of 'an administrative record', a document containing classified and open source information compiled by the State Department and the Department of Justice. A notice of the decision to place an organisation on the Terrorist Exclusion List is published in the Federal Register.

De-listing

It is unclear how a designation under the Terrorist Exclusion List is reviewed or expires.

Non-citizens who provide support to or are associated with designated organisations may be prevented from entering the US or deported.

Executive Order 13224

Listing

Either the Secretary of State or the Secretary of Treasury, in consultation with the Attorney General, is authorised to designate individuals or entities as Terrorist if they:

- assist, sponsor or provide financial material or technological support for acts of terrorism; or
- are otherwise associated with individuals or entities designated in this order.

Once an individual or entity has been designated, US financial institutions must block the assets of the individual or entity and report them to the Office of Foreign Assets Control (OFAC). Notice of the designation is published in the Federal Register as well as the list of Specially Designated Global Terrorists which appears on the OFAC website.

De-listing

Designations remain in effect until revoked, or the Executive Order lapses or is terminated. However, the Executive Order does not specify criteria or timeframes for making revocations.

ATTACHMENT B - PROSCRIBED ORGANISATION APPEALS COMMISSION (POAC) MODEL

POAC was established by s 5 of the *Terrorism Act 2000* (UK) and the procedures for constituting and administering it are found in Schedule 3 of the Act.

An organisation can appeal to POAC if the Secretary of State has refused an application to de-proscribe an organisation (s 5(2)). POAC will allow an appeal if it considers the decision to refuse de-proscription was flawed on the principles applicable on an application for judicial review (s 5(3)).

Under the *Proscribed Organisations Appeal Commission (Human Rights Act 1998 Proceedings) Rules 2006*, POAC is also the appropriate tribunal before which to bring proceedings against the Secretary of State in respect of his refusal to de-list a proscribed terrorist organisation where the refusal is argued to be incompatible with 'Convention rights', as defined by the *Human Rights Act 1998.*

Although it was held in *Kurdistan Workers' Party & Ors, R v Secretary of State for the Home Department* [2002] EWHC 644, that "there is no material difference between POAC and the Administrative Court in terms of the legal principles to be applied" (at [84]), this was referring to the principles of judicial review, not merits review. Indeed, POAC is less flexible than an administrative court in terms of remedies: it cannot quash a proscription Order, relying on the Secretary of State to make a further Order doing so.

The Lord Chancellor plays a crucial role in the constitution and administration of POAC, appointing members (cl 1), determining when and where the Commission sits (cl 4(1)) and making rules prescribing its practice and procedure (cl 5(b)). Although there are relatively few details about POAC's specific constitution in the Schedule, it is prescribed that three members shall attend each sitting, one of whom shall hold high judicial office (cl 4(3)).

The Lord Chancellor can also make rules about practice and procedure, including rules providing for particulars of POAC decisions to be withheld from the applicant and their representatives (cl 5(4)(a)), who can also be excluded from proceedings (cl5(4)(b)). In these cases, a summary of evidence is provided to the applicant and their representatives (cl 5)(4)(c)) and a special advocate is also appointed (cl 6(2)).

The latest specific POAC rules made under s 5 are contained in the *Proscribed Organisations Appeals Commission (Procedure) Rules 2007*. The POAC (Procedure) Rules align with the Special Immigration Appeal Commission (SIAC) (Procedure) Rules 2007. Major themes of the POAC (Procedure) Rules are:

General powers and duties of POAC

POAC must ensure that information is not disclosed contrary to the interests of national security, international relations, the detection and prevention of crime or the general public interest (Rule 4).

Like any Court, POAC has the power to conduct a directions hearing (Rule 11) and issue general directions throughout the proceedings (Rules 20 and 21). POAC can also issue a summons requiring any person to appear before it, answer questions, and produce documents (Rule 26)

Notice of appeal/reply

An organisation has 42 days to appeal its proscription from the date from which it is informed of the Secretary of State of the Home Department's decision to de-proscribe the organisation (Rule 6). The signed and dated Notice of Appeal must set out the grounds relied upon, with supporting reasons (Rule 7). Upon receiving a Notice of Appeal, the Secretary of State must file with POAC the reasons for the proscription of the organisation, a summary of the evidence in support of those reasons, and the evidence which is relied on in opposition to the appeal (Rule 12).

Closed material

Rule 2 defines 'closed material' broadly as 'material upon which the Secretary of State wishes to rely in any proceedings before the Commission.' Closed material must not be relied on at a hearing unless a special advocate has been appointed (Rule 14(1)(b)).

The Secretary of State must apply to the Commission for permission to withhold the closed material from the appellant and their representatives (Rule 14(1)(a)). If this permission is granted, the Secretary of State must serve the closed material on the appellant and their representatives, as well as the reasons for withholding the material and a summary of the material if possible (Rule 14(2)).

POAC can direct that a hearing be held in private so that information is not disclosed contrary to the public interest, excluding the appellant and their representative (Rule 22).

Special advocates

Rule 9(5) provides that the function of a special advocate is to represent the interests of the appellant by:

(a) making submissions to the Commission at any hearing from which the appellant and their representatives have been excluded;
(b) adducing evidence and, with the permission of the Commission, cross-examining witnesses at any such hearing;
(c) making written submissions to the Commission.

As above, a special advocate is appointed whenever the Secretary of State relies on closed material. The special advocate may communicate with the appellant or their representative at any time before being served the closed material by the Secretary of State (Rule 10(1)). After the closed material has been served, the special advocate requires directions from POAC which give permission to communicate with the appellant (Rule 10(4)). Such communication can only occur in writing, and can only be replied to after further directions from POAC (Rule 10(6)).

When POAC makes the determination, its reasons are stated so far as it is possible to do so without disclosing information contrary to the public interest (Rule 28(3)). Where full particulars cannot be stated, these particulars are provided in a separate determination (Rule 28)(4)). The special advocate can appeal, stating that the material is not contrary to the public interest and that the determination should be open (Rule 28(5)).

Rights of Appeal

The right to appeal a POAC decision is contained in Rule 30. The appeal must be lodged within 10 days of the adverse decision (Rule 30(2)).

Cases and Appeals

As stated in our covering letter, we were unable to locate comprehensive information on the outcomes of any cases heard by POAC.